

GROSS RECEIPT TAXES ON TELEPHONE CHARGES.

1. Statutes imposing taxes are always strictly construed and all reasonable doubts with reference to the applicability of the taxes are resolved in favor of the taxpayer.
2. A gross receipts tax is not payable by telephone companies on commissions earned by the company for collecting telegraphic accounts on messages sent over its wires to the telegraph company.
3. A gross receipts tax is not payable under Article 7070 on moneys earned by telephone companies for directory advertising.
4. A gross receipts tax is not payable under the terms of Article 7070 by telephone companies on uncollected accounts.

OFFICES OF THE ATTORNEY GENERAL,

AUSTIN, TEXAS, November 19, 1934.

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

DEAR MR. SHEPPARD: On March 16, 1934, Mr. Byrne of your office requested of Attorney General James V. Allred an opinion on the following question:

"Is the Southwestern Bell Telephone Company required by law to pay a gross receipts tax upon commissions received for handling telegrams, and receipts from directory advertising?"

In response to that inquiry Assistant Attorney General Hubert Faulk on March 21, 1934, advised your department that in his opinion the Southwestern Bell Telephone Company was liable to pay a gross receipts tax upon commissions received from handling telegrams and receipts from directory advertising. The opinion of Mr. Faulk was based upon his construction of Article 7070, Revised Civil Statutes of Texas of 1925. At the subsequent oral conference, in which your department was represented, a request was made of this department to advise you whether a gross receipts tax was payable upon uncollected telephone charges.

In determining the proper construction of Article 7070, Revised Civil Statutes of 1925, it becomes necessary to examine into the prescribed legal methods of statutory construction. It is not sufficient to accept in this connection mere general rules of statutory construction, but it is necessary to determine the rules applicable to the construction of statutory provisions imposing taxes.

It is fundamental as a rule of statutory construction referable to taxation statutes that they are strictly construed and that all doubts are resolved in favor of the taxpayer. Sutherland on Statutory Construction, Sections 536, 537; State of Texas vs.

San Patricio Canning Company, 17 S. W. (2d) 160; McCallum vs. Retail Credit Men of Austin, 26 S. W. (2d) 715; same case, 41 S. W. (2d) 46; Rudolph vs. Potomac Electric Power Company, 24 Fed. (2d) 882. This rule results, of course, from the fact that the imposition of taxes places a special burden upon those taxed and should not be lightly regarded or liberally construed.

Article 7070, Revised Civil Statutes of Texas (1925), which is the article with which we are concerned in this question, reads as follows:

“Each individual, company, corporation or association owning, operating, managing or controlling any telephone line or lines or any telephones within this State, and charging for the use of the same, shall make quarterly, on the first days of January, April, July and October of each year, a report to the Comptroller under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the gross amount received from all business within this State during the preceding quarter in the payment of charges for the use of its line or lines, telephone and telephones, and from the lease or use of any wires or equipment within this State during said quarter. Said individuals, companies, corporations and associations, at the time of making said report, shall pay to the State Treasurer an occupation tax, for the quarter beginning on said date, equal to one-and one-half per cent of said gross receipts, as shown by said report.”

In order for a gross receipts tax to be collectible by the State upon telegraph commissions, it is necessary to determine that the practice of the Southwestern Bell Telephone Company of permitting its subscribers to use their telephones in sending telegrams and making the collection for the telegraph company on the telephone bill, results in the collection of an amount received in payment “for the use of its line or lines, telephone and telephones and from the lease or use of any wires or equipment within this state

In his opinion Assistant Attorney General Faulk calls attention to the fact that the word “use” is not a word of art having a technical meaning but is of ordinary meaning. He then takes the position that when telegraph messages are read over the telephone by the telegraph company that the equipment has been used.

It is not to be disputed that the word “use” is of general usage and does not have a technical meaning. It does not follow, however, that a tax is payable upon the commissions so received by the telephone company if the commission is not paid for this use. It is pertinent, therefore, to examine into what the commission is paid for. It seems apparent that the commission is paid to the telephone company by the telegraph company in order to reimburse the telephone company for its exchange in making the collection for the telegraph charges. A message called into the telegraph company differs in no respect from any other message and the commission is not paid for the privi-

lege of calling in the message. The commission is paid for the service rendered by the telephone company in collecting telegraph accounts.

Whatever may be said as to the desirability of imposing a tax on the telephone company for this service or whatever may be said with regard to the policy of so construing Article 7070 as to requiring the Southwestern Bell Telephone Company to pay a gross receipts tax on such commissions is not within the proper consideration of this department. At most, whether the commissions so received by the Southwestern Bell Telephone Company are subject to the gross receipts tax presents a doubtful question and in view of the rule originally referred to in this opinion, it is our opinion that under the present wording of Article 7070, the Southwestern Bell Telephone Company is not liable to pay a gross receipts tax upon the commissions paid to it for collecting telegraph accounts.

In determining whether a gross receipts tax is payable to the State of Texas for the moneys received from directory advertising it becomes necessary to ascertain whether the telephone directory is "equipment" within the meaning of the term as used in Article 7070.

Just what is equipment with reference to any industry or business is largely a question of degree; certainly, not every item used by a business would be considered equipment while most items would be so considered. Perhaps the leading case on this question is the National Bank of Cleburne vs. The Gulf, Colorado and Santa Fe Railway Company, et al, 95 Tex. at Page 182, in which it was held that the machine shops and roundhouses of a railroad company did not constitute equipment within the meaning of a statute granting to mechanics and laborers a lien for the amounts due for personal services. In this connection, attention should also be called to the fact that a proper construction of Article 7070 would require the application of the rule of ejusdem generis limiting words of general meaning to things similar to those previously detailed within the same article. It can hardly be said that a telephone directory is in the same class of things as lines, telephones, wires and leases as are specifically mentioned in Article 7070 preceding the general use of the term "equipment."

Again we would call attention to the fact that it is not within the purview of this department to determine whether as a matter of good policy or legislative desirability the sums derived from directory advertising should be subject to the gross receipts tax. Whatever may be said in this regard, it is our opinion that whether a telephone directory is equipment within the meaning of Article 7070 is a question susceptible of very reasonable doubt and under the rule laid down in the beginning of this opinion, it is believed that the sum earned from directory advertising by the Southwestern Bell Telephone Company is not subject to a gross receipts tax.

With reference to the last question presented, that is, whether a gross receipts tax is payable upon uncollected telephone charges, attention is called to the wording of Article 7070 imposing a tax only upon amounts received "in the payment for charges from the use of its line or lines, telephone or telephones and from the lease or use of any wires or equipment." It is our opinion that the use of the word "payment" in Article 7070 requires the payment of a gross receipts tax only upon moneys actually coming into the hands of the telephone company and not to sums owing but uncollected by the telephone organization. Again we would call attention to the fact that this opinion does not propose to pass upon the policy of the legislature, but only to lend construction to the already existing terms of Article 7070. It is at least doubtful whether uncollected accounts come within the terms of Article 7070 and they are for that reason properly excluded by the company from their calculation of the gross receipts tax due the state.

You are accordingly advised that a gross receipts tax is not payable by the Southwestern Bell Telephone Company upon commissions earned by the company for collecting telegraph charges on messages sent over its lines nor upon the amounts earned from directory advertising nor upon uncollected accounts.

All opinions in conflict with this opinion heretofore issued are accordingly overruled.

Yours very truly,

SCOTT GAINES,
Assistant Attorney General.

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

ELBERT HOOPER,
Acting Attorney General.

No. 2957

INTOXICATING LIQUOR—COMMON CARRIER INTRASTATE AND INTERSTATE TRANSPORTATION.

(1) C.O.D. shipments of liquor in intrastate commerce by common carriers holding permits to transport and deliver same are not prohibited by the Statutes of Texas if such transportation is for permitted purposes, i. e., medicinal, mechanical, scientific, or sacramental purposes.

(2) C.O.D. shipments of liquor interstate are prohibited and made unlawful by Section 239 Criminal Code (389 U.S.C.A. Title 18).

(3) The transportation of liquor interstate on shippers' order notify bill of lading, where bill of lading with sight draft attached is sent to a bank for collection at the point of destination by the bank, before turning over bill of lading to the consignee, is prohibited and made unlawful by Section 239 Criminal Code (389 U.S.C.A. Title 18).

OFFICES OF THE ATTORNEY GENERAL.
AUSTIN, TEXAS, October 22, 1934.

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

DEAR SIR: Your letter, addressed to Attorney General James V. Allred, has been received by this Department and referred to the writer for attention. The inquiries propounded in your letter may be restated briefly as follows:

"(1). Is it legal for medicinal liquor to be shipped intrastate 'C.O.D.' or 'Cash on Delivery' by common carriers holding permits to transport and deliver the same?

"(2). Are 'C.O.D.' or 'Cash on Delivery' shipments of liquor interstate prohibited and made unlawful by Section 239 Criminal Code (U.S.C.A. Title 18)?"

"(3). Is the transportation of liquor interstate on shippers' order notify bill of lading, where bill of lading with sight draft attached is sent to a bank to be collected at the point of destination by the bank, before turning over bill of lading to the consignee, prohibited and made unlawful by Section 239 Criminal Code (U.S.C.A. Title 18)?"

We shall take up and endeavor to answer the questions in the order which they appear above.

I.

Article 5075, Revised Civil Statutes of 1925, provides that it shall be unlawful for any person to possess or receive for the purpose of sale, or to manufacture, sell, transport or deliver any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication. The word "person" as used in the above article includes a corporation, Art. 23, R.C.S., 1925, Art. 5077, R.C.S., 1925, names the exception as to intoxicating liquor, that is, it shall not be unlawful for any person to manufacture, sell or transport any spirituous, vinous or malt liquor for medicinal, mechanical, scientific, or sacramental purposes. Art. 5078, R.C.S., 1925, names the exceptions as to other liquors, that is, the transportation of any spirituous, vinous or malt liquor for medicinal, mechanical, scientific, or sacramental purposes shall not be punishable under the terms of Title 80 of the Revised Civil Statutes. Article 5083, Revised Civil Statutes, 1925, defines the uses to which liquor can be put that are lawful.

Article 5092, R.C.S., 1925, which provides that the common carrier shall secure his permit entitling him to transport liquor, reads as follows:

"Every railroad company, express company, or other common carrier that transports any liquor shall secure first a permit from the Comptroller and keep correctly at the place of receipt for shipment, in type-writing or in a clear and legible hand, that the same may be easily read, a permanent alphabetically arranged record of the receipt of such liquors and the name and post-office, address, street address, or other description of domicile of the consignor and consignee, and the place of delivery.

Nothing herein shall be construed to authorize the transportation of liquor for other than permitted purposes."

Article 5093, R.C.S., 1925, provides that common carriers may deliver liquor to persons who have permits to manufacture or possess the same, upon the presentation of his verified copy of the permit from the Comptroller and affidavit to the carrier that such liquor will not be used in violation of the law. This article further provides that the common carrier may receive for shipment, and ship and deliver, liquor to persons for uses permitted herein when affidavit is presented to the carrier that such liquor will not be used in violation of the law. Article 5094, R.C.S., 1925, provides that the record to be kept by the transportation company at the place of delivery shall show the name of the consignor, consignee, the kind of liquor and quantity; the number of the permits from the Comptroller; the signature of the consignee, in addition to setting forth the form of affidavit to be used by the consignee. Article 5095, R.C.S., 1925, as amended by the Acts of 1931, 42nd Legislature, page 415, provides that the Comptroller shall have printed and furnish at cost the forms of records, affidavits and prescription as provided therein.

In view of the articles cited above, it is our opinion, and you are so advised, that the "C.O.D." or "*Cash on Delivery*" shipments of liquor in intrastate commerce by common carriers holding a permit to transport and deliver the same is not prohibited by the Statutes of this State if the transportation of the same is for permitted purposes, that is, for medicinal, mechanical, scientific, or sacramental purposes.

II.

Section 239 Criminal Code (389 U.S.C.A. Title 18) provides as follows:

"Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined not more than \$5,000."

In the case of *Danciger vs. Cooley*, 248 U.S. 319, 63 L. Ed. 266, Mr. Justice Van Devanter, speaking for the Court in regard to this section of the Criminal Code, said:

"Without question the practice of collecting the purchase price at the point of destination as a condition to delivery was the thing at which the section was aimed."

In case of *One Truck Load of Whisky vs. U. S.*, 274 Fed. 99, the expression of the court in regard to this section was as follows:

"While Section 238 has reference only to shipments by common carriers, Section 239 refers to transportation by any person as well as by a common carrier."

In view of the Article cited and the interpretation put upon said article by the courts, it is our opinion, and you are so advised, that "C.O.D." or "Cash on Delivery" shipments of intoxicating liquor from one state into another are prohibited under this section of the Criminal Code.

III.

In the case of *Danciger vs. Stone*, reported in 188 Fed. 510, where complainant's practice was to deliver liquor to carriers for shipment into dry states, received from the carrier a bill of lading and forward bill of lading to a bank or to some other responsible person, at the home of the consignee, attached to which was a sight draft for the purchase price of the liquor, and where the customer paid the draft and received the bill of lading, and upon presentment to the railroad company, received the shipment, it was urged by respondents that complainants could not invoke the aid of a court of equity because it appeared from the facts cited that their business was carried on and conducted in direct violation of Section 239 (389) of an act of Congress. The Court said:

"The law applies to any railroad company, express company, or other common carrier, or any other person, whose acts shall bring him within its terms. The acts at which the statute is leveled are: First, the collection of the purchase price, or any part thereof before, on, or after delivery, from the consignee, or any other person; and, second, in any manner acting as the agent of the buyer, or seller, of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same. But such acts are only condemned by this section when they are committed in connection with the interstate transportation of such liquor. It is true, when the bank collects the draft, it collects the purchase price of the liquor; *but can such collection be said to be in any way connected with the interstate transportation of the same?* The transportation is effected by the R.R. company, or other common carrier, entirely independent of the bank. The transportation of the liquor and the collection of the draft are two separate and distinct acts, performed by separate and distinct individuals or corporation, *and the fact that the carrier, under its contract, cannot deliver the shipment until consignee first goes to the bank and pays the draft, to secure the bill of lading, and then presents it to the carrier, cannot be said to in any way connect the bank with the transportation.* Its acts cannot therefore be said to be in violation of the terms of the statute."

In the case of *First National Bank vs. United States*, 46 L.R.A. (N.S.) 1139, 206 Fed. 378, in error to the District Court

of the United States for the District of North Dakota to review a judgment collecting a draft attached to a bill of lading for intoxicating liquors in violation of the statute, the facts were as follows:

One Myers, a resident of Anamoose, North Dakota, ordered a case of beer of the Hamm Brewing Company, a corporation, of Minnesota. The brewing company accepted the order at St. Paul, shipped the beer thence to Anamoose via the "Soo" Railway Company, and received a bill of lading from that company under an agreement that the company would not deliver the beer to Myers until he presented a bill of lading to its agent at Anamoose. The brewing company then attached a sight draft on Myers for the purchase price of the beer to the bill of lading, and sent them to the bank at Anamoose, which agreed with the vendor to collect the draft from Myers, and to deliver the bill of lading to him so as to enable him to receive the shipment of beer from the railroad company, and thereby to complete the sale and delivery of the beer.

Counsel for the bank contended that the facts of the case did not bring it, or its acts, within any of the classes of persons or acts which this statute subjects to fine for collecting the price of liquor. The attorneys for the government, on the other hand, insisted that the statute subjects to punishment all persons, and all corporations that collect the purchase price of liquor transported in interstate commerce, or that act as agents of vendor or vendee in the buying or selling thereof. The court said:

"The statute, however, does not read, as it seems as though it naturally would have read if such had been the intention of Congress, that every person who, in connection with the transportation thereof in interstate commerce, should collect the purchase price of interstate liquor, or who should act as the agent of the buyer or seller for the purpose of buying, selling or completing the sale thereof, should be fined thereunder. *By the terms it contains it does not embrace within its denunciation all persons but expressly limits its condemnation to 'any railroad company, express company, or other common carrier, or other person who, in connection with the interstate transportation, collects or acts as agent. And, if the contention of counsel for the government were to prevail, the words 'railroad company, express company or other common carrier, or other,' in the law would become futile, and the statute would be made to read, 'any person who' etc., in violation of the maxim that 'all the words of a law must have effect, rather than that part should perish by construction.'* . . . The apparent and natural meaning of the terms of a statute is always to be preferred to any curious or hidden signification reached by the reflection and ingenious reasoning of unusually strong and acute minds. And unless at the time this bank was charged with the violation of this statute, this act of Congress clearly expressed to a man of ordinary ability and intelligence the meaning that the collection by a bank of a sight draft for the purchase price of liquor that had been transported in interstate commerce, and the delivery to the purchaser of the bill of lading therefor attached to the draft, subjected that bank to the fine which the statute

prescribed, the defendant below ought not to be, and must not be punished by this fine."

The opinion then notes the fact that Judge Smith in writing his opinion in *U. S. Express Co. vs. Friedman*, 191 Fed. 673, failed to find any suggestion in the statute that a bank which made such a collection would thereby subject itself to the punishment specified in the act, stating that the judge spoke of this section as prohibiting "common carriers from collecting the purchase price of liquors on interstate shipments, or from in any way acting as agent of the buyer or seller of such liquors, except in the actual transportation and delivery of the same, under a penalty of a fine of not over \$5,000." Mention also was made of the opinion rendered in the case of *United States vs. 87 Barrels of Whisky*, 180 Fed. 216.

The opinion also cites the opinion of Judge Campbell in the case of *Danciger vs. Stone*, *supra*, wherein such a collection by a bank was decided not to subject such bank to the fine imposed by this law.

Likewise, the opinion of the Attorney General of the United States, which held: "The act does not apply to banks collecting drafts with bill of lading attached where the shipment is made to a real consignee upon an order sent by him and filled by shipment from the dealer's place of business. The collection of a draft for the purchase price of a commodity in that manner is the usual and ordinary method of carrying on business, and is not connected with the transportation of the property within the meaning of the statute under consideration." 29 Ops. of the Attorney General 58.

The Court's opinion continues:

"And in our opinion, the reason why the secretary, the Attorney General, Judge Campbell, and the defendant below failed to find in this statute any intention of the Congress, or any expression of any intention, to condemn the collection by banks of sight drafts for liquor transported in interstate commerce and the delivery of bills of lading therefor to consignee to enable them to obtain possession of the liquor, is that they did not exist. The history of the times and of the proceedings in Congress which led up to the enactment of this statute has convinced that the mischief at which it was leveled was not the collection of sight drafts by banks or ordinary collectors for the purchase price of liquors, although bills of lading were attached thereto and delivered upon the collection, and that it was the collection by the carriers of their agents, of the purchase price for C.O.D. shipments of liquor into prohibition states, whereby they became virtually the agents of the liquor dealers in selling their liquors . . . To our minds the natural and manifest meaning of the declaration in this law, that 'any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation' etc., shall collect the purchase price, or act as the agent of the buyer or seller shall be fined, excludes *banks, ordinary collectors, and all persons who are not members of the general class of carriers*. This interpretation finds support in the fact that the *contrary construction expunges the words*

railroad company, express company, or other common carrier, or any other, and makes the statute read 'any person who,' etc., and in the rule, which is especially applicable to statutes defining crimes and regulating their punishment, that where general words follow the enumeration of particular classes of persons or acts, the general words shall be construed to apply to persons or acts of the same general nature or class as those enumerated. our minds have been forced to the conclusion that the acts charged against the bank in the second court of the indictment in this case, upon which it was convicted constituted no offense. . . ."

A dissenting opinion was rendered in this case by Trieber, District Judge, who said:

"In my opinion the statute clearly includes not only all common carriers and their employes, but '*any other person*' who 'in connection with the transportation of intoxicating liquors in interstate commerce, shall collect the purchase price thereof before, on or after delivery, from the consignee or from any other person,' regardless of the fact that he is not an employe of the carrier. . . ."

The question as to whether or not Sec. 239 (389) of the Criminal Code reaches and includes acts done by an agent collecting a sight draft for the purchase price of an interstate shipment of liquor before handing over to consignee the bill of lading attached thereto, was first presented to the Supreme Court of the United States in the case of *Danciger vs. Cooley*, decided January 7, 1919, and reported in 248 U.S. 319, 39 Supreme Court Rep. 119. This being a case in error to the Supreme Court of the State of Kansas that a judgment which affirmed the judgment of the District Court of Shawnee County, in the state in favor of defendant in an action to compel an agent to account for collections of the purchase price of interstate shipments of intoxicating liquors, wherein the facts were as follows:

Danciger Brothers, who conducted a mail order liquor business in Kansas City, Missouri, brought this suit to recover from Cooley certain monies collected by him under an arrangement with them as the purchase price of intoxicating liquor sold by them in interstate commerce.

In defense of the suit Cooley invoked the ruling of the State Court of Kansas that a principal who employs an agent to make collections, in violation of a criminal law, cannot compel the agent to account for what he collects.

The facts disclosed that Danciger Brothers received through the mails several orders for whisky from customers in Topeka, Kansas, and in each instance shipped the liquor from Kansas City, Missouri, to Topeka as freight. Each package was consigned to shipper's order and was to be delivered by the carrier only on the surrender of the bill of lading, properly endorsed. A sight draft was drawn on the customers for the purchase price, and this, with the bill of lading attached, was sent to Cooley under an arrangement whereby he was to collect the draft, was then to hand the bill of lading to the customer to

enable the latter to get the package from the carrier, and ultimately, was to remit to Danciger Brothers the amount collected, less a commission for the services rendered.

The attorneys, submitting the cause for plaintiffs in error, urged that the Section 239 (389) of the Penal Code referred only to railroad carriers and not to employees; that none of its provisions covered the conduct of the parties in this instant case, and that the opinion of the Supreme Court of Kansas, holding that this Section of the Penal Code of the United States applied, was in conflict with and repugnant to the decisions of the Federal Courts. Citing *First National Bank vs. United States*, 46 L.R.A. (N.S.) 1139, 206 Fed. 378; *Danciger vs. Stone* 188 Fed. 510; *Ops. Atty. Gen.* 58, wherein it was held that Section 389 of the United States Code does not apply to or prohibit banks from collecting the purchase price of liquor transported in interstate commerce by means of a draft attached to a bill of lading.

Mr. Justice Van Devanter in delivering the opinion of the Court, which opinion affirmed the decision of the Kansas Court, concluded that this Section of the Code reaches and embraces acts done by an agent such as Cooley, the Court holding:

"Whether Section 239 (389) of the Criminal Code reaches and embraces acts done by an agent such as Cooley was in this instance, or is confined to acts of common carriers and their agents, is a question about which there has been some contrariety of opinion, and it is now before this court for the first time. Of course, the chief factor in its solution must be the words of the statute. Omitting what is irrelevant here, they are: 'Sec. 239 (389). Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any . . . intoxicating liquor . . . from one state . . . into any other state . . . shall collect the purchase price or any part thereof, before, on or after delivery, from the consignee, or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined,' etc."

The court then made a reference to the conditions existing when this Section was enacted in 1909, setting out that at that time there were in some of the states statewide laws prohibiting the manufacture and sale of intoxicating liquor, while in other states the business was lawful. That the prohibitory laws did not reach sales or transportation in interstate commerce for the reason that this was a matter that only Congress could regulate. That although a state was able effectively to prohibit the manufacture and sale of liquor within its own territory, it was unable to prevent its introduction from other states through the channels of interstate commerce. This interstate business generally was carried on by means of orders transmitted through the mails and of shipments made according to some plan whereby ultimate delivery depended on payment of the purchase price.

The plans varied in detail, but not in principle or result. All included a collection of the purchase price at the point of destination before or on delivery. One made the carrier having the shipment the collecting agent; another committed the collection to a separate carrier, the liquor being forwarded as railroad freight, and the bill of lading being sent to an express company, with instructions to hand it to the buyer when the money was paid; and still another made use of an agent, such as Cooley was here, the bill of lading being sent to him with a sight draft on the buyer for the purchase price. In some instances, the liquor was consigned to the buyer and in others to the shipper's order, the bill of lading then being suitably endorsed by the shipper.

The opinion then states that the report of the Committee on the Judiciary of the Senate, when considering further regulation of interstate shipments of liquor, showed that its attention was directed to the practice of shipping liquor from one state into another, to be paid for as a condition to delivery, and that the committee regarded it as an evil which should be met and corrected. The opinion continuing as follows:

"With the conditions just described in mind we come to examine Sec. 239. It consists of two parts, both relating to liquor transported from one State into another. The first deals with the collection of the purchase price, and the second with acts done 'for the purpose of buying or selling or completing the sale' of 'any such liquor.' If the meaning of the first is affected by the second it is not in a restrictive way, but the reverse, so, if Cooley and his acts are within the first, the second need not be noticed further. The first, as before quoted, says: 'Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any . . . intoxicating liquor . . . from one State . . . into any other State, . . . shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, . . . shall be fined,' etc. *The words 'any railroad company, express company, or other common carrier,' comprehend all public carriers; and the words 'or any other person' are equally broad. When combined they perfectly express a purpose to include all common carriers and all persons; and it does not detract from this view that the inclusion of railroad companies and express companies is emphasized by specially naming them. To hold that the words 'or any other person' have the same meaning as if they were 'or any agent of a common carrier' would be not merely to depart from the primary rule that words are to be taken in their ordinary sense, but to narrow the operation of the statute to an extent that would seriously imperil the accomplishment of its purpose. The rule that where particular words of description are followed by general terms the latter will be regarded as applicable only to persons or things of a like class is invoked in this connection, but it is far from being of universal application, and never is applied when to do so will give to a statute an operation different from that intended by the body enacting it. Its proper office is to give effect to the true intention of that body, not to defeat it. United States vs. Mescall, 215 U. S. 26.*

"Without question the practice of collecting the purchase price at the point of destination as a condition to delivery is the thing at which the statute is aimed. Through that practice the sale of liquor in interstate commerce was rapidly increasing. But, as before shown, such collections were not confined to carriers and their agents, but often were made by others. In principle and result there was no difference; the evil was the same in either event. Besides, if the statute were made applicable only to carriers and their agents, it could be evaded so readily by having other collectors that it would accomplish nothing. The volume of the business and the attending mischief would be unaffected. Doubtless all this was in mind when the statute was drafted and accounts for its comprehensive terms. That the words 'or any other person' are intended to include all persons committing the acts described is, as we think, quite plain.

"To be within the statute it is essential that the act of collecting the purchase price be done 'in connection with the transportation of' the liquor. The statute does not say 'in the transportation,' but 'in connection with' it. Transportation, as this court often has said, is not completed until the shipment arrives at the point of destination and is there delivered. . . . What Cooley did, while not part of the transportation, was closely connected with it. He was at the point of destination and held the bill of lading, which carried with it control over the delivery. Conforming to his principal's instructions he required that the purchase price be paid before the bill of lading was passed to the vendee. The money was paid under that requirement and he then turned over the bill of lading. A delivery of the shipment followed and that completed the transportation. Had the carrier done what he did all would agree that the requisite connection was present. As the true test of its presence is the relation of the collection, rather than the collector, to the transportation, it would seem to be equally present here.

"We conclude that Sec. 239 reaches and embraces acts done by an agent such as Cooley was . . ."

In determining whether or not this decision of the United States Supreme Court overrules the decisions of the Federal Courts, in the cases cited, it is necessary first to determine whether or not there are any distinguishing features between the cases. If it is found that there is nothing to distinguish the cases, the ruling of the Supreme Court, of course, overrules those of the Federal Courts.

The opinion of the Supreme Court in the Danciger case states the question decided therein to be "whether Section 239 of the Criminal Code reaches and embraces acts done by an agent such as Cooley . . . or is confined to acts of common carriers and their agents"—in other words—whether Sec. 239 is confined to acts of common carriers and their agents or whether it embraces acts of other agents such as those engaged in collecting the purchase price of shipments of liquor and turning over to consignee in return for payment of such shipments of the bill of lading that will enable him to obtain the shipment from the carrier.

In the beginning therefore a distinction is made by the Supreme Court between an agent of the common carrier and an "agent such as Cooley was."

Considering then whether the banks as agents in the Federal cases, were agents "such as Cooley was" we find that the banks and Cooley were both employed by the consignors, respectively, of the shipments in question i. e. both were employed by the same character of principal; both must be classified as the same character of agents in that both were employed by their respective principals in transactions of a like nature and in transactions of a particular class, namely, that of collecting the purchase price of shipments of liquor; both possessed the same character of authority, the powers that were invested by the principals in their agents, the banks, were the same powers that were invested by the principal in Cooley, the authority and power of both being restricted to the collection of the purchase price of the shipments and the releasing of the bills of lading; both received commissions for the services performed and were under the same obligation to their respective principals, namely, to account to their principals for the monies collected on sight drafts with bills of lading for shipment attached.

The fact that some of the agents styled themselves banks and were engaged in other kinds of employment unconnected with the particular agency here referred to, or that such agency was a branch or "side line" of some other business in which such agents were engaged, would not appear to alter or change their relationship to their principal or make such relationship any different than that of the other agent who was engaged solely in the business of accepting employment as an agent collecting such drafts.

In our opinion there is no distinction between a bank collecting the purchase price through a draft attached to a bill of lading on a shipment of liquor, and an agent, such as Cooley, collecting such purchase price in the same manner. Moreover, although the Supreme Court did not in its decision make direct mention of the Federal cases cited in this brief, or the opinion of the Attorney General cited in *First National Bank vs. U. S.*, supra, all of which opinions were urged by the attorneys for the plaintiffs, it does, we believe, directly cover the points made by such opinions and appears to be directing its language against each salient point brought out by the Federal Courts in their respective opinions.

Thus—in the opinion of the Federal Court in *Danciger vs. Stone*, supra, where the court states:

"It is true, when the bank collects the draft, it collects the purchase price of the liquor; but can such collection be said to be in any way connected with the interstate transportation of the same?"

". . . the fact that the carrier, under its contract, cannot deliver the shipment until consignee first goes to the bank and pays the draft, to secure the bill of lading, and then presents it to the carrier, cannot be said to in any way connect the bank with the transportation."

The Supreme Court, in our opinion, overrules this ruling of the Federal Court, for it states:

“What Cooley did, while not a part of the transportation, was closely connected with it. (His acts were the same as those of the bank.) He was at the point of destination and held the bill of lading, which carried with it control over the delivery. Conforming to his principal’s instructions, he required that the purchase price be paid before the bill of lading was passed to vendee. The money was paid under that requirement and he then turned over the bill of lading. A delivery of the shipment followed and that completed the transaction.”

And in the opinion of the Federal Court in *First National Bank vs. U. S.*, supra, the court in reaching its opinion that the act in question does not subject to punishment all persons and all corporations that collect the purchase price of liquor transported in interstate commerce, states that the act,

“By the terms it contains does not embrace within its denunciation all persons but expressly limits its condemnation to any railroad, express company or other person who, etc. . . . and, if the contention of counsel for the government were to prevail, the words ‘railroad company, express company, or other common carrier, or other’ in the law would become futile.”

But the Supreme Court in its opinion stated:

“The words ‘any railroad company, express company, or other common carrier’ comprehend all public carriers, and the words ‘any other person’ are equally broad. When combined they perfectly express a purpose to include all common carriers and all persons; and it does not detract from this view that the inclusion of railroad companies and express companies is emphasized by specially naming them.”

Again the Federal Court in its opinion in the *First National Bank* case in another part thereof stated:

“To our minds the natural and manifest meaning of the declaration in this law, that ‘any railroad company, express company, or other common carrier, or any other person who’, etc., . . . *excludes banks, ordinary collectors, and all persons who are not members of the general class of carriers.* This interpretation finds support in the fact that the contrary construction expunges the words ‘railroad company, express company, or other common carrier, or any other’ and makes the statute read ‘any person who’, etc. . . ; and (finds support) in the rule which is especially applicable to statutes defining crimes and regulating their punishment, that where general words follow the enumeration of particular classes of persons or acts, the general words shall be construed to apply to persons or acts of the same nature or class as those enumerated.”

But the Supreme Court again answers in its opinion and says:

“To hold that the words ‘or any other person’ have the same meaning as if they were, ‘or any agent of a common carrier’ would be not merely to depart from the primary rule that words are to be taken in their ordinary sense, but to narrow the operation of the statute to an extent that

would seriously imperil the accomplishment of its purpose. The rule that where particular words of description are followed by general terms, the latter will be regarded as applicable only to persons or things of a like class, is invoked in this connection but it is far from *being the universal application*, and never is applied when to do so will give to a statute an operation different from that intended by the body enacting it. Its proper office is to give effect to the true intention of that body, not to defeat it."

And in another part of its opinion the Supreme Court stated:

"Besides, if the statute were made applicable only to carriers and their agents, it could be evaded so readily by having other collectors that it would accomplish nothing. . . . That the words 'or any other person' are intended to include all persons committing the acts described is, as we think quite plain."

The effect of the opinion of the Federal Court in the First National Bank case is to practically eliminate the words "any other person," by excluding "all persons who are not members of the general class of carriers." The opinion holding that these general words, "any other person" should be construed to apply to persons of the same class as those enumerated in the act.

The Supreme Court in the case of *U. S. vs. Mescall*, 215 U. S. 26; 54 L. ed. 77, a case wherein the defendant had been indicted under the statute which provided "that if any owner, importer, consignee, agent, or *other person* shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoices, etc." It was shown that the defendant was neither the owner, importer, consignee or their agent, but was assistant weigher of the United States in the Custom Service at the port of New York and was engaged in the performance of his duties as such when the fraud complained of was perpetuated on the government. The defense set up was that the general term "other person" should be read as referring to some one similar to those named, whereas the defendant was not an owner, importer, consignee or agent, or of like class with either. The Circuit Court sustained this contention, but upon writ of error, the Supreme Court reversed this ruling, and held that the words "other person" included all persons, although having a different relation to the importation than that of the owner, consignee or agent.

Further, under this opinion of the Federal Court in the First National Bank case, wherein it states that in the opinion of that court the act "*excludes banks, ordinary collectors and all persons who are not members of the general class of carriers*" we are justified in concluding that this court would not have held, as was held by the Supreme Court in its opinion, that Section 239 reached and embraced "acts done by an agent such as Cooley."

Neither in the case of *U. S. Express Co. vs. Friedman*, 191 Fed. 673, referred to in the opinion of the Court of First National Bank vs. U. S., supra, nor in the case of *U. S. vs. 87 Barrels of Whiskey*, supra, was the question presented in the above

cases, before the court, and what was said there was clearly obiter so far as it effects the principles considered in this opinion.

We conclude that Sec. 389 of the Criminal Code of the United States statutes makes unlawful the practice of shipping liquor C.O.D. from one state into another state.

We further conclude that the ruling of the Supreme Court as set out in its opinion in the *Danciger vs. Cooley* case, *supra*, makes no distinction between a bank and a local commission agent collecting a draft from the consignee of a shipment of liquor before turning over to such consignee the bill of lading in order to enable him to obtain the shipment. That the principle involved in the case of the bank is the same as that involved in the case of the commission agent, and any arrangement between an interstate shipper of intoxicating liquors consigned to shipper's order by which the bills of lading with sight drafts attached are sent to a bank or commission agent who is to collect the drafts from the consignee before turning over the bills of lading, suitably endorsed, to enable the consignee to obtain delivery by the carrier, comes within the condemnation of Section 389 of the Criminal Code providing for punishment of any railroad company, express company, or other common carrier, or any person who, in connection with the transportation of intoxicating liquors, from one state into another state, shall collect the purchase price or any part thereof before or after delivery, from the consignee or from any other person.

This opinion is not to be construed as to apply to the interstate transportation of intoxicating liquors to be used for scientific, sacramental, medicinal and mechanical purposes. Sec. 123, Chapter 6, Title 27, U. S. C. A.

Respectfully submitted,

J. W. TOWNSEND,

Assistant Attorney General.

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

SCOTT GAINES,

Acting Attorney General.

No. 2957-A

OIL—CONFISCATION—CONSTITUTIONAL LAW.

1. An amendment to the oil and gas laws which provides for confiscation and forfeiture to the State of oil produced in violation of the rules and regulations of the Railroad Commission will be constitutional.
2. A tax levied upon illegally produced oil equivalent to the value thereof, or such amount to render its production unprofitable, is constitutional.
3. A statute providing that any oil well, producing in excess of the amount validly allocated to it by the Railroad Commission, be cut back or down so as to make up for such excess production, is contrary in its principle to the purpose of our conservation statutes.

Austin, Texas, February 1, 1935.

Hon. James V. Allred, Governor of Texas, Austin, Texas.

MY DEAR GOVERNOR: I am in receipt of your letter of January 12th reading in part as follows:

"Would an amendment to the present oil and gas laws be constitutional which provided for confiscation or forfeiture to the State of oil produced in violation of the rules and regulations of the Railroad Commission?"

"Would a statute levying a tax upon illegally produced oil equivalent to the value thereof, or in such amount as to render its production unprofitable, be unconstitutional?"

"Would a statute providing that any oil well, producing in excess of the amount validity allocated to it by the Railroad Commission, be cut back or cut down so as to make up for such excess production be constitutional?"

1. Answering your questions in the order in which they appear, I beg to advise that an amendment of the nature suggested in your first question would be constitutional. It is well established that the state has the power to regulate the production of oil and gas with a view to conserving natural resources.

Lindsley vs. Natural Carbonic Gas Co., 220 U. S. 61;

Ohio Oil Co. vs. Indiana, 177 U. S. 190;

F. C. Henderson, Inc., vs. Railroad Commission of Texas, et al., 56 Fed. (2d) 218;

Amazon Petroleum Corp. vs. Railroad Commission, 5 Fed. Supp. 633; 31 Tex. Jur. 1140, Sec. 387.

It is equally well settled that in the exercise of its police power the state may enact any statute reasonably calculated to accomplish the purpose of the police regulations involved.

Willoughby on The Constitution of The United States (2nd. Ed.), Vol. 3, Page 1781, Sec. 1181;

City of New Braunfels, et al., vs. Waldschmidt, et al., 109 Tex. 302, 207 S. W. 303;

Danciger Oil & Refg. Co. vs. Railroad Commission, 49 S. W. (2d) 837; 31 Tex. Jur. page 1142, Sec. 388; *Everhard vs. Day*, 265 U. S. 545;

Purity Extract Co. vs. Lynch, 226 U. S. 44.

The State and Federal Courts have repeatedly upheld various statutes providing for the confiscation, forfeiture or destruction of property involved in the violation of the law.

Sterrett, et al., vs. Gibson, 168 S. S. 16;

Lawton vs. Steele, 152 U. S. 133, 38 L. Ed. 385;

Van Oster vs. State of Kansas, 272 U. S. 465, 47 S. Ct. 133;

Samuels vs. McCurdy, 267 U. S. 188, 45S. Ct. 264, 37 A. L. R. 1379;

Mugler vs. Kansas, 123 U. S. 623, 31 L. Ed. 205;

Patterson vs. Kentucky, 97 U. S. 501;

Jacob Ruppert vs. Caffey, 251 U. S. 264;

Fertilizer Co., vs. Hyde Park, 97 U. S. 659;

Adams vs. Milwaukee, 228 U. S. 572, 33 S. Ct. 610;

Furth vs. State (Ark.) 78 S. W. 759;
 Frost vs. People (Ill.) 86 Am. St. Rep. 352;
 State vs. Klondike Machine, (Vt.) 57 Atl. 994;
 Henderson's Distilled Spirits, 14 Wall. 44;
 Dobbins Distillery vs. United States, 96 U. S. 395;
 Goldsmith-Grant Co. vs. United States, 254 U. S. 505, 41 S. Ct. 189;
 Waterloo Distilling Co. vs. United States, 282 U. S. 577, 51 S. Ct. 282;
 United States vs. 3 Copper Stills, 47 Fed. 495;
 United States vs. 246½ Pounds of Tobacco, 103 Fed. 791;
 Tacher's Distilled Spirits, 103 U. S. 679;
 Thomas Wood, Jr., vs. United States, 14 Curtis 336, 16 Peters 342;
 The Palmyra, 12 Wheaton 1;
 Peter Harmony, and others vs. United States, 15 Curtis 91, 2 Howard 210;
 United States vs. Olsen, 57 Fed. 579;
 Bigelow vs. Forrest, 9 Wall. 339;
 25 Corpus Juris, 1172, Section 50;
 Article 7, Section 4, of the Texas Constitution;
 Article 7, Section 3, of the Texas Constitution;
 Arnold vs. Leonard, 273, S. W. 799;
 Article 1, Section 16, of the Texas Constitution;
 Samuels vs. McCurdy, 45 S. Ct. 264, 267 U. S. 188, 37 A. L. R. 1379;
 People vs. Broad, 5 Pac. (2d) 55;

The right of the sovereign of forfeiture and sell property is not based on the inherent evil quality of the property which is seized and sold. A fish net which is used to catch fish in closed waters is not of a more inherent evil character than any other kind of fish net. The forfeiture of cloth because the same was fraudulently invoiced in violation of the custom laws, even though duties were paid is in keeping with the general rule that statutes providing for forfeiture of specific property used in violation of law usually have been deemed constitutional.

2. We are of the opinion that a tax levied upon illegally produced oil equivalent to the value thereof, or such amount to render its production unprofitable is constitutional. The regulation of the production of its natural resources being a valid exercise of the police power of the state it follows that such regulations may be accomplished by a tax on oil illegally produced so large as to be prohibitive.

St. Louis Poster Advertising Co. vs. City of St. Louis, 39 Sup. Ct. 274, 249, U. S. 269;

Hammond Packing Co. vs. State of Montana, 34 Sup. Ct. 596, 233 U. S. 331;

McCray vs. United States, 195 U. S. 27, 49. L. Ed. 78;

Alaska Fish Salting & By-Products Co. vs. Smith, 41 Sup. Ct. 219, 255 U. S. 44;

Willoughby on the Constitution of the United States (2nd Ed.) Sec. 379, Page 669;

Willoughby on the Constitution of the United States (2nd Ed.) Sec. 1181, Page 1781;

Cooley on Taxation (4th Ed.) Sec. 1714, Page 3433;

31 Tex. Jur. Sec. 388, Page 1142.

“Police regulations may assume any form of control reasonably calculated to achieve the end aimed at. Thus at times stamp taxes and other forms of assessments resembling taxes have been imposed not so much for the purpose of the revenue to be derived from them as for the purpose of administrative control. When this is done the validity of the statutory requirements is determined upon the basis of the police power and not that of the taxing power.”

I can perceive of no reason, however, why the Legislature may not accomplish its real purpose—the punishment for violation of law—by the imposition of a penalty to be recovered in such manner and in such tribunals as it may prescribe, such penalty to be visited for the violation of any law, rule or order validly determining the allowable of production. This penalty could be based upon any act or series of acts, graduated accordingly to the quantity of over production upon any scale, or predicated upon any definite scheme, the Legislature might see fit to adopt. This would meet the real purpose underlying such proposed legislation and would possess the merit of fairness and directness without circumlocution.

3. It appears that their question which you propound is one that is contrary in its principle to the purposes of our conservation statutes. Regardless of its legal aspect I am reliably informed that such a statute would be productive of certain waste and would preclude the extraction of the fullest measure of oil from the fields.

I am informed by the Railroad Commission of Texas, speaking through Honorable Gordon Griffin that,

“From an engineering standpoint, I would say that the above policy would be contrary to sound engineering principles, for the reason that all wells in the State of Texas do not have identical reactions to the same conditions, and that in various areas within the State the sub-surface conditions warrant different allowables for the fields; and subsequently, these conditions are taken into consideration in setting forth the amount of oil to be produced from each specific field.

“The Gulf Coast District is peculiar in that, the manipulations and adjustments of wells must be gradual, and any sudden change, whether it be an increase or a decrease in the size of choke, many times kills the well, and at all times is injurious to the well.

“Shut in wells in many fields on the Gulf Coast has proven in the past to be extremely detrimental and subsequently causes a great lessening in the ultimate recovery from the well that has been shut in.

“In other areas of the State, wells are producing with a fluid seal in order to reduce the gas/oil ratio, and once this seal is broken it is a task to regain.

"Shutting in wells also in many cases necessitate swabbing, which in turn creates premature encroachment of water and causes a greater differential on the sand body, which also reduced the amount of recoverable oil from the pool. In many instances during a shut down or shut in of wells gas leaks through small openings, that are hard to detect with the eye, but these small leaks deaden the flood column within the well bore, often necessitating the acquisition of pumping equipment, which is a tremendous expenditure of money. Also wells that are pumping will not recover as much oil from a reservoir as wells that are flowing naturally their daily production.

"Wells making large per cents of water whether flowing or pumping once shut down never regain the oil production that it had before the shut down. In other words, the water drowns out the oil, which in turn causes the plugging and abandoning of the well resulting in a loss of recoverable oil to the extent of the amount that that well would have produced.

"Extreme changes of choke sizes causes a great differential across the stream body which encourages encroachment of water, plugging of the screen mesh and reworking of the well.

"Also shut ins, over a period of time encourages the accumulation of paraffin which warrants unnecessary expenditures of money.

"It is the policy of sound engineering to set up a system of equal withdrawal between property lines and between wells. If wells exceed the production as allocated by the Commission, low pressure areas will develop causing channeling and coning of water and subsequently trapping the oil. After this is in progress should the operator be forced to shut down or shut in his well, equalization of reservoir pressures would be in progress causing migration of oil, retardation of water, and the reservoir would be in a turmoil until this condition was remedied. This situation would be very detrimental to wells that are producing with fluid seals or producing with a per cent of water. Any sudden changes within a reservoir are contradictory to sound engineering principles."

I note in the closing paragraph of your letter that "These questions are submitted to you in view of the claim in some quarters that present penalties under the oil and gas laws are not sufficiently drastic to deter violations."

It is my opinion that with the correction of several matters of procedure and the substantial increase of the forces engaged in the administration and enforcement of our conservation laws we would better be able to judge the efficacy of our present oil and gas laws.

Respectfully submitted,

WILLIAM MCCRAW.

No. 2958

FEES—DISTRICT AND COUNTY ATTORNEY'S FEES IN HABEAS
CORPUS CASES.

1. Where separate writs are applied for in "bona fide habeas corpus proceedings" and separate writs are legally issued by the court, and the county or district attorney appears and represents the State on hearing of such application, the official is entitled to the fee in each case as fixed by law.

2. Whether a particular claim or claims for fees in habeas corpus cases are properly due an officer is dependent upon whether same were earned in "bona fide proceedings", which presents a question of fact which will have to be determined by the accounting officers before the claims are approved and paid.

3. When the facts in any claim raise the question of fraud on the part of the official, the claim should not be allowed until after said claim has been passed upon by a court of competent jurisdiction. (Rogers vs. Lynn, 49 S. W. (2d) 709.)

ATTORNEY GENERAL'S DEPARTMENT,
Austin, Texas, February 2, 1935.

Hon. George B. Simpson, State Auditor, Austin, Texas.

DEAR SIR: Your letter of December 11, 1934, addressed to the Honorable James V. Allred, Attorney General, has been referred to this writer for attention. In said letter you request an opinion upon the following statement of facts:

"Where a defendant was charged with more than one felony, an application for writ of habeas corpus was made out on each complaint or indictment, separate affidavits were made by the defendant and separate writs issued by the court. The complaints or indictments were placed upon the habeas corpus docket separately. When the cases were called, the county attorney introduced in evidence the writs holding the defendant. Then the question to be determined was whether the offense was bailable. If bailable, the defendant or his attorney would make a statement as to defendant's ability to make bond. After the extent of defendant's ability to make bond had been determined, by agreement or otherwise, the court then determined the total amount of bail to be required of defendant. Upon the agreement of counsel where the defendant was charged with more than one felony, the court would fix the bail in the amount agreed upon by counsel of both parties, and the same evidence and the same agreement was considered by the court and an order entered fixing the bail as by agreement of counsel. After the first order was entered on the trial docket the subsequent orders would be 'same order as in Case No.——.' Judgment in each instance was entered separately by the clerk in the minutes of the District Court. Separate Bonds were made by each defendant.

"For example, one defendant was charged with five burglaries. Before the county attorney entered the court room he had been advised by counsel for defendant that the maximum bail that he could make would be \$1,250. The judge was advised by the county attorney that this particular defendant had five charges against him for burglary, and it was agreed by the county attorney and counsel for defendant that the maximum bail that he could make was \$1,250. The aggregate amount of bail being satisfactory to the

court, it was agreed that bail should be fixed at \$250 in each instance, and that the same evidence be considered as introduced in each. Judgment was then entered accordingly.

"In hearings of habeas corpus cases where the agreement had been reached by counsel and where the court agreed to enter judgment on the stipulated agreement, the hearings in no event consumed more than the necessary time to make the announcements in each case, usually less than thirty minutes."

"In order to make my position in the matter clear and probably assist you to render your opinion, I might explain that I attach significance to the fact that before judgment was entered in the first proceeding called, the court took under consideration the aggregate bail that the defendant could make, the number of writs issued, and the seriousness of the various offenses. This was necessary before he could set bail in the first case, and at the same time be assured that the purpose of the proceeding or proceedings was not defeated. In other words, the defendant was trying to get out of jail and all the circumstances had to be considered when the first case was called, otherwise the entire proceeding might fall flat.

"You are, therefore, respectfully requested to render this office an opinion as to whether proceedings held in accordance with the above facts constituted separate proceedings on which a fee of \$16 in each case is legally due the county attorney."

Article 1, Section 12, provides the writ of habeas corpus is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual.

Article 5, Section 8 of the Constitution of Texas provides:

"The district court shall have original jurisdiction in all criminal cases of the grade of felony . . . and said court and the judges thereof shall have power to issue writs of habeas corpus."

Article 113, C. C. P., defines the writ as follows:

"The writ of habeas corpus is the remedy to be used when any person is restrained in his liberty. It is an order issued by a court or a judge of competent jurisdiction, directed to anyone having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint."

Article 127, C. C. P., provides:

"The writ of habeas corpus shall be granted without delay by the judge or court receiving the petition, unless it be manifest from the petition itself, or some documents annexed to it, that the party is entitled to no relief whatever."

Article 117, Code of Criminal Procedure, provides:

"The Court of Criminal Appeals, the District Courts, the County Courts, or any judge of said courts, have power to issue the writ of habeas corpus; and it is their duty, upon proper application, to grant the writ under the rules prescribed by law."

Article 116, Code of Criminal Procedure, provides:

"Every provision relating to the writ of habeas corpus shall be most favorably construed in order to give effect to the remedy, and protect the rights of the person seeking relief under it."

Article 128, Code of Criminal Procedure, provides:

"A judge of the district or county court who has knowledge that any person is illegally confined or restrained in his liberty within his district or county may, if the case be one within his jurisdiction, issue the writ of habeas corpus, without any application being made for the same."

Article 136, Code of Criminal Procedure, provides:

"Where a person has been committed to custody for failing to enter into bond, he is entitled to the writ of habeas corpus, if it be stated in the petition that there was no sufficient cause for requiring bail, or that the bail required is excessive. If the proof sustains the petition, it will entitle the party to be discharged, or have the bail reduced."

Article 5, Section 21 of the Constitution of Texas provides that a county attorney shall be elected by the qualified voters of each county and that said county attorneys shall represent the State in all cases in the district and inferior courts in their respective counties and shall receive as compensation only such fees, commissions, and perquisites as may be prescribed by law. It is a Constitutional mandate and not by preference, therefore that the county attorney shall represent the State as prescribed in the Constitution.

Article 25, C. C. P., provides:

"Each district attorney shall represent the State in all criminal cases in the district court of his district, except in cases where he has been, before his election, employed adversely. When any criminal proceeding is had before an examining court in his district or before a judge upon habeas corpus, and he is notified of the same, and is at the time within the county where such proceeding is had, he shall represent the State therein, unless prevented by other official duties."

Article 26, C. C. P., provides:

"The county attorney shall attend the terms of all courts in his county below the grade of district court, and shall represent the State in all criminal cases under examination or prosecution in said county; and in the absence of the district attorney he shall represent the State alone"

Article 1025, C. C. P., provides in part as follows:

"For representing the State in each case of habeas corpus where the applicant is charged with felony, sixteen dollars."

Article 163, C. C. P., provides:

"If a writ of habeas corpus be made returnable before a court in session, all the proceedings had shall be entered of record by the clerk thereof, as in any other case in such court. . . ."

The writ here discussed was known to the common law long before the celebrated Habeas Corpus Act gave it definition. However, in Texas the rules pertaining to this writ are largely statutory, the Legislature having enacted, in obedience to a constitution mandate, a comprehensive body of laws designed to make the remedy speedy and effectual. In particular, the lawmakers have settled such matters as the persons entitled to the writ, the occasions when it may be resorted to, and the manner in which a judicial investigation under it is to be conducted. And for the guidance of the courts they have declared the rule of interpretation to be that "Every provision relating to the writ of habeas corpus shall be most favorably construed in order to give effect to the remedy, and protect the rights of the person seeking relief under it."

The writ of habeas corpus, which has for centuries been esteemed the best and only sufficient defense of personal freedom, is a high prerogative common law writ, having for its object the speedy release by judicial decree of persons who are illegally restrained of their liberty, or illegally detained from the control of those who are entitled to the custody of them. It is essentially a writ of inquiry, and on matters in which the State itself is concerned, in aid of right and liberty. The writ is directed to the person in whose custody the petitioner is detained, and requires the body of the person alleged to be unlawfully held in custody or restrained of his liberty to be brought before the court that appropriate judgment may be rendered upon judicial inquiry into the alleged unlawful restraint. Relief from illegal imprisonment by means of habeas corpus is not the creature of any statute, and the origin and history of the writ are lost in antiquity. There is ample evidence, however, that it was in use before the days of Magna Charta, and came to us as a part of our inheritance from the mother country, and exists as a part of the common law of the several states. While the various purposes for which the writ may be used and the proceedings thereon have been to some extent regulated by ancient English statutes and by local legislative enactments, the writ cannot be abrogated by a legislature.

Like mandamus and prohibition, habeas corpus is one of the writs regarded as "prerogative." It is often spoken of as the "bulwark of human liberty," and is regarded as of the highest importance to the State as well as to the individual.

In the case of *Streight vs. The State*, reported in 138 S. W. page 742, the Court says:

"Article 1, Section 12, of the Constitution, provides: 'The writ of habeas corpus is a writ of right and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual.' The Legislature, in obedience to this command, in Article 150 to 214 of the Code of Criminal Procedure, has hedged about this supposed bulwark of human liberty almost every statutory demand calculated to its full enforcement and preservation to the citizens. Not only has the Legislature attempted to obey this instruction in letter and spirit, but it has made it a penal offense in almost every

conceivable instance where an attempt could be made or is made to evade its effect or deny its protection. To the courts alone is intrusted the solemn duty of assuring and securing to the citizen these reserved rights."

The proceeding on habeas corpus is an extraordinary one. In it the court or judge exercises a special jurisdiction conferred by the constitution and laws for prompt relief against improper interference with personal liberty. It is a summary remedy, unshackled by forms and conditions in the mode of obtaining it. Ordinarily the proceeding is *ex parte*, and is not to be regarded as a controversy between private parties. The proceeding may be conducted by a judge at chambers, or before a court in full session. Although the writ is properly used to inquire into the detention of an accused person, the proceeding thereon is not an examining trial, and the court or judge before whom it is held is not an examining court.

It does not follow that for the writ to be granted the defendant must be right in his contention that he is illegally restrained or that his bail is excessive as it is the right of one who might think that his Constitutional rights are being denied him. The Court in *Ex parte Bice* 289 S. W. page 43 says:

"One accused of felony, who thinks bail excessive, should resort to a writ of habeas corpus rather than a direct appeal, and if on the hearing of the writ relief be denied, he may then appeal to the Court of Criminal Appeals."

It is clear from what has been shown that any prisoner has the Constitutional right to apply for a writ of habeas corpus in order to secure his admission to bail, and this right, guaranteed by the Constitution and made secure by statute, can not under any circumstances or for any reason be denied. When an application is filed and the writ is granted, the statute requires the county attorney to represent the State at the hearing and fixes his compensation for such services.

Under the terms of Articles 450, 451 and 452, Code of Criminal Procedure, the right of the court to fix the amount of bail is limited to the times when the court is in session, and it is only during vacation that the sheriff is authorized to fix the amount thereof. If, for any reason sufficient to the court, the bond is not fixed, the prisoner has no method provided by law to secure his release other than to apply for a writ of habeas corpus. It may be contended that Article 452, Code of Criminal Procedure, makes it the duty of the court to fix bonds in felony cases which are bailable when indictments are returned into court. Even if it should be agreed that this article is mandatory rather than directory, upon which question I express no opinion, I cannot avoid giving consideration to the fact that the prisoner is nevertheless unlawfully restrained of his liberty and that he has no remedy whatever other than to apply for a writ of habeas corpus. This is equally true in the event, during vacation, the sheriff should, for some reason sufficient unto himself, fail or refuse to fix the amount of bond required of a prisoner.

Touching on the question as to whether or not the fixing of the amount of the bond, as provided in Article 452, Code of Criminal Procedure, is mandatory or directory only it should be noted that under the terms of Article 281, Code of Criminal Procedure, the court, judge, magistrate or officer taking bail, in determining the amount thereof in any particular case, is to be governed in the exercise of his discretion by the Constitution and by the following rules:

"1. The bail shall be sufficiently high to give reasonably assurance that the undertaking will be complied with.

"2. The power to require bail is not to be so used as to make it an instrument of oppression.

"3. The nature of the offense and the circumstances under which it was committed are to be considered.

"4. The ability to make bail is to be regarded and proof may be taken upon this point."

It may be urged with equal force that the terms of this article are mandatory, and that the amount of the bond shall not be fixed until the court or other officer charged with fixing the same shall have had the benefit of facts sufficient upon which to base his judgment under the terms of said article. In the meantime the prisoner is not obliged to await their pleasure in ascertaining these facts in a leisurely fashion, but is entitled, both by the Constitution and the statutes enacted pursuant thereto, to apply for the writ of habeas corpus—the only remedy vouchsafed him for an illegal restraint of his liberty.

The Constitutional right of a prisoner to the writ of habeas corpus cannot be denied simply because some officer may have failed to act in accordance with, or has acted contrary to, some provision of statutory law. It is only under such circumstances that a person is required to apply for this relief for it is only when he is illegally restrained of his liberty that he is entitled to the writ. That his liberty is illegally restrained by the failure on the part of the court or of an officer to discharge some statutory duty not only does not deprive him of the relief afforded by the writ of habeas corpus, but it is this very failure to act which forms the constitutional basis of his right to this relief.

You state that an application for a writ of habeas corpus was made out on each complaint or indictment, that separate affidavits were made by the defendant and separate writs issued upon the habeas corpus docket separately, that when the cases were called the county or district attorney introduced the writs holding the defendant, and that the judgment of the court was entered in each case and separate entries were made by the clerk.

I have studied the opinions rendered by the Honorable Bruce Bryant and Honorable Elbert Hooper, former Assistant Attorneys General, in which the question of fees allowed in habeas corpus proceedings are fully discussed and with which opinions I fully concur and wish to adopt and include in this opinion and

have extracted a portion of their reasoning for this opinion because a careful examination of the statutes and authorities cited thereunder would cause me to believe that these opinions were a correct statement of the law which govern the answer to your question.

It is true that Judge Bryant, in his opinion, would cause us to believe that in cases of this nature only one writ might have been necessary, but as he says:

"That where separate writs were issued and there was an actual trial or hearing of the cases in which the county attorney appeared and represented the State, he would be entitled to the fee prescribed by the statutes."

The same trend of reasoning might well apply to the fees of the county attorney in examining trials where defendant is charged with five separate felonies, and who appears before the magistrate and waives examining trial whereupon the testimony of the material witnesses is reduced to writing in each case, and that, although it is all completed at the same setting or hearing by the magistrate, and in a very few minutes, there is no doubt but that they have had five examining trials and the officials are entitled to fees in five separate cases.

For further reasoning along the same line, we will consider the case where a defendant might have five felony indictments against him and he enters a plea of guilty to all five cases before the judge, waiving the right to a trial by jury, and the judge assesses his punishment at a year's confinement in the penitentiary in each case and all of his cases to run concurrent. Under these circumstances would we be entitled to say that the county attorney would be entitled to but one fee and that conviction in one case would have served the same purpose as did the conviction in five cases? In this instance the five indictments were presented to the court at the same time and pleas were accepted in the five cases and five separate judgments were entered by the judge on the minutes of the court; therefore, in my opinion I can see no difference between these illustrations and the one submitted by you.

As mentioned in the opinion of the Honorable Elbert Hooper, the Legislature evidently recognized this situation as being the law, and at the Regular Session of the Forty-second Legislature provided in chapter 200 as follows:

"In all felony cases where an officer is allowed fees paid by the State for services performed, whether before or after indictment, including examining trials before the magistrate for habeas corpus proceedings, no officer shall be entitled to fees in more than five cases against the same defendant."

Chapter 354, Acts of the Regular Session of the Forty-second Legislature, provides in part as follows:

"But only three such fees of Sixteen (\$16.00) Dollars each shall be had in representing the State in such habeas corpus proceedings brought by any one defendant *no matter how many writs may have been issued.*"

In my opinion the Legislature construed the law as have the Honorable Bruce Bryant and Honorable Elbert Hooper, as shown by their opinions, and have sought to remedy this by enacting the above statutes which provide that from the time of the taking effect of these articles that no officer can claim more than five fees against one defendant in felony matters and not more than three fees in habeas corpus proceedings in certain counties.

As to whether or not actual hearings were held is of course a matter of fact and this department does not presume to pass on fact questions, but the question submitted by you is concrete and specific in that certain things were done and for me to say that it was not done would be a grave indictment against the district judges of this State, of whom I have the highest regard as to their integrity. As was stated in the recent case of *Burttschell vs. Sheppard*, 69 S. W. (2d) 402, a portion of which opinion is as follows:

"We will not assume that a district judge would have a witness, or witnesses, unnecessarily or wantonly resummoned. He is acting as a court and in his judicial capacity. The resummoning of witnesses should occur only in exceptional cases, and under circumstances which in the mind of the court would create a necessity therefor. The better practice from the standpoint of economy and efficiency would be for the court to refrain from discharging a witness before the end of the case, and to compel his attendance under the one subpoena; but where the judge has seen fit to discharge a witness, in the exercise of a sound discretion, or even arbitrarily and wrongly, and later such witness is needed to give testimony, it must be held that the court has the power to have the witness resummoned. Authority so essential to the operation of courts will not be denied. The possibility of abuse of authority is no argument against its existence."

Whether a particular claim for fees in habeas corpus cases are properly due an officer is dependent upon whether the same were earned in "bona fide proceedings," which present a question of fact which will have to be determined by the accounting officers before the claims are approved and paid.

By the term "bona fide proceedings" is meant where the writ of habeas corpus is prepared, filed and heard in good faith, by the court, and separate applications were filed and separate entries on the docket were made and separate judgments rendered in each case, then, in my opinion, these are to be considered as separate cases.

In all cases where the question of fraud or subterfuge is raised with reference to any claim, it would be the duty of the officials in charge of said department to refuse their approval of such claims until the question had been passed upon by a Court of competent jurisdiction. (*Rogers vs. Lynn*, 49 S. W. (2d) 709).

We do not think that the opinions of Honorable Bruce Bryant and Honorable Elbert Hooper and this opinion are in any manner in conflict with the decision as rendered in the case of *Rogers vs. Lynn*, reported in 49 S. W. (2d) 709. In that case

the question of fraud was raised by the pleadings filed in behalf of the respondents and the court held that where the question of facts such as were raised by these pleadings that they were without jurisdiction.

The statute makes it the duty of the county and district attorneys to appear and represent the State in these proceedings and the writs are never applied for the county attorneys as the statute provides that the writ must be applied for by the defendant or his legal representative and in the absence of fraud or collusion on the part of the county attorney and district judge, to say that the county attorney would not be entitled to his fees would be contrary to the statutes covering the fees as are now provided for in such cases.

You are, therefore, advised that in my opinion that the proceedings held in accordance with the facts as set out in your letter constitute separate proceedings or cases, in which a fee of sixteen (\$16.00) dollars in each case is legally due the county or district attorney.

Yours very truly,

LEON O. MOSES,
Assistant Attorney General.

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

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2961

STATUTE CONSTRUED—ARTICLE 7084 REVISED CIVIL STATUTES,
1925, AS AMENDED BY ACTS OF 1931, FORTY-SECOND
LEGISLATURE, CHAPTER 265, PAGE 441.

1. Notes, bonds and debentures, originally maturing a year or more from date of issue, but past due on the books of corporations, are required to be included in the annual report of the corporation as part of their taxable capital for franchise tax purposes.
2. Exemptions from taxations come within the rule of strict construction and the exemption must appear in terms too plain to be mistaken.

OFFICES OF THE ATTORNEY GENERAL,
Austin, Texas, March 27, 1935.

Hon. Gerald C. Mann, Secretary of State, Austin, Texas.

DEAR MR. MANN: Your letter of date of March 18, 1935, addressed to Attorney General William McCraw has been referred to the writer for attention.

The question upon which you seek an opinion, reads as follows:

“Shall bonds, notes and debentures which originally matured one year or more from date of issue and have since matured and are now past due on

the books of the corporation, be considered a part of the taxable capital within the meaning of Article 7084?"

A former Secretary of State directed this same inquiry to the Attorney General's Office April 24, 1934. In an elaborate and able opinion of April 30, 1934, written by Honorable William N. Sands, Assistant Attorney General, and Honorable Sidney Benbow, Assistant Attorney General, and approved by Honorable Elbert Hooper, Acting Attorney General, it was held that notes, bonds, and debentures maturing one year or more from date of issue, but past due and unpaid, form no part of the taxable capital of a corporation for franchise tax purposes. We have given that opinion our most serious and impartial consideration. It is with great reluctance that we register a divergent view to that held by those learned gentlemen. But we must do so after having given your question our most careful thought and after an exhaustive perusal of authorities. Our reasons for dissenting from the opinion written by a former administration are set out below in as explicit manner as we are able to make them.

The material portion of Article 7084, Revised Civil Statutes of 1925, which you ask to be officially construed with a view to arriving at a conclusion as to what constitutes taxable capital, reads as follows:

"Except as herein provided, every domestic and foreign corporation heretofore or hereafter chartered or authorized to do business in Texas shall, on or before May 1st of each year, pay in advance to the Secretary of State a franchise tax for the year following based upon that proportion of the outstanding capital stock, surplus and undivided profits, plus the amount of outstanding bonds, notes and debentures, other than those maturing less than a year from date of issue, etc."

This article expressly states what shall constitute the basis for computing the franchise tax. Having thus expressly stated certain items others cannot be added by implication. At the same time the statute expressly exempts certain commercial paper, to-wit: short term notes, bonds, and debentures; those maturing in less than one year. There being an expressed exemption of certain items, no other can be exempt by implication.

The items of notes, bonds and debentures were not included in the original franchise tax law. But the practice of corporations in issuing relatively little stock, which was taxable, and securing their working capital by the use of notes, bonds and other paper which was not taxable, led to the Legislature amending the statute by including notes, bonds and debentures which mature a year or more from date of issue.

The constitutionality of our existing franchise tax law was passed upon and the statute declared valid by the Supreme Court of the United States in *Southern Realty Company vs. Heath*, 65 Fed. (2d) 934. The *legislation* seems secure from attack. It is the *application* with which we are not concerned.

Our interpretation of the legislative intent is that the capital of corporations, only by which they can survive in the business for which they were created, is to be taxed. That capital may not be cash at all times, but it is representative and symbolic of cash. A note maturing one year from date is taxable, not because it is a note but because it is a mute reminder of the corporation. It cannot be forgotten that after a note becomes due it is only by the gracious forbearance of the holder or payer that the maker of the note is not compelled to make satisfaction. Thus, a corporation might have at the close of the fiscal year \$25,000.00 of undivided profits and at the same time have an outstanding past due note for \$10,000.00 which amount of money is being used and enjoyed by the corporation only because it has not paid its outstanding past due note. We cannot subscribe to any theory which leads us to the inevitable conclusion that capital represented by a past due note has vanished, and, therefore, no longer benefits the corporation. The fallacy of such conclusion is elaborately demonstrated by the fact that no corporation could long survive the struggle if it operated on a cash or non-indebtedness basis. The fact that a corporation's note is past due is no barometer by which to gauge the degree of prudence used in the investment of the funds obtained by the note. The State's right to levy a franchise tax cannot be subordinated to and governed by the judicious or injudicious manner in which a corporation's business is conducted.

As stated above, we find in the statute an expressed exemption of certain items of a given class of commercial paper. Exemptions from taxation come within the rule of strict construction.

"A claim of exemption from taxation by virtue of a statute is construed strictissimi juris. It must rest upon language in regard to which there can be no doubt as to the meaning, and the exemption must be granted in terms too plain to be mistaken." *Southwestern Ry. Co. vs. Wright*, 116 U. S. 231; *Bailey v. McGuire*, 22 Wall 215.

A claim that notes, bonds and debentures, maturing one year or more from date and past due form no part of the taxable capital of a corporation within the meaning of Article 7084, Revised Civil Statutes of 1925, must fall when appraised by the rule announced above.

Therefore, it is our opinion and you are so advised, that notes, bonds, and debentures originally maturing one year or more from date of issue, but past due, should be considered as taxable capital of a corporation for franchise tax purposes.

Trusting that our opinion has been made clear to you, I am

Very truly yours,

HUBERT T. FAULK,
Assistant Attorney General.

Considered in conference, approved, and ordered filed.

WILLIAM McCRAW,
Attorney General of Texas.

No. 2962

MOTOR CARRIER ACT.

Under the provisions of Article 911b, Revised Civil Statutes of Texas, commonly known as the Motor Carrier Act, wholesale concerns who deliver in their own trucks their products to their customers in other cities, selling the commodities at a given price f.o.b. shipping point and to such price add as an additional cost of the commodities the regular freight charges from the shipping point to the point of destination, such wholesale concerns would be transporting property for hire and would be required to comply with the Motor Carrier Act regardless of whether such additional charges made be called service charges or by any other name.

The transportation of property under the facts as above stated would not constitute the wholesale concerns common carriers, but they would be contract carriers and would be required to comply with that phase of the Motor Carrier Law applicable to contract carriers.

This opinion is not in conflict with the cases of *Frost vs. Railroad Commission of California*, 271 U. S. 570, and *Michigan Public Utility Commission, et al., vs. Duke*, 266 U. S. 191, and other cases therein cited, which held the motor carrier acts of the States of California and Michigan, respectively, unconstitutional on the grounds that the acts in each of those states undertook, by legislative enactment, to make common carriers of contract carriers.

OFFICES OF THE ATTORNEY GENERAL,
Austin, Texas, April 19, 1935.

Hon. T. J. Holbrook, State Senate, Austin, Texas.

DEAR SIR: On the 19th day of February, 1935, in response to an inquiry from the Honorable Lon A. Smith, Chairman of the Texas Railroad Commission, the writer rendered to the Commission the following opinion:

"Attorney General William McCraw has referred to me for reply your letter of January 17, 1935, the material portion of which is as follows:

"Your opinion concerning the Motor Carrier Law is respectfully requested upon the following matters:

"There is, herewith three specimen invoices involving freight charges which, I think, covers the entire field of transportation activities as practiced by the wholesale grocers, packers, lumber companies and others who own and control their own equipment and deliver their merchandise to various consignee, who are in fact, their customer.

"Invoice No. 1 shows a gross weight of each commodity with the price named F. O. B. Dallas, shown thereon, and the transportation charge is determined by the multiplying of the total gross weight by the prescribed grocery mixture rate of 20c, which is the rate from Dallas to Mesquite, adding it to the F. O. B. total, giving a delivery cost for the entire sale at Mesquite.

"On invoice No. 2, we have added in the price of each commodity the figures weight times the prescribed rate of 20c giving the total delivery Mesquite sales price.

"The attached invoice No. 3 shows the F. O. B. price, to the total of which has been added the code requirements on the basis of 2% and showing thereon the total cost of delivered at Mesquite.

"Please study the specimen invoices inclosed herewith and let us have your opinion as to whether or not the jobber or wholesaler can under the terms of the provisions of the Motor Carrier adopt the policy and methods as shown by any one or either of the specimen invoices.'

"Attached to this letter are three specimen invoices which will be discussed in the order mentioned in your letter.

"The first of said specimen invoices reads as follows:

Dallas, Texas.

Sept. 18, 1934.

Sold to: John Smith & Company,
Mesquite, Texas.

By: John Doe Wholesale Grocery Co.,
Dallas, Texas.

1 Gross No. 140 Lead Pencils	2½ lbs.	1	\$1.40	\$1.40
2 Boxes Wrigley Chewing Gum	2	2	.60	1.20
2 Cases No. 2 Tomatoes	79	4	1.00	4.00
1 Sack Pinto Beans	100	1	7.25	7.25
2 Sacks Granulated Sugar	200	2	4.75	9.50
1 Case Post Toasties	29	1	2.85	2.85
	412½			\$26.20
Service charge 412 lbs. @ 20c	-	-	-	.82
Your total cost delivered Mesquite	-	-	-	\$27.02

"It is noted that on this invoice the wholesaler, who also makes deliveries to his customers by truck, according to the information given in your letter, adds to the f.o.b. price of the commodities sold a so-called service charge of twenty cents per one hundred pounds, which is the regular rate between the two towns used as examples in the specimen invoice. We have little difficulty in arriving at the conclusion that a charge of this kind must be construed as a charge for hauling the commodities. In other words, a business concern which delivers commodities sold to its customers and to the f.o.b. price adds a charge for delivering the same such concern is in fact hauling merchandise for compensation or hire so that such concern should comply with the Motor Carrier Act.

"Specimen invoice No. 2 is as follows:

Dallas, Texas.

September 18, 1934.

Sold to: John Smith & Company,
Mesquite, Texas.

By: John Doe Wholesale Grocery Co.,
Dallas, Texas.

1 Gross No. 140 Lead Pencils	1	\$1.40 2/5	\$1.41
2 Boxes Wrigley Chewing Gum	2	.60 2/5	1.21
2 Cases No. 2 Tomatoes	4	1.04	4.16
1 Sack Pinto Beans	1	7.45	7.45
2 Sacks Granulated Sugar	2	4.95	9.90
1 Case Post Toasties	1	2.90	2.90
Delivered Mesquite	-	-	\$27.03

“There is nothing in this invoice itself to indicate that any additional charge is made for delivering the products mentioned therein. I note from your letter, however, that to the f.o.b. price of each article has been added a sufficient amount so that the total price charged would be equal to the regular f.o.b. price plus the twenty cents per one hundred pounds freight rate between the two towns. It appears to me that this practice is but doing indirectly what the law does not permit doing directly. It matters not by what name the hauling charge may be called, or in what particular manner it may be figured, so long as the final result is to charge for hauling the commodities it is my opinion that such practice in fact constitutes hauling merchandise for hire so as to require the concern ingaged in this practice to comply with the Motor Carrier Act.

“Specimen invoice No. 3 is as follows:

Dallas, Texas.

September 18, 1934.

Sold to: John Smith & Company,
Mesquite, Texas.

By: John Doe Wholesale Grocery Co.,
Dallas, Texas.

1 Gross No. 140 Lead Pencils	1	\$1.40	\$1.40
2 Boxes Wrigley Chewing Gum	2	.60	1.20
2 Cases No. 2 Tomatoes	4	1.00	4.00
1 Sack Pinto Beans	1	7.25	7.25
2 Sacks Granulated Sugar	2	4.75	9.50
1 Case Post Toasties	1	2.85	2.85
			\$26.20
Code Requirements - - - - -			.52
Your total cost delivered Mesquite - - - - -			\$26.72

“I note that to the regular f.o.b. price in this invoice is added a so-called ‘code requirement’ charge of fifty-two cents. Just what is meant by the term ‘code requirements’ is not clear. If such charge is in fact a charge made for the delivery of the merchandise, then it is my opinion that the same rule would apply to this invoice as to the two preceding ones and the concern engaged in this practice should comply with the Motor Carrier Act.

“Trusting that this sufficiently answers your inquiry, I am ”

By resolution, the State Senate now requests a conference opinion upon the questions passed upon in the former opinion, the resolution raising the question as to whether said opinion is in conflict with the cases of Frost vs. Railroad Commission of California, 271 U. S. 570, and Michigan Public Utility Commission, et al., vs. Duke, 266 U. S. 191, and other cases therein cited.

The question passed upon in the above cases was as to the constitutionality of the transportation acts of the States of California and Michigan, respectively.

In the Frost case, supra, the complaining parties were operating under a single private contract under which they were engaged in the business of hauling citrus fruits between fixed points in the State of California.

Prior to 1919 the Automobile, Stage and Truck Transportation Act of California defined the term "transportation company" to be a common carrier for compensation over any public highway between fixed termini or over a regular route. The act forbade any person's or corporation's transporting either persons or property as a common carrier unless a permit to do so had been first obtained from the Railroad Commission of that state. The act further required the obtaining of a certificate of convenience and necessity before the issuance of the permit. In 1919 this act was amended so as to bring within its provisions persons operating motor vehicles for the transportation of persons or property under private contracts. In other words, by the amendment contract carriers were placed upon the same basis and were forced to meet the same requirements as common carriers.

The substance of the complaint against the act was that it, by legislative fiat, undertook to make the complainants common carriers without their consent, when in fact they were contract carriers only, and that the act was therefore in contravention of the due process clause and other provisions of the Federal Constitution. This contention was sustained by the Supreme Court of the United States. We quote the following excerpts from the opinion of the court.

"Thus, it will be seen that, under the act as construed by the state court, whose construction is binding upon us, a private carrier may avail himself of the use of the highways only upon condition that he dedicate his property to the business of public transportation and subject himself to all the duties and burdens imposed by the act upon common carriers. In other words, the case presented is not that of a private carrier, who, in order to have the privilege of using the highways, is required merely to secure a certificate of public convenience and become subject to regulations appropriate to that kind of a carrier, but it is that of a private carrier, who, in order to enjoy the use of the highways, must submit to the condition of becoming a common carrier and of being regulated as such by the Railroad Commission. The certificate of public convenience, required by Section 3, is exacted of a common carrier, and is purely incidental to that status. The requirement does not apply to a private carrier qua private carrier, but to him only in his imposed statutory character of common carrier. Apart from that signification, so far as he is concerned, it does not exist.

"That, consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by more legislative command, is a rule not open to doubt, and is not brought into question here."

The Duke case, *supra*, involved the same question, the Michigan statute being very similar in its provisions to the California statute. The complainants in that case were likewise engaged in operating under a single contract and were not in any sense of the word common carriers.

In holding the Michigan statute unconstitutional the court used the following language:

"Moreover, it is beyond the power of the State by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment."

Let us now examine the opinion of this department under date of February 19, 1935, and the Texas Motor Carrier Act in the light of the above decisions. In so doing it should be borne in mind that in the former opinion the only question under consideration was whether or not the transportation of property under the state of facts as presented in the inquiry came within the terms of the Motor Carrier Act of this State. We were not asked and did not attempt to pass upon the constitutionality of the Act. It is the policy of this department to presume the constitutionality of the acts of the Legislature and to refrain from expressing an opinion to the effect that a given act is unconstitutional unless such act is so clearly so as to admit no doubt.

A reading of the Texas Act shows that two distinct classes of motor carriers are specifically defined and recognized, viz: common carriers and contract carriers. Common Carriers, under the terms of the act, are required to obtain a certificate of convenience and necessity before they are entitled to be issued a permit to operate over the public highways as such common carriers. Contract Carriers are required by the terms of the act to obtain a permit to operate over the public highways, but the act does not specifically require contract carriers to obtain a certificate of convenience and necessity.

The former opinion of this department was in substance to the effect that wholesale companies who operated their own trucks and delivered merchandise sold by them to their customers and added to the f. o. b. price of the various commodities at the shipping point a charge for making such delivery, which charge was the same in amount as the regular fixed transportation charge for the same commodity from the point of shipment to the point of destination, such companies would in effect be charging for the transportation of property and would, therefore, be required to comply with the Motor Carrier Act. In other words, this opinion was to the effect that a person or concern could not, under the guise of calling the charge a service charge or by some other name, in fact charge for the transportation of property of others and thereby evade compliance with the Motor Carrier Act. It should be borne in mind that this opinion did not, either expressly or by intendment, hold that a wholesale company could not sell and deliver to its customers without complying with the Motor Carrier Act. For example, a wholesale concern in Dallas, Texas, could sell to a concern at Mesquite, Texas, and deliver the commodities to that concern at whatever price it saw fit. There is, such concern could fix whatever price on a given commodity, f. o. b., Mesquite, as it saw

fit, insofar as the Motor Carrier Act is concerned. But if such wholesale concern sold to a customer in Mesquite a commodity at a given price f. o. b. Dallas, and to such f. o. b. price added the charge for transporting the property to Mesquite, whether such charge be in the name of service charge or by any other name, such concern would in effect be transporting the property of another for compensation and would be required to comply with the Motor Carrier Act.

In this connection we call attention to the fact that the use of the term "comply with the Motor Carrier Act" has reference only to that part of the Motor Carrier Act which relates to the class of transportation under consideration, which is to say contract transportation. The former opinion does not say nor infer that the doing of the acts of the kind above described would constitute the concern a common carrier. Such concern, in so doing, would be engaged in contract transportation and would not come under the classification of common carrier.

Thus it will be seen that the effect of the former opinion was not to undertake by law to force a person or concern into a business in which it was not in fact engaged and did not intend to engage, but only to require such concern to comply with the law when it voluntarily brought itself within the provisions thereof. This being the case it is not believed that the former opinion is in any manner in conflict with the above mentioned or any other decisions of the courts and said opinion is therefore confirmed.

Very truly yours,

EARL STREET,
Assistant Attorney General.

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

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2965

HOUSE BILL No. 256
APPROPRIATION BILL—GENERAL LAW.

A general law may not be amended or changed by the provisions of an appropriation bill, under Acts of the 43rd Legislature, Regular Session, Chapter 211, the funds provided for therein shall be allotted according to the terms of said Act and not as provided for in Article 2750 Revised Civil Statutes 1925.

OFFICES OF THE ATTORNEY GENERAL,
Austin, Texas, May 22, 1935.

Hon. George B. Simpson, State Auditor, Austin, Texas.

DEAR SIR: I have for attention your letter under date of May 21, 1935, addressed to the Honorable William McCraw, Attorney

General of Texas, in which you desire a conference opinion upon the following matters:

"Article 2750, R. C. S. 1925, provides in part as follows:

"The board of trustees shall have authority, whenever the average daily attendance exceeds thirty-five pupils, to employ one competent assistant to every thirty-five pupils of such excess and fractional part thereof exceeding fifteen pupils.'

"Acts Forty-third Legislature, Regular Session, Chapter 211, in making an appropriation for Rural School Aid, in Section Four, provides as follows:

"State Aid under provisions of this Act shall be allotted upon the basis of one teacher for any number of scholastics from twenty (20) to thirty-five (35) and one (1) additional teacher for each additional thirty (30) scholastics, or fractional part thereof. The basis for calculation shall be the net scholastic enumeration of white or colored race, as the case may be, including the transfers into the district and excluding the transfers out of the district for the current year, and there shall be deducted all scholastics who have completed the course of study in their home school, as authorized by the County Board of Trustees, provided that in unusual or extraordinary conditions of actual enrollment, an adjustment as to the number or teachers may be made by the State Superintendent, with the approval of the State Board of Education.'

"Your opinion is respectfully requested as to whether it is proper for the State Board of Education to allot rural aid on the basis of the provisions of Section Four, of Chapter 211, Acts Forty-third Legislature as quoted above, in view of the fact that Article 2750 specifically restricts the employment of teachers to one for every thirty-five pupils or fractional part thereof exceeding fifteen pupils.

"This inquiry arises from the fact that in numerous instances the districts have violated the provisions of Article 2750, in order to take full advantage of the more liberal allowance under the Rural Aid Appropriation Bill. It occurs to us that possibly the Legislature can not amend a general statute by an appropriation bill, or that the State Board of Education would be bound to take notice of the fact the number of teachers is restricted by Article 2750, and to limit the distribution of the Rural Aid Appropriation according to the maximum teacher allowance under the general statute."

Article 2750 Revised Civil Statutes 1925 reads as follows:

"Trustees of a district shall make contracts with teachers to teach the public schools of their district, but the compensation to a teacher, under a written contract so made, shall be approved by the county superintendent before the school is taught, stating that the teacher will teach such school for the time and money specified in the contract. The board of trustees shall have authority, whenever the average daily attendance exceeds thirty-five pupils, to employ one competent assistant to every thirty-five pupils of such excess and fractional part thereof exceeding fifteen pupils. All children within the scholastic age residing in such district, though they may have settled in such district since the scholastic census was taken, shall be entitled to receive all the benefits of the schools of such district. In a district that levies a special school tax the trustees shall have the right.

to increase the salaries of teachers and the scholastic age, and may also have the schools taught longer than six months, if it is deemed advisable."

Section 4 of House Bill No. 256, Chapter 211, page 627, Acts Regular Session, Forty-third Legislature, reads as follows:

"(Teacher Pupil Load) State Aid under consolidation of this Act shall be allotted upon the basis of one teacher for any number of scholastics from twenty (20) to thirty-five (35) and one (1) additional teacher for each additional thirty (30) scholastics, or fractional part thereof. The basis for calculation shall be the net scholastic enumeration of white or colored race, as the case may be, including the transfers into the district, and excluding the transfers out of the district for the current year and there shall be deducted all scholastics who have completed the course of study in their home school, as authorized by the County Board of Trustees, provided that in unusual or extraordinary conditions of actual enrollment, and adjustment as to the number of teachers may be made by the State Superintendent, with the approval of the State Board of Education."

This Department has long ruled that an Appropriation Bill may not amend or repeal a General Law (conference opinion number 1745, under date of April 30, 1917, rendered by the Honorable B. F. Looney, former Attorney General of Texas). This may only be done in strict pursuance to the terms of the Constitution and Statutes of this State.

The question thus evolves itself as to whether or not Acts 43rd Legislature, Regular Session, Chapter 211, entitled "Rural School Aid Appropriation," is a general law or merely an appropriation bill. In order to determine whether or not the bill above referred to is a general law or an appropriation, it becomes necessary to ascertain the intention of the Legislature in this respect.

The scarcity of authorities upon this point is amazing, and due to this lack of decisions we can be guided by nothing but reason and cases which are slightly analogous with the instant case.

The accepted definition of an appropriation in our Jurisprudence is as follows:

"A setting apart from the public revenue of a certain sum of money for a specific object in such a manner that the executive officers of the government are authorized to use that money and no more for that object and for no other." C. J. Vol. 4, page 1460.

Webster defines an appropriation bill as follows:

"A measure before a Legislative body authorizing the expenditure of public moneys and stipulating the amount, manner, and purpose of the various items of expenditures."

In this opinion we think it proper to be governed by that definition and will take the name "Appropriation Bill" in its ordinary accepted meaning. There can be but little question that House Bill No. 256 meets all of the requirements set out above

with the exception that it has other purposes than the mere setting aside of money for a specific purpose and hence we conclude that the bill spoken of is at least in part an appropriation bill. But a bill may carry an appropriation and at the same time be a general law. In order to more clearly express our meaning it is necessary that we arrive at a correct definition of the term statutes or general law. In C. J. Volume 59, page 521, we find the following:

“A statute is the written will of the Legislature rendered authentic by certain prescribed forms and solemnities, prescribing rules of action or civil conduct with respect to persons, things, or both.”

In view of this definition, which is the generally accepted definition in our Jurisprudence, if the bill does more than set aside a sum of money, provide the means of its distribution, and to whom it shall be distributed, then it is a general law with an appropriation included therein.

Upon referring to the act itself all question is removed as to its effect as an appropriation bill or as a general law. Section 11 thereof provides as follows:

“(Transportation Aid) The County Superintendent and County School Board are hereby authorized to set up a system of transportation for the purpose of transporting high school pupils from their districts where their grade is not taught to the most convenient accredited high school. The expense of such transportation shall be paid out of funds hereby provided not to exceed Two Dollars (\$2.00) per pupil per month. Provided further, that in districts composing an entire county, high school transportation aid as authorized in this Section may be granted for the purpose of transporting high school pupils within such districts to the most convenient accredited high school located in the county.”

It will be observed that this Section authorizes the County Superintendent and County School Board to set up a system of transportation. We are not of the opinion that this is in any wise incidental or necessary to an appropriation bill, but that it within itself is a declaration of law as to the authority of the County Superintendent and County School Board.

Section 19 of said Act reads as follows:

“(Transfer of entire district) On the agreement of the Board of Trustees of the district concerned or on petition signed by a majority of the qualified voters of the District and subject to the approval of the County Superintendent and the State Superintendent, the trustees of a district which may be unable to maintain a satisfactory school may transfer its entire scholastic enrollment, or any number of grades thereof, to a convenient school of higher rank, and in such event all of the funds of the district, including the State aid to which the district would otherwise be entitled to under the provisions of this Act, or such proportionate part thereof as may be necessary, may be used in carrying out the said agreement.”

The action of the Board of School trustees in transferring pupils to another school is in no way akin to the appropriation item provided for herein, but this Section can be construed only as a general law governing the authority of school districts.

If there remains any question as to House Bill No. 256 being a General Law and not an Appropriation Bill, all doubt is removed upon referring to Section 25 thereof, reading as follows:

“(Repealing and Constitutional Clauses) All laws or parts of laws in conflict herewith are hereby repealed, and in the event any provision of this Act is unconstitutional or invalid the remainder of this Act shall, nevertheless, remain in effect.”

That any provision of law would be in conflict with an appropriation of this character is untenable. If the Legislature's intent were not to make this a General Law, why repeal all laws in conflict therewith. The very wording of the Act declares the intention of the Legislature to enact a General Law and not an Appropriation Bill.

Upon looking into the history of the Rural Aid Law we find that the Legislature has enacted such laws consistently over a period of years from 1916 to the present time. Each Act so passed carried practically the same provisions as the Act here under consideration. It appears that the Legislature was satisfied with the scope of the Acts. If it were not, we may rest assured that the same would have been amended or changed to meet the terms of the Law as the Legislature is presumed to be cognizant of all of the facts and circumstances surrounding its Legislation. The Legislature has permitted, in its wisdom and discretion, the apportionment of the funds according to the terms of House Bill No. 256 and it is reasonable to conclude that if they had not wished the funds so allotted they would have surely amended same to meet their objections thereto.

The Department of Education of the State of Texas is the administering officers of this Act and in case of doubt in the construction of the Statutes the Courts are inclined to the construction placed upon the Act by the enforcing officer, and such departmental ruling will not be set aside except when clearly wrong or unreasonable. In view of this rule of law, we are of the opinion that if any doubt exists it should therefore be settled in favor of the departmental construction by the Department of Education which has held in the past that the same was a General Law and not merely an Appropriation Act.

Furthermore, House Bill No. 256 and Article 2750 *supra*, does not cover the same subject matter, as Article 2750 prescribes the method of employing teachers by the local school board while House Bill No. 256 is merely an allotment of funds with certain prescribed duties. One may only be entitled to the aid provided in House Bill No. 256 by a strict compliance with its terms. The aid in House Bill No. 256 is additional aid to any other provided by law.

A little explanation is here necessary as to the application of the two laws. Article 2750 supra, is a General Law governing certain characters of school districts. House Bill No. 256 classifies to a great extent school districts and all schools coming within its classification should be governed by its terms, and all schools which do not come within this classification, of necessity are still governed by Article 2750 supra.

It is, therefore, the opinion of this Department, and you are accordingly advised that House Bill No. 256, Acts 43rd Legislature, Regular Session, is a General Law, self sustaining and entirely independent of Article 2750, Revised Civil Statutes 1925. We are further of the opinion that said Act in no way conflicts with Article 2750, Revised Civil Statutes 1925, but that the same is cumulative thereof, and that the said Act in no way repeals Article 2750, Revised Civil Statutes 1925, and each should govern in its respective sphere. You are further advised that in the opinion of this Department that the allotment of funds under said Act shall be as set out therein and should in no way be governed by Article 2750, Revised Civil Statutes 1925.

All opinions in conflict therewith are hereby overruled.

Respectfully submitted,

JOE J. ALSUP,
Assistant Attorney General.

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

SCOTT GAINES,
Acting Attorney General of Texas.

No. 2967

SHERIFF FEES FOR EXECUTING BENCH WARRANTS.

1. Sheriff is entitled to mileage fees for executing a bench warrant on defendant who has been released from his jail to another sheriff who was armed with a bench warrant on the original release.
2. Sheriff is entitled to his mileage from the State for the execution of a bench warrant upon a defendant who has been released under bond and later commits an offense in another county and is held by foreign county by reason of such offense. The sureties on the bond are not liable for such expenses in re-arresting the defendant.
3. Sheriff is not entitled to mileage fees for executing a bench warrant where he has released his prisoner to another officer who was armed with only a warrant issued out of the justice court.

OFFICES OF THE ATTORNEY GENERAL,

Austin, Texas, June 25, 1935.

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

DEAR SIR: Your letter of June 18, 1935, addressed to the Honorable William McCraw, Attorney General, has been re-

ferred to this writer for attention. In said letter you submit three questions as follows:

"A is secured by sheriff B on Justice Court warrant, examining trial held and bond refused. While A is confined in jail, he is delivered by sheriff B to Sheriff C on Justice Court warrant. After indictment Sheriff B, armed with capias and bench warrant goes to sheriff C for the prisoner.

"What fee, if any, is Sheriff B entitled to receive for this trip?"

"A is arrested by Sheriff B on Justice Court warrant, examining trial held, and bond granted. A is later picked up in another county on a felony charge and committed to jail. After indictment of A, Sheriff B armed with bench warrant and capias, goes for prisoner.

"What fee, if any, is he entitled to receive for this service?"

"A is arrested by Sheriff B on Justice Court warrant, examining trial is held and bond refused. While A is confined in jail he is delivered to Sheriff C by reason of bench warrant issued by the judge of C's county. Later B, armed with a bench warrant issued by the judge of his county, travels to the county of Sheriff C and brings A back to Sheriff B's jail.

"What fee, if any, is Sheriff B entitled to receive for this trip?"

In answering your question I will, for the sake of convenience, take them in the reverse order.

We do not find any statutory authority for the execution of a "bench warrant." This writ at common law and in practice a warrant issued from the bench or court for the arrest of a party is denominated "a bench warrant." In the case of Oxford vs. Berry, reported in 170 N. W. 83, we find a "bench warrant" as follows:

"A 'bench warrant' is a process issued by the court itself or from the 'bench' for the attachment or arrest of a person, either in case of contempt or where an indictment has been filed against him."

The authority of courts to issue a "bench warrant" has been passed upon by the Court of Criminal Appeals of Texas in the case of Ex Parte Lowe reported in 251 S. W. 506. In this case the defendant was arrested by the Sheriff of McLennan County on a charge of lunacy and placed in the McLennan County jail. The Grand Jury of Hill County indicted the defendant and the District Judge of Hill County issued a bench warrant for the arrest of the defendant. Defendant applied for a writ of habeas corpus and writ was denied and defendant remanded to the custody of Hill County. In this case the court used the following language:

"It is insisted that under the warrant issued by the district judge of Hill county no right exists for restraining the relator for the reasons: *First, that the writ is not one known to the law; second, that it was prematurely issued; and third, that its intent and effect was to invade the jurisdiction of the county court of McLennan county to try the accused for lunacy. We know of no statute in terms directing the issuance of the warrant in question, but at common law and in practice, a warrant issued from the bench or court for the arrest of a party is denominated a 'bench*

warrant.' Webster's Dict. See, also, Cyc. vol. 12, p. 343. It is the writ used to compel the attendance in cases of contempt committed out of court (Cyc. vol. 9. p. 39), and for other similar purposes. (Cyc. vol. 40, p. 2163). It is also the writ used to bring a convict confined in the penitentiary to trial in another case. See Hernandez vs. State, 4 Tex. App. 425; Gaines vs. State (Tex. Cr. App.) 53 S. W. 623; Washington vs. State, 1 Tex. App. 647; Ex parte Jones, 38 Tex. Cr. R. 142, 41 S. W. 626."

Under the facts stated in your third question the only legal authority under which Sheriff B could obtain the custody of A would be by a bench warrant.

The next question that we must answer in arriving at a decision in this matter is whether or not a sheriff is entitled to pay for executing such process. Articles 1029 and 1030, C. C. P., provide for compensation of our sheriffs. These articles are silent as to the pay for executing bench warrants but use the following language:

"To officers for serving criminal process. . . ."

"Criminal process" is defined in Article 26 of the Penal Code as follows:

"The term criminal process is intended to signify any *capias*, warrant, citation, attachment, or any other written order issued in a criminal proceeding, whether the same be to arrest, commit, collect money, or for whatever purpose used."

It is true that Article 1020 as amended by the Forty-third Legislature, page 219, provides that after an official has collected mileage for arrest after examining trial has been held that he shall not receive any additional mileage for any subsequent arrest of a defendant, but in my opinion this was meant to apply for re-arrest of a defendant after the Grand Jury had indicted said defendant and it was the intention of the Legislature to provide sheriffs and constables with a fair compensation for services rendered in arresting defendants upon a warrant issued out of the justice court before indictment and they so provided that after the defendant had been arrested that it was the duty of the sheriff to safely keep said defendant unless released on bond and in that event, it was the duty of the bondsmen to see that the defendant appeared at the proper time.

You are therefore advised that it is my opinion that the sheriff under the facts stated in your third question would be entitled to be paid for such services rendered in executing a bench warrant as is provided for by statute.

In answering your second question you are advised that by reason of the above answer to your third question I am constrained to hold there is no doubt but that the sheriff is entitled to pay for his services rendered under this proposition but the serious question is whether he shall be paid by the State or by the sureties on the defendant's bond.

Senate Bill No. 436 enacted by the Forty-third Legislature which amends Article 273, C. C. P., reads in part as follows:

"6. The bond shall also be conditioned that the principal and sureties will pay all necessary and reasonable expenses incurred by any and all sheriffs or other peace officers in re-arresting the principal in the event he fails to appear before the court or magistrate named in the bond at the time stated therein. The amount of such expense shall be in addition to the principal amount specified in the bond. The failure of any bail bond to contain the conditions specified in this paragraph shall in no manner affect the legality of any such bond, but it is intended that the sheriff or other peace officer shall look to the bondsmen of the accused for expenses incurred by him, and not to the State for any fees earned by him in connection with the re-arresting of an accused *who has violated the conditions of his bond.*"

The courts of Texas have held that in the matters of bail forfeitures it is a defense to the sureties and they may avail themselves of the same upon a proper showing that the defendant is in the legal custody of the State authorities.

In the case of Cooper vs. State reported in 32 American Reports, page 571, the defendant failed to appear and answer and where said bond was forfeited a judgment final was rendered against the sureties who had answered setting up the fact that the defendant had been indicted, tried and convicted in another county and was then in the hands of State authorities. The trial judge held that these facts set up no legal or valid cause why the judgment nisi should not be made final and refused to hear any evidence to sustain said answer. In reversing this case the court used the following language:

"We believe that the answer of appellant set up a good and legal cause why the judgment nisi should not be made final, and that the court below should have allowed him to introduce evidence to sustain the allegations made in his answer.

"Bail is the security given by a person accused of an offense that he will appear and answer before the proper court the accusation brought against him. Those who become bail for the accused, or either of them, may at any time relieve themselves of their undertaking by surrendering the accused into the custody of the sheriff of the county where he is prosecuted. Bail, says Mr. Bouvier, are those persons who become sureties of the defendant in court. Again, he says their powers over the defendant are very extensive, as they are supposed to have the custody of the defendant.

"In the case of Gay vs. State, 20 Tex. 507, Mr. Justice Wheeler speaks of them as being 'manu captors of the defendant, . . . his jailers.' When the State, under lawful authority, has deprived the securities of control over their principal, and placed it beyond their power to relieve themselves of their undertaking by surrendering the accused into the custody of the sheriff of Jack County, the State by its own act has changed their relation to the obligee in the bond. The trial and conviction of the principal in the bond for a felony, and his confinement by the State in pursuance

of the judgment of conviction, were acts inconsistent with any rights in the bail to the custody of Pate.

"In the case of Peacock vs. State, 44 Tex. 11, the Supreme Court decided that the sureties on a bail-bond are relieved by a second arrest and bail of their principal on the same indictment, even though the second bond was held defective and quashed. We make the following extract from that opinion: 'So long as Miller was left in the custody of his bail, or was under their control, they were bound for his appearance, and liable for the penalty of the bond for his non-appearance. Any act done by the State or its officers, under lawful authority, that would deprive the securities of control over their principal, would change the relation the parties sustained to each other and their relation to the State, and would thereby relieve the sureties from their obligation.'

"In the State of Tennessee, where the Governor of one State, on the demand of the Governor of another State, surrendered a person who had been previously arrested for murder in the former State, and bound over, and who was on bail at the time of the demand made, it was held that the delivery of him by the former State to the constituted authorities of the latter discharged the bail from his recognizance. State vs. Allen, 2 Humph. 258. See, also Canby vs. Griffin, 3 Harr. 333; People vs. Stager, 10 Wend. 437.

"The judgment of the District Court is reversed and the cause re-manded."

From a study of this case and numerous other authorities on the same question it is my opinion that the sureties would not be liable for the expenses of the sheriff who executes a bench warrant under the circumstance stated in your second question and that the State would be liable for the same.

In answer to your first question you are advised that in my opinion this sets up a difficult matter for us to pass upon. Article 42, C. C. P., provides:

"When a prisoner is committed to jail by warrant from a magistrate or court, he shall be placed in jail by the sheriff. It is a violation of duty on the part of any sheriff to permit a defendant so committed to remain out of jail, except that he may, when a defendant is committed for want of bail, or when he arrests in aailable case, give the person arrested a reasonable time to procure bail, he shall so guard the accused as to prevent escape."

Article 265, C. C. P., provides:

"Every sheriff shall keep safely a person committed to his custody. He shall use no cruel or unusual means to secure this end, but shall adopt all necessary measures to prevent the escape of a prisoner. He may summon a guard of sufficient number, in case it becomes necessary to prevent an escape from jail, or the rescue of a prisoner."

Article 5116, R. C. S., provides:

"Each sheriff is the keeper of the jail of his county. *He shall safely keep therein all prisoners committed thereto by lawful authority, subject to the order of the proper court, and shall be responsible for the safe keeping*

of such prisoners... The sheriff may appoint a jailer to take charge of the jail, and supply the wants of those therein confined; but in all cases the sheriff shall exercise a supervision and control over the jail."

The sheriff is the chief executive officer and conservator of the peace in his county. The basic performance of enforcement of the law is in his hands, and it is an office of great responsibility and trust under our present system of government.

The sheriffs, as are other public officers, are for some purposes agents of the public and of the community which they represent; they are agents whose duty and authority are defined and limited by law. It has been said that a public office is a public trust and that one who accepts a public office does so cum onere and is considered as accepting its burdens and obligations with its benefits. It therefore follows that when a person accepts an office, he is bound by the statute in acting it, and must bear its burdens as well as reap its benefits described by that statute.

It follows that there are certain powers and duties imposed on every office and it is accepted that powers granted to officers must be exercised and the duties imposed on them must be performed, in the manner prescribed by law.

When the government creates an office it is clearly within its power and right to prescribe how much, if any, compensation shall be received by the incumbent. An officer is only entitled to be paid for his official services in accordance with the provisions of the law and in that manner alone.

An officer is not entitled to any compensation in addition to that which has been fixed by law for the performance of the duties of his office, even though the compensation so fixed is unreasonable or inadequate. He may be required by law to perform specific services or discharge additional duties for which no compensation is provided. The obligation to perform such services is imposed as an incident to the office, and the officer by his acceptance thereof is deemed to have contracted to perform them without compensation. In the construction of the language of the statute the joy of serving, rather than the money, or the smallest instead of the largest sum of money allowable, is to be preferred as compensation doing the named duty, in the one case, or the largest amount, in the other, is provided for in terms or by implications of undeniable cogency.

There can be given many illustrations of an official doing some particular act without any reward other than fulfilling obligations of his oath of office and carrying out the duties as prescribed by statute: For instance, in all proceedings against juveniles the officials are not allowed to claim nor do they receive any compensation for their acts, and in some counties in this State this constitutes severe hardship on the officials, but they do their duty nevertheless.

The majority of our public officials are granted their compensation by fees as actually earned. "Fees" has been defined

as the reward or compensation or wages allowed by law to an officer for services performed by him in the discharge of his official duties. This compensation is fixed by the Constitution or by the statutes. An officer may not claim or receive any money without a law authorizing him to do so, and it is a well settled rule of construction that the salaries or emoluments are incident to the title to the office and not to its occupation or to the performance of official duties.

A study of the above quoted statutes would show us that it was the intention of the Legislature for the sheriff to be the head of the law enforcing agency in our several counties. They have placed the responsibility and duty of the custody of the jail on his shoulders. They have further placed responsibility of safe keeping the prisoners in his hands and have enacted laws which would permit him additional guards when necessary to see that this trust is carried out.

The intention of the law is that when a defendant was placed in jail that the sheriff would be ready and willing and able to produce him on the day of trial unless otherwise legally released.

If the sheriff permits the defendant to escape or release him without proper authority, it is his duty under the plain reading of the statute, as well as his moral duty, to take every step possible to recapture the prisoner, and he should not expect or want reward for performing some additional service which the law says is his duty and which obligation he owes to the State. The statutes prescribing fees for public officials are to be strictly construed and a right to fees may not rest in implication. Where this right is left to construction, the language of the law must be construed in favor of the government. Where a statute is capable of two constructions, one of which would give an officer additional compensation for his services and the other not, the latter construction should be adopted. In construing fee statutes and ascertaining the intent of the Legislature and the meaning of the statute, the usual methods and rules of interpretation are applicable.

Some may say if the procedure outlined in this opinion is followed, that it will be a hindrance to "law enforcement" and that the officials in such cases would not make an effort to recapture an "escaped" prisoner knowing that they will not receive any reward for the additional time nor expense. The only answer to this argument is that the statutes must be strictly followed and that the law presumes that every official is honest and regards his office as a public trust.

In this case the sheriff has allowed the prisoner to escape from his custody. He has no right to surrender the prisoner without a legal order of someone in authority.

You are advised that in my opinion the sheriff would not be entitled to receive any fee for performing the services as mentioned in your first question as he has released the prisoner

without legal authority and it is his duty to obtain said prisoner in order that his court may have jurisdiction upon the date of the trial.

Respectfully submitted,
LEON O. MOSES,
Assistant Attorney General.

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

SCOTT GAINES,
Acting Attorney General of Texas.

No. 2968

STATE BOARD OF EDUCATION—STATE SUPERINTENDENT
AUTHORITY OVER TEXT BOOK DIVISION.

1. The authority to appoint the personnel to the Text Book Division is vested exclusively in the State Board of Education, and not in the State Superintendent of Public Instruction.
2. The State Board of Education may discharge an employee of the State Text Book Division without the consent or approval of the State Superintendent of Public Instruction.
3. The State Board of Education has the authority and is charged with the duty of making the rules and regulations for the guidance of the Text Book Division in the purchase and distribution of text books.
4. The duty to see that such rules and regulations are enforced is upon the State Superintendent.

OFFICES OF THE ATTORNEY GENERAL,

Austin, Texas, July 16, 1935.

*Hon. Ben F. Tisinger, President, State Board of Education,
Austin, Texas.*

DEAR SIR: I have for attention your letter of inquiries under date of July 13, 1935, addressed to the Honorable Wm. McCraw, Attorney General of Texas, on which you desire a conference opinion with reference to the following matters:

"1. Is the authority to appoint the personnel of the Text Book Division vested and lodged in the State Superintendent of Public Instruction or in the State Board of Education?

"2. If you answer that the State Board of Education has no such power and that such power is vested in the State Superintendent of Public Instruction subject to the approval of the State Board of Education, then answer this Question: May the State Superintendent of Public Instruction discharge any employee of the Text Book Division without the approval of the State Board of Education?

"3. May the State Board of Education discharge an employee of the State Text Book Division without the consent or approval of the State Superintendent of Public Instruction?

"4. Does the State Board of Education have the authority and is it charged with the duty of, making rules and regulations for the guidance of the Text Book Division in the purchase and distribution of text books?

"5. If you answer that the Board of Education has such authority and is charged with such duty, upon whom does the duty devolve to see that these rules and regulations are enforced?"

The writer will proceed to answer your questions in the order which they appear. In answer to your question No. 1, you are advised as follows:

There appears to be no specific article of the Constitution or statutes which vests the power of appointment of the personnel of the Text Book Division in any given body. We, therefore, are confined to the duties of the various officials as prescribed by the Constitution and statutes of this State since it may be reasonably presumed that the body to which the power is granted to purchase, distribute and perform other duties with reference to the Text Book Division is the body which our Legislature and Constitutional Framers had in mind should have the appointive power.

Article 7, Section 3 of the Constitution of Texas reads as follows:

"One fourth of the revenue derived from the State occupation taxes and poll tax of one dollar on every inhabitant of the State, between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools; and in addition thereto, there shall be levied and collected an annual ad valorem State tax of such an amount not to exceed thirty-five cents on the one hundred (\$100.00) dollars valuation, as with the Available School Fund arising from all other sources, will be sufficient to maintain and support the public schools of this State for a period of not less than six months in each year, *and it shall be the duty of the State Board of Education to set aside a sufficient amount out of the said tax to provide free text books for the use of children attending the public free schools of this State*; provided, however, that should the limit of taxation herein named be insufficient the deficit may be met by appropriation from the general funds of the State and the Legislature may also provide for the formation of school district (s) by general laws; and all such school districts may embrace parts of two or more counties, and the Legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public school or schools of such districts, whether such districts are (are) composed of territory wholly within a county or in parts of two or more counties. And the Legislature may authorize an additional ad valorem tax to be levied and collected within all school districts heretofore formed, for the further maintenance of public free schools, and for the erection and equipment of school buildings therein; provided that a majority of the qualified property taxpaying voters of the district voting at an election to be held for that purpose, shall vote such tax not to exceed in any one year one (\$1.00) dollar on the one hundred dollars valuation of the property subject to taxation in such

district, but the limitation upon the amount of school district tax herein authorized shall not apply to incorporated cities and towns constituting separate and independent school districts, nor to independent or common school districts created by General or Special Law." (Italics writer's.)

Article 7, Section 8 of the Constitution of Texas, authorizing the creation of the Board of Education, reads as follows:

"The Legislature shall provide by law for a State Board of Education, whose members shall be appointed or elected in such manner and by such authority and shall serve for such terms as the Legislature shall prescribe not to exceed six years. The said board shall perform such duties as may be prescribed by law."

In pursuance to the authority here vested, the Legislature has seen fit to enact Article 2675b-1 creating the State Board of Education composed of nine members to be appointed by the Governor with the advice and consent of the Senate.

It will be observed that Article 7, Section 3, *supra*, places the duty upon the State Board of Education to set aside a sufficient amount of taxes to provide free text books for the use of children attending public free schools of this State. It, therefore, is incumbent upon this Department to ascertain the extent of the authority thus delegated and to arrive at a correct solution of the meaning of the term "provide free text books"; whether it means to merely set aside a sum of money to purchase same or whether it means to not only set aside a sum of money but also to purchase, bind and distribute the same to the various school districts of this State?

From the very reading of the provision, it appears that the Board of Education, and that body alone, has power to appropriate money from the Text Book Fund, and under the Constitution they are the only body which have control over said appropriation after the appropriation is made.

It is true that as a general rule the Legislature has the sole power of appropriation, but the Legislature itself is only a creature of the Constitution, and, therefore, subject and bound by its terms. The power of appropriation in this instance is clearly bestowed upon the Board of Education.

It is contended that Article 7, Section 3, *supra*, merely vests in the State Board of Education the power to purchase text books. With this contention, the writer is forced to disagree as we are thoroughly convinced that said Article goes further than merely vesting in the Board the power to purchase text books but also gives them discretionary power as to how such funds so appropriated should be spent, and incidentally thereto to employ assistants to assist in the distribution of free text books. In further answer to this contention, the writer would respectfully call your attention to Article 2866:

"The State Board of Education is hereby authorized and empowered and it is made its duty to purchase books from the contractors of text

books used in public free schools of this State and to distribute the same without other cost to the pupils attending such schools within this State in the manner and upon the conditions hereinafter set out."

Thus the power of distributing free text books, as well as the purchasing of same is in the Board of Education exclusively, (Charles Scribner & Son vs. Marrs, 262 S. W. 722), and the Constitution and laws speak of no other Board with similar authority. The words "provide free text books" therefore must be given a very broad meaning in order to properly effect enforcement of the Act. In the opinion of the writer, the term "provide free text books" means not only appropriate money for their purchase but also to appropriate funds for their proper care and distribution. For it is axiomatic in order to provide its essential, and incidental that the body have a means of providing said text books.

The writer has been unable to find any Texas authority on the question with reference to the proper construction of the term "provide free text books," but in the case of State, ex rel, Whelchel, et al, vs. Claxton, et al, in the Supreme Court of Missouri, the Court goes into a very lengthy discussion as to what was meant by the term "provide an eight month school term." In the case just cited, which, of course, is not mandatory but is highly persuasive, the Board of Trustees had the duty of setting aside sufficient funds out of the 40c on the one hundred dollar (\$100.00) valuation to run the school for a term of eight months out of each year. The Honorable Court held that the term meant not only to set aside sufficient funds to run the school over the required time but also incidentally thereto the trustees must employ teachers and furnish fuel for the operation of the school. To quote:

"What does the clause 'provide for an eight months' school,' as used in said statute, mean? If it is merely to provide the money necessary to pay the expenses of an eight months' school by making the levy of 40 cents on the \$100 valuation, then the school district did not lapse because in the present instance such a levy was made and the necessary money thereby provided. If, on the other hand it means that the school district must not only take the required steps to provide the revenue, but must also take such other action as shall provide a teacher, schoolhouse, and fuel for the eight months, then the school district in the present case became lapsed, because only five months' school was provided or had during the year in question. The learned trial judge was of the opinion that the school district should provide the required funds. We are unable to agree with that construction. It will not do to say that an eight months' school has been provided for when only the money necessary to pay the cost of the school has been levied and collected. That is only one step in the right direction; The other steps are the providing or supplying of a teacher and necessary and suitable school house and incidental equipment during the entire eight months school. The clear intendment of the statute is to compel, under penalty of losing its corporate existence, every such school district to have an eight months' term of school when-

ever the revenue prescribed, together with the funds on hand, will pay the necessary expenses of such a term, unless such district is saved or excused by reason of one of the provisos or exceptions mentioned in the statute. None of the exceptions mentioned in the provisos of said statute exist in the case at bar. The State would certainly have little interest in requiring that revenue necessary for an eight months' term be levied and raised unless the money so raised was also required to be used in supplying the required eight months' term. If the clause read 'provide the necessary funds for an eight months' school,' instead of the clause which is used to wit, 'provide for an eight months' school,' we are unable to see how the statute can be said to have been complied with, under the facts in the present case, unless an eight months' school is actually had. It therefore follows that, for the reasons stated above, said school district 'lapsed as a corporate body,' and that thereupon the respondents lost their official powers as such school directors, and should have been ousted from further acting in such official capacities."

The writer is of the opinion that this definition is correct, and that it is conclusive upon the proper construction of the term "provide free text books." The word "provide" being a much broader and more comprehensive term than the word "purchase." Provide includes purchase. Hence the phrase "provide free text books" should be construed to mean not only purchase but the taking of all action necessary for the proper distribution of said books.

In view of Article 2870 and Article 2865, Revised Civil Statutes, 1925, it is contended that the State Superintendent has the supervising control of the Text Book Division of this State. The apparent basis for this misunderstanding exists in the fact that Article 7, Section 8 of the Constitution provides that the Board of Education shall perform such duties as may be prescribed by law. This provision limits, according to the contention, the Board to such powers as are specifically delegated by the Legislature, and hence under the above article the State Superintendent has the disputed authority. While it is true that Section 8 of Article 7 provides that "the Board shall perform such duties as may be prescribed by law," we must bear in mind that the Constitution of our State is law prescribed by the people. It is the supreme law. The phrase "as prescribed by law" means not only statutory laws but Constitutional laws as well. Thus Article 7, Section 3 of the Constitution is a provision prescribed by law placing the duties of administration of the Free Text Book Division upon the Board of Education.

We do not wish to hold that the Legislature may not provide further duties of the Board of Education. They may. But they have no authority to in any way decrease, diminish or hinder the duties imposed under Constitutional authority. This can only be done by Constitutional amendment.

We have made the statement above that the power to set aside a sufficient sum to purchase free text books and to handle

their proper distribution is vested by law in the State Board of Education, and in this respect, we are of the opinion that we are entirely sustained in the case of Charles Scribner & Son vs. Marrs, Supra. This case, as well as the cases of Laidlaw Bros., Inc., vs. Marrs, 273 S. W. 789; Johnson, et al, vs. City of Dallas, et al, 291 S. W. 972; American Book Co. vs. Marrs, 262 S. W. 730; American Book Co. vs. Marrs, 282 S. W. 568, holds in effect that the exclusive control of the Text Book Division is vested in the State Board of Education and that the duties of the State Superintendent in this respect are merely ministerial, he having been made ex officio secretary of the Board under and by virtue of Article 2675b-3. To substantiate the argument that this grant by the Constitution is exclusive, the Honorable Court, in the case of Charles Scribner & Son vs. Marrs, supra, laid the rule briefly as follows:

"The Constitution having placed the distribution of this fund (meaning text book fund) in the hands of the *State Board of Education*, the grant is *exclusive*, and the power must be exercised *by them alone* or under their direction." (Italics writer's).

Also the Honorable Court further held:

"Without quoting them (referring to the opinion of other Courts) we deem it sufficient to say that the Constitution and the Statutes place the responsibility and ultimate authority in the matters of purchasing text books and their distribution with the State Board of Education." (Italics writer's).

The Supreme Court in enlarging upon the various powers of the departments concerned and in holding that the duties of the State Superintendent are merely ministerial, ruled thus:

"It held that the power was granted exclusively to the State Board of Education to ascertain the number of books needed; to determine the amount, and set aside from the available school fund the necessary funds for the purchase of free text-books; and to determine who are contractors with the State. It is its duty to purchase and distribute free text-books under the management of the Superintendent of Public Instruction. In these matters respondent is subject to their direction, and his duties are ministerial."

Please observe that this Court has here declared it the duty of the State Board of Education to purchase and distribute free text books. The Court, in this respect, was evidently following the terms of Article 2866 Supra or some similar article. Article 2870 is referred to and the Court has held in the paragraph above quoted that the State Superintendent's duties are merely ministerial. The power of appointment cannot be considered as a ministerial duty, but the same involves a very high degree of discretion. This discretion is not vested in the State Superintendent but in the State Board of Education.

From the above, it is apparent that the duty of providing free text books devolves upon the State Board of Education and that

this duty includes purchase as well as distribution and other matters incidental to the providing of free text books to pupils of this State. It would be absurd in face of the above to place the appointive power in any other body except that of the Board of Education, and we may reasonably presume that the constitutional drafters intended that this Board, and this Board alone, should have such authority.

One last statement with reference to the appointive power herein vested, and the writer will proceed to the consideration of the other questions found in your letter. Article 2870, Revised Civil Statutes, 1925, provides that the purchase and the distribution of free text books for the State shall be under the management of the State Superintendent of Public Instruction subject to the approval of the State Board of Education. This Article in no way gives the State Superintendent appointive power, as evidenced by the quotations above, but merely gives him supervising control and management of the ministerial duties imposed by law. It is significant to note that this Article placed the ultimate control and power in the State Board of Education by providing "subject to the approval of the State Board of Education." Practically speaking, the State Superintendent would have to appoint those desired by the Board or they could refuse their approval, as the law does not require that they give any reason for their disapproval. As a natural sequence the duty of either body could be so affected as to make the effective performance of their duty an impossibility. We are not willing to concede that the constitutional framers or legislators of this State contemplated such a dissension and hence intended that the appointive power in this respect should rest in the body which has ultimate control, namely the State Board of Education. This logic can in no way be attacked on the grounds that the Senate confirms all appointments made by the Governor as the power of appointment in that case is expressly vested by law in the Chief Executive while no express grant is found with reference to the appointive power of the departments here concerned.

Kindly bear in mind in this respect that the office of State Superintendent and the Board of Education are two separate and distinct entities. They are both created by different articles of the statutes and occupy a similar position as the Commissioners Court and the County Judge, who by law is made the presiding officer of said body. The State Superintendent is made the ex-officio secretary of the Board by law. (See Article 2664, Revised Civil Statutes and Article 2675b-3, Revised Civil Statutes, 1925). The confusion seems to arise in the fact that they handle similar matters. This is perfectly consistent.

Article 2865, Revised Civil Statutes, 1925, governing the appointive power of the State Superintendent, reads as follows:

"The teachers selected upon said Commission under the provisions of this Act shall receive as compensation for their services the sum of five

dollars per day each while on active duty and actual traveling expenses in going to and from the place of meeting, and in attending to the business of the Commission, to (be) paid upon warrants drawn by the Comptroller under the direction and approval of the chairman of the Commission. The Superintendent of Public Instruction is hereby fully authorized to employ one stenographer to assist in the clerical work of the State Textbook Commission, the pay of said stenographer to be paid out of the appropriation made for expenses of the Textbook Commission on account approved by the State Superintendent of Public Instruction."

This is the only Article which provides for employees by the State Superintendent in the Text Book Division, and it is well to bear in mind that the State Superintendent has only such appointive power as is expressly granted by the Legislature or Constitution of this State, or that which is necessarily implied from the express grant. The Legislature has the authority to grant such appointive power so long as the grant so made in no way invades the providence of the Board of Education in the proper administration of the Text Book Division. Furthermore, if the State Superintendent has general appointive powers over the Text Book Division, the writer wishes to be advised as to the purpose of this Article (2865)? It is within itself indicative to the mind of the writer that the Legislature intended to make an exception in this case, and hence this Article points conclusively to the fact that the general appointive powers are in the Board of Education.

From the statement of facts contained in your letter, it appears that the various departments concerned have over a period of years construed the law to be that the State Superintendent has appointive power with reference to the Text Book Division. It is an elementary principle of law that such construction should never be overruled unless clearly erroneous. We, however, are of the opinion that such a construction is so clearly erroneous that it should have but little force and effect in reaching our decision in this matter.

In view of the above, the writer has concluded, and you are accordingly advised that in the opinion of this department the authority to appoint the personnel of the Text Book Division, subject to the exception set out above (Art. 2865), is vested in the State Board of Education and not in the State Superintendent of Public Instruction.

Answering the above as we have, it thereby becomes unnecessary to answer your question No. 2.

With reference to your question No. 3, the writer wishes to advise that in view of the above towit, that the State Board of Education has exclusive control of the Text Book Division, and the ultimate authority rests in them that they may remove or discharge any employee of the State Text Book Division without the consent or approval of the State Superintendent of Public Instruction.

With reference to your question number 4 as to the power of the State Board of Education to promulgate rules and regulations for the guidance of the Text Book Division, you are advised as follows:

Article 2843, Revised Civil Statutes, 1925, vests the authority of making such rules and regulations in the Text Book Commission of this State, and it will be observed that the Text Book Commission has been abolished. In Article 2675b-5 the powers heretofore granted to the Text Book Division are hereafter vested in the State Board of Education, and for this reason, we advise that in the opinion of this Department the State Board of Education has authority to promulgate rules and regulations for the guidance of the Text Book Division for the purchase and distribution of Text Books.

With reference to your question No. 5, the writer wishes to advise that under Article 2870 the duty devolves upon the State Superintendent to see that rules and regulations promulgated by the State Board of Education are enforced.

Respectfully submitted,

JOE J. ALSUP,
Assistant Attorney General.

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

WM. MCCRAW,
Attorney General of Texas.

No. 2969-A

OIL—CONFISCATION BY STATE AND SOLD—
INTERSTATE COMMERCE

1. Certificates of clearance under the Act of February 22, 1935, or the regulations of March 1, 1935, thereunder should be granted to persons offering for shipment illegally produced oil which has been confiscated by the State of Texas and sold in accordance with the provisions of law governing the sale of confiscated unlawful oil.

2. Section 715. (a), Acts of the 74th Congress of the United States, February 22, 1935, does not have the effect of prohibiting the movement of forfeited and confiscated oil or its product into commerce as provided under the laws of Texas.

Construing: House Bill 581, Acts of the Regular Session of the 44th Legislature of Texas. Acts of 74th Congress of United States, Section 15 (a), February 22, 1935.

AUSTIN, TEXAS, September 6, 1935.

Hon. Angus D. McLean, Assistant Solicitor General, Department of Justice, Washington, D. C.

File No. 19-8128

DEAR SIR: In our letter to you of August 16th, we advised that an opinion was being prepared upon certain questions pro-

pounded to you by the Attorney General of the United States. Those questions are as follows:

"1. Whether certificates of clearance under the Act of February 22, 1935, or the regulations of March 1, 1935, thereunder should be granted to persons offering for shipment illegally produced oil which has been confiscated by the State of Texas and sold in accordance with the provisions of law governing the sale of confiscated unlawful oil?

"2. In the event that these regulations do not permit the granting of certificates of clearance for such oil, may additional regulations be issued?"

Answering the questions, we beg to advise that we do not believe that Section 715(a), Acts of the 74th Congress of the United States, February 22, 1935, has the effect of prohibiting the movement of forfeited and confiscated oil or its products into commerce as provided in Section 10, Subsection (b) of H. B. 581; Acts of the Regular Session, 44th Legislature of Texas, for the following reasons namely:

(1) Oil or its products which at one time may have been "produced, transported or withdrawn from storage in excess of the amounts permitted to be produced, transported or withdrawn from storage under the laws of the State or under any regulations or order prescribed thereunder by any board, Commission, officer or other duly authorized agent of such State," would not necessarily be subject to the prohibition provided in Section 715(b) of the same Act, when the State which said Act intends to protect in conserving its natural resources has, by its Legislature, set up statutory machinery whereby such oil may again become a lawful object of commerce and whereby the conservation laws of such State be more effectively enforced.

Section 10, Subsections (b) and (c), authorize the Attorney General to institute suits in rem against unlawful oil and/or unlawful oil products and also against all persons owning, claiming or in possession thereof. The mode and method of procedure is prescribed and a judgment authorized, forfeiting the same to the State of Texas; and that the same be sold under execution and the proceeds thereof placed in the General Revenue Fund of the State of Texas. Subsection (d) of Section 10 of H. B. 581 reads:

"The officers of said Court shall receive the same fees provided by law for other civil cases. Provided further that the sheriff executing said sale shall issue a bill of sale or certificate to the purchaser of said oil and/or products and the Commission shall, upon presentation of such certificate of clearance, issue a tender if a tender is required, permitting the purchaser of said oil and/or products to move the same into commerce."

Under the provisions of the above Section, any unlawful oil or unlawful products produced in violation of the laws of the State of Texas, after having had a suit in rem instituted against it in a court of competent jurisdiction, seeking its condemnation, and after having gone through the process of trial, then, in our

opinion, it becomes purged of any taint of illegality and experiences a metamorphosis, which results in its becoming a lawful article of commerce, capable of being moved into commerce. This construction is reached by looking to the language of the Act itself, which evinces the undoubted legislative intent that such was to be the result after unlawful oil or unlawful oil products had been cleansed by having gone through the judicial process provided for in Section 10, Subsection (d) of H. B. 581; that is, to permit the purchaser of said oil and/or oil products "to move the same into commerce."

(2) Referring to the argument made in Memorandum B, enclosed in your letter, to the effect that regardless of the fact that illegal oil or illegal products may have been forfeited and sold and the purchaser at such sale, being furnished with a bill of sale, authorizing him to a tender which would permit him to move such oil or oil products into commerce, the terms of Section 715 (a) of the Acts of the National Congress should be enforced as read. That is, "contraband oil which was produced, transported or withdrawn from storage in excess of the amounts permitted to be produced, transported or withdrawn from storage under the laws of the State, or under the regulation or order prescribed thereunder by any board, commission, officer or duly authorized agent of such State, should be prohibited from shipment or transportation into interstate commerce from any State from which said contraband oil had been produced or said contraband oil and/or products withdrawn from storage in violation of the law."

To this argument we cannot agree. If such a construction were placed upon Section 715(a) in view of the present state of the statutory law of this State, which authorizes the confiscation of illegal oil and the movement of the same into commerce, it would result and lead to injustice and absurd consequences, as we do not believe that it was the intention of the National Congress to enforce Section 715(a) according to its letter, but according to the underlying intention of Congress when it enacted such law. The quotation from the Committee Report upon the National bill, referred to in your Memorandum A, reflects the intention of the National Congress in enacting Section 715(a). The quotation is as follows:

"We specifically point out that this bill provides for '*Federal control only as supporting the enforcement of the valid State Laws.*' It leaves to the oil-producing states the entire authority to determine how much or how little oil shall be produced in their jurisdictions." (Italics ours.)

It is stated in your Memorandum A:

"The apparent purpose, vigorously asserted by the proponents of the measure as above indicated was to deny the right of interstate shipment to oil which is contraband in the State, thus 'Supporting the enforcement of the valid State law' to apply the statute literally so as to include oil which was originally 'produced unlawfully' but is no longer contraband by

reason of the operation of the other provisions of the State law, would result in extending the statute beyond its apparent purpose in one respect and furthermore would interpose an obstacle to the carrying out the state law, the punitive provisions of which are as much part of the law as are the provisions concerning production quotas."

To this we agree. Moreover, the statement quoted is supported by the Supreme Court of the United States in the case of *Sorrells vs. United States*, 287 U. S. 435; 77 L. Ed. 413. Chief Justice Hughes states the rule in respect to the question as follows:

"Literal interpretation of the statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned. In *United States v. Palmer*, 3 Wheat, 610, 631, 44 L. Ed 471,477, Chief Justice Marshall, in construing the Acts of Congress of April 30, 1790, No. 8 (1 Stat. at L. 113, Chap. 9), relating to robbery on the high seas, found that the words 'any person or persons,' were 'broad enough to comprehend every human being,' but he concluded that 'general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the Legislature intended to apply them.' In *United States v. Kirby*, 7 Wall. 482, 19 L. Ed. 278, the cases arose under the Act of Congress of March 3, 1825, (4 Stat. at L. 104, chap. 64) providing for the conviction of any person who shall knowingly and willfully obstruct or retard the passage of the mail, or of any driver or carrier . . . carrying the same'. Considering the purpose of the statutes, the Court held that it had no application to the obstruction or retarding of the passage of the mail or of its carrier by reason of the arrest of the carrier upon a warrant issued by a state court. The Court said, 'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or any absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.' And the Court supported this conclusion by reference to the classical illustrations found in *Puffendorf and Plowden, Id.*, pp. 486, 487."

Further referring to the intention underlying the National Congress in enacting legislation designed to assist oil producing States, we quote the apt language of the Circuit Court of Appeals, 5th Circuit, in *Ryan vs. Amazon Petroleum Corp.*, 71 Fed. (2d) 1:

"The Central Government was not created to be an opponent and a rival of the State Governments but to be a supplement and a protection to them. Its enumerated powers although supreme and sometimes exercised to the dissatisfaction of some state, are not misused when by a happy concord of duty these governments can co-operate. The grant to the Central Government of the power to regulate interstate and foreign commerce is without qualification and in general exclusive of the States, and that Government may rightly take up the regulation of a matter the point where the state government because of this grant must itself cease to regulate.

Thus when some of the states in the exercise of their general police power sought to control the transportation and sale of intoxicating liquors within their borders, Congress with a plain purpose to make the State regulation more effective first made such liquors subject to state laws on arrival, and later forbade them to be transported in interstate commerce into such a state. In re Rahrer, 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 572; Clark Distilling Co. vs. Western Maryland R. R. Co., 242 U. S. 311, 37 S. Ct. 180, 61 L. Ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845. So the states in the exercise of their police power regulate the stealing of automobiles, but Congress supplementarily forbids and punishes the interstate transportation of stolen cars. Brooks v. United States, 267 U. S. 432, 45 S. Ct. 345, 69 L. Ed. 699, 37 A. L. R. 1407. The Lottery Act supplements in the Federal domain a police power undubitably residing in the States. Champion v. Amos, 186 U. S. 321, 23 S. Ct. 321, 47 L. Ed. 492. Other instances may be cited. The provision of the National Industrial Recovery Act under discussion . . . was intended to operate so as to make more effectual valid State action with reference to oil production."

The Connally Act discussed in that case was subsequently held to be unconstitutional by the Supreme Court. However, the grounds for striking down the law in the decision by the Supreme Court had no connection with the principles just above announced by the Circuit Court of Appeals.

To demonstrate further that a literal construction of Section 715(a) would result in absurd and unjust consequences, we cite an example which could very probably arise out of a literal construction of the Congressional Act discussed in the case of Brooks v. United States, supra. The Act discussed in the Brooks case provided:

"That whoever shall transport or cause to be transported in interstate or foreign commerce, in motor vehicle, *knowing the same to have been stolen*, shall be punished by a fine." (Italics ours.)

Suppose that by the law of a certain state from which an automobile had been stolen, and transported, or that by the law of a state to which such stolen automobile had been transported, provided that such stolen automobile after the thief had been apprehended, and the owner thereof could not be found, should be forfeited to the State, condemned and sold at public auction and that the State officer designated by such supposed state law be authorized to execute a bill of sale to such stolen automobile to the purchaser as such sale; and that thereafter the purchaser of such stolen automobile should transport said automobile into another state, and there be prosecuted for transporting in interstate commerce a motor vehicle "knowing the same to have been stolen." Can it be argued that any such absurd and unjust construction would be placed upon the language of such statutes; or that in respect to the example just referred to, the statute should be given a literal construction? We submit that no such construction would ever be given to such a statute in the face of such circumstances.

If Section 715(a) be literally construed, then consequences like those stated in the above example would result, which we do not believe were intended by the National Congress in enacting Section 715(a).

Accordingly, you are advised that any oil which had been "produced, transported," or any oil or oil products which had been "withdrawn from storage in excess of the amounts permitted to be produced, transported or withdrawn from storage under the laws of the State or under any regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agent" of the State of Texas, and which had been forfeited to the State of Texas according to the provisions of Section 10, Subsections (a), (b), (c), and (d) of H. B. No. 581, and where the purchaser of such oil or oil products, at the sale provided for in said Act, and who has received a bill of sale or certificate entitling him to a tender which permits him to move the same into commerce, are lawful subjects of commerce and should not come within the prohibitions found in Section 715(a) and 715(b), Acts of the 74th Congress, dated February 22, 1935; and that the Federal Tender Board should issue tenders for such oil and oil products to the purchaser thereof, at the sale provided for in H. B. No. 581.

Yours very truly,

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2970

BANKING DEPARTMENT—BIENNIAL
APPROPRIATION BILL.

1. A General Law may not be repealed or amended by the terms of provisions in an Appropriation Bill.
2. The paragraph appended to the end of the appropriation for the State Banking Department for the biennium ending August 31, 1937, is ineffective and invalid, as conflicting with General Laws of the State insofar as it purports to be a limitation upon certain items of appropriation for the State Banking Department.

OFFICES OF THE ATTORNEY GENERAL,

Austin, Texas, September 17, 1935.

Hon. Irvin McCreary, Banking Commissioner of Texas, Austin, Texas.

DEAR SIR: This will acknowledge receipt of your letter of September 12th, in which you request the advice of this Department upon the following question:

"What is the legal effect of the language appended to the General Appropriation Bill for the support of the Department of Banking for the

biennium 1935-1937 (General Acts, 44th Legislature, page 1061, 1. c. page 1064) as follows:

"All appropriations herein made for the State Banking Department, shall be paid out of their receipts, and if necessary, the Commissioner shall reduce his expenditures so as not to exceed the actual receipts collected."

You enclose with such request for opinion an opinion by Judge Ocie Speer, counsel for the Department of Banking, upon this subject, which opinion reads in part as follows:

"This language is capable of two interpretations, (a) that the limitation applies to each and every item mentioned in the bill and, (b) that it applies only to those items appropriated as 'fees,' such as those growing out of the administration of the Building & Loan Association Laws and Loan & Brokerage Company Laws.

"I think the latter interpretation should be adopted, the effect of which would be to limit the expenditures for such items to the amount actually collected by the Department in the supervision of such institutions and would have no effect whatever as to those sums otherwise specifically appropriated for items, such as salaries for the Commissioner, Deputy Commissioner, Examiners, stenographers and other employees of the department.

"The Appropriation Bill for this Department carries with it as a whole the manifest intention that with respect to Building & Loan Associations, Loan & Brokerage Companies and the like, the Department shall be self sustaining and that the expenditures shall not exceed the actual receipts of the Department and that an appropriation is made to this extent only.

"The language being construed, carries within itself an admonition to the Commissioner to this effect. If the construction suggested is not the proper one, and if the language being considered applies to all items of appropriation, then I think it is clearly void, as being in contravention of general statutes governing the collection of fees and charges by the Commissioner and requiring them to be paid to the State Treasurer and checked out only upon specific appropriations through vouchers duly issued therefor.

"It is the undoubted rule that an Appropriation Bill in contravention of a general statute is of no force or effect. (State vs. Steele, 57 Tex. 203; Linden vs. Finley, 92 Tex. 451; Attorney General Opinion 1916-1918, page 110; Attorney General Opinion 1934-1936, and Attorney General Opinion No. 2965 of date May 22, 1935)."

It is the opinion of the writer that the reasoning used by Judge Speer in his opinion is wholly correct, and such opinion is here adopted.

We wish to point out, in addition, that insofar as the examination fees required by law to be assessed by the Commissioner against banking corporations are concerned Article 363 of the Revised Civil Statutes of 1925, provides in part as follows:

"....All sums collected as examination fees shall be paid by the Commissioner directly into the State Treasury to the credit of the General Revenue Fund...."

If the rider on the appropriation for the Banking Department quoted hereinabove is intended to require the State Banking Department to pay any portion of the appropriations out of the receipts to the Banking Department as examination fees, such rider is invalid and ineffective for the reason that it is in direct contravention to the provisions of said Article 363, supra.

Section 3 of the general provisions at the end of the appropriation bill herein involved reads as follows:

"If any Section, Subsection or provision of this Act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of any other provision or part of the Act."

In view of such provision, the invalidity of the paragraph hereinabove quoted appended to the end of the appropriation for the Department of Banking would not affect the validity of the remaining portions of said appropriation and therefore the appropriations hereinabove listed by numbers are valid appropriations out of the General Revenue Fund of the State of Texas, the same as if such paragraph had not been so appended to said appropriation.

You are therefore respectfully advised that it is the opinion of the writer that such paragraph appended to the appropriation bill for the Banking Department is wholly invalid insofar as it concerns items 1 to 13 inclusive, and items 17 to 18, as well as the nine thousand dollars (\$9,000.00) appropriation in item 14, out of the General Revenue Fund to be used as an advancement, of the appropriation for the Department of Banking for the biennium ending August 31, 1937.

Yours very truly,

W. W. HEATH,
Assistant Attorney General.

Considered in conference and approved and ordered filed.

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2971

BANK DEPOSIT INSURANCE CORPORATION—COMMISSIONER
OF BANKING.

1. Bank Deposit Insurance Corporation is an instrumentality of the government or a convenient means to carry out a governmental function and not a corporation created by Special Law in violation of Sections 1 and 2, Article 12, of the Constitution of the State of Texas.
2. The Commissioner of Banking, as ex-officio director of Bank Deposit Insurance Corporation may vote as such and receive the compensation as director provided by statute, in addition to that amount he receives from the State as Banking Commissioner of the State of Texas.

3. The President of such corporation shall be selected by the Board of Directors and may be either the Commissioner of Banking or any other member of the Board of Directors.

4. The Commissioner of Banking, if properly selected as president of the corporation, shall receive such salary, if any, as the Board of Directors may determine, but may not receive any additional compensation as director, while serving as president.

5. The duties of the Commissioner of Banking as director of the corporation and as president, if selected in the manner provided by law, are ex officio duties of the office of Commissioner of Banking and are not separate positions of emolument.

6. The corporation is an instrumentality of the government, and therefore the functions of its board of directors are governmental and the Legislature may give to it the right to select its president from any of its directors, including the Commissioner of Banking.

OFFICES OF THE ATTORNEY GENERAL,

Austin, Texas, September 20, 1935.

Hon. Irvin McCreary, Commissioner of Banking, Austin, Texas.

DEAR SIR: This will acknowledge receipt of your letter of September 12th, addressed to Attorney General McCraw.

You state that under the provisions of Article 489a of the Revised Civil Statutes that the Commissioner of Banking is an ex officio member of the Board of Directors of the Bank Deposit Insurance Company, and that the Board of Directors of such corporation has seen fit to elect the Commissioner of Banking as president of the corporation, and ask the advice of this Department upon the following question:

"Under the aforementioned conditions, would the Commissioner of Banking of Texas be entitled to draw a salary from the Bank Deposit Insurance Corporation as President of the corporation?"

On October 5th, 1933, Honorable Sidney Benbow, then Assistant Attorney General, in a letter opinion addressed to Honorable E. C. Brand, the then Commissioner of Banking of the State of Texas, held that the Commissioner of Banking of the State of Texas could serve as one of the directors of the corporation as provided in the bill creating the corporation, could vote at all director's meetings and could receive the statutory compensation as a director of the corporation in addition to that amount he then received as Commissioner of Banking of the State of Texas.

Judge Ocie Speer, who was then and is now counsel for the Commissioner of Banking, on the same date, also wrote an opinion to the said E. C. Brand, the then Commissioner of Banking, upon the same questions as were involved in the Benbow opinion, and held the same as was held by Mr. Benbow. These opinions were based largely upon the decision of the Supreme Court in the cases of Middleton vs. Texas Power & Light Com-

pany, 108 Tex. 96, 185 S. W. 556 (Sup. Ct.); First Baptist Church vs. City of Fort Worth, 26 S. W. (2d) 196; and Jones vs. Alexander, 59 S. W. (2) 1080, (Sup. Ct.).

The first of these cases seems to be decisive upon the question of whether or not the Bank Deposit Insurance Corporation is a corporation created by Special Law in violation of Sections 1 and 2, Article 12, Constitution of the State of Texas, which reads of follows:

“Sec. 1. No private corporation shall be created except by General Laws.

“Sec. 2. General Laws shall be enacted providing for the creation of private corporations and shall therein provide fully for the adequate protection of the public and of the individual stockholders.”

Both Judge Speer and Mr. Benbow correctly held, in the opinion of this writer, that under the decision in the Middleton vs. Texas Power & Light Company, *supra*, the Bank Deposit Insurance Corporation is an instrumentality of the government or a convenient means to carry out a governmental function and not such a corporation as would violate the provisions of the Constitution just above quoted.

In the Middleton case, this same question was raised with respect to the Texas Employers Insurance Association, which was created by a Special Act of the Legislature in the same way that the Bank Deposit Insurance Corporation was created and the Supreme Court in such case held as set forth in the paragraph next above.

Therefore, it is seen to begin with, as was so aptly shown by both Mr. Benbow and Judge Speer, that the Bank Deposit Insurance Corporation is a legal and constitutional body and not in violation of Sections 1 and 2 of Article 12 of the Constitution of the State of Texas.

If the functions to be performed by the body created by this Act are governmental in their character, as was held as to a similar body in the Middleton case, the writer can see no objection in providing under the terms of the Act that the Commissioner of Banking shall act as the *ex officio* member of the Board of Directors and be entitled to vote as such and receive an additional salary for the additional duties imposed upon him as Commissioner of Banking.

The only objection that could be raised to the Commissioner holding such position and receiving such additional compensation would be due to the inhibitions contained in Article 16, Section 40, of the Constitution of the State of Texas, which reads as follows:

“No person shall hold or exercise at the same time, more than one civil office of emolument, except that of justice of peace, county commissioner, notary public and postmaster....”

The last two cases, the styles of which are given above, are decisive of this question and in effect hold that to impose such

additional duties upon the Commissioner of Banking and allow him additional compensation for such additional duties would not violate such constitutional inhibition.

The First Baptist Church vs. City of Fort Worth case, *supra*, is a case in which this constitutional inhibition was urged against an Act of the Legislature imposing upon the Tax Assessor of the City of Fort Worth the additional duties of acting as Tax Assessor for the Fort Worth Independent School District. Judge Leddey, of the Commission of Appeals, in sustaining the constitutionality of such Act, had the following to say:

"The effect of the Act in question is merely to impose additional duties upon the assessor and collector of taxes of the city of Fort Worth. It is not shown that this officer received any added compensation to that paid by the city for the performance of the additional duties thus placed upon him. Even if he had been allowed such compensation, it would not follow that the Legislature was creating a new office. No sound reason exists why the Legislature could not impose additional duties upon this officer and increase his compensation accordingly.

"The imposition of additional duties', says *Corpus Juris*, vol. 46, p. 934, par. 29 'upon an existing office, to be performed under a different title, does not constitute the creation of a new office.' The same authority further says: 'An office to which the duties of another are annexed remains technically a single office; it is not an office under its own name and title and another under the name of the one whose duties are annexed to it.' See, also, *Allen vs. Fidelity Co.*, 269 Ill. 234, 109 N. E. 1035; *Hatfield vs. Mingo County Court*, 80 W. Va. 165, 92 S. E. 245; *State vs. Powell*, 109 Ohio St., 383, 142 N. E. 401."

In the *Jones vs. Alexander* case, which is a comparatively recent case, it was held that the imposition upon a District Judge of the duties of a member of the Juvenile Board of his county for which an additional compensation of fifteen hundred dollars (\$1500.00) was allowed out of county funds, in addition to the salary he received from the State, was not a violation of such constitutional inhibition forbidding the holding of two offices of emolument. This case was decided upon certified questions, the precise questions certified to the Supreme Court being:

"1. Is membership on the Juvenile Board a public office in the sense that the exercise of the duties of such position by a District Judge violates the provision of Article 16, Sec. 40, of the Constitution, that prohibits (with exceptions) the same person to hold or exercise at the same time more than one civil office of emolument, etc?

"2. Was the Legislature constitutionally authorized to provide for the payment, annually, to certain District Judges, members of County Juvenile Board, \$1500.00 in addition to the salary authorized by the law to be paid other District Judges of the State?

"3. Would the payment, on orders of the Commissioners Court, of such additional salaries violate Section 51 of Article 3 of the Constitution, as being unauthorized grants of public money?"

The Supreme Court answered each of the questions to the effect that the Act conferring the additional powers and providing the additional compensation was not in violation of Article 16, Sec. 40, of the Constitution; and furthermore, was not in violation of Sec. 51 of Article 3 forbidding the unauthorized grants of public money.

It is apparent, from a reading and study of these two cases, that the imposition upon the Commissioner of Banking of the State of Texas of additional duties of his office in the nature of acting as an ex officio director of the Bank Deposit Insurance Corporation is not the holding of two public offices of emolument by such Banking Commissioner, and such is the holding in both the Benbow and the Speer opinions mentioned herein, and the holding of this department at this time.

The Bank Deposit Insurance Corporation, under the Middleton case, is an instrumentality of the government as a convenient means to carry out a governmental function, and therefore the duties of the Commissioner of Banking as ex officio director of such corporation are necessarily governmental in their nature and are additional duties imposed upon him as Commissioner of Banking of the State of Texas for which an additional compensation is allowed by virtue of the Act creating the Bank Deposit Insurance Corporation.

The sole additional question presented by the request for an opinion now before us not fully covered in the opinions heretofore rendered by this Department in Mr. Benbow's letter of Oct. 5th, 1933, and in the opinion of Judge Ocie Speer, of the same date, as counsel for the Commissioner of Banking, is the question of whether or not the Commissioner of Banking would be entitled to draw a salary from the Bank Deposit Insurance Corporation as President of the corporation after he had been elected as such by the Board of Directors.

It has been seen in the discussion hereinabove that the Commissioner of Banking is authorized to serve as ex officio director of the corporation and to receive the statutory compensation therefor.

Section 4, of Article 489a, Revised Civil Statutes, reads in part as follows:

".....the President of the corporation shall receive such salary, if any, as the Board of Directors may determine, but such amount as he may receive hereunder for acting as a director shall be credited upon such salary and shall not be additional thereto.... At their first regular meeting, the Directors shall choose by ballot a President *who shall be a member of the Board* (Italics ours) Such officials shall be elected to serve for a period of two years or until their successors have been elected and qualified, but any officer may be removed for good cause and his successor elected at any time by a majority vote of the Board. . . ."

It is seen from a reading of this statute that the statute specifically requires that the President of the corporation be

selected by the Board of Directors from such Board. No other person is eligible to be President. The Banking Commissioner is specifically made by the statute an ex officio member of the Board of Directors and the statute does not say that the President shall be elected from the Board of Directors except the Commissioner of Banking.

Obviously, the Board of Directors would have as much right and power, should they see fit, to elect the Commissioner of Banking as president of the corporation as to elect any other member of the Board of Directors. It might as well be said that the Legislature meant to exclude any one of the other directors from the presidency as to say that it was meant for the Commissioner of Banking to be excluded.

The only difference between the legal right of the Commissioner of Banking to serve as a Director of the corporation and to receive a compensation from the corporation therefor, and the right of the Commissioner to serve as President of the corporation and to receive a compensation therefor, is that the statute creating the corporation makes his serving as Director mandatory, whereas such Act makes his serving as President optional with the Board of Directors.

Under the decision in the *First Baptist Church vs. City of Fort Worth and Jones vs. Alexander*, discussed above, we think that there is no doubt but that the Legislature has the right to impose the additional duties of President of the corporation upon the Commissioner of Banking as an ex officio duty of his office and to provide an additional compensation therefor just as it would have the right to impose the duties of Director of the corporation upon him and allow a compensation therefor.

It is true that such duties were not mandatorily imposed upon him, but he is authorized under the Act to discharge such additional duties and to receive such additional compensation therefor as the Board of Directors may fix in the event he is selected as President by the Board of Directors of the corporation.

This body, being a governmental agency, the other directors exercise governmental functions in the discharge of their duties as Directors of this body the same as the Commissioner of Banking exercises governmental functions in the discharge of his additional duties as ex officio Director of the corporation, and in view of the fact that the Board of Directors in the discharge of their duties are exercising governmental functions and carrying out the purposes of an instrumentality of the government, there is no reason, in the opinion of the writer, why the Legislature could not, as they did, provide that the Board of Directors in discharging their duties should select any of its directors, which would include the Commissioner of Banking, as its President.

You are therefore respectfully advised that it is the opinion of this writer that the Commissioner of Banking may serve as President of the Bank Deposit Insurance Corporation if he is

elected by the Board of Directors in the manner prescribed by law, and that he may receive such salary, if any, as the Board of Directors of the corporation may determine, but that he is not entitled to receive an additional compensation for acting as a director of the corporation for the reason that the statute provides that such amount as he may receive for acting as a Director shall be credited upon his salary as President and shall not be additional thereto.

Yours very truly,

W. W. HEATH,
Assistant Attorney General.

Considered in conference and approved and ordered filed.

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2972

OLD AGE PENSION—REVENUE AND TAXATION.

1. An old age pension bill initiated in the Senate and passed by the Legislature would be valid if a revenue-raising provision is contained for the purpose of creating a fund out of which to pay the pension, so long as the taxes imposed are but means incident to the consummation of the main purpose provided by the Act and not for the purpose of raising revenue for the general purposes of the State.

2. Assuming that Senate Bill 22 meets the requirements of paragraph No. 1 above, a per capita annual tax for pension fund purposes would be invalid for the reason that same would be a poll tax separate and distinct from the present poll tax, and the Legislature is limited in the Constitution to levying one poll tax.

3. A per capita tax of the kind set forth in Senate Bill 22, being a poll tax, would have to be paid under the provisions of Article 6, Section 2 of the Constitution of Texas, before the person owing same could vote at any election in this State.

4. The Legislature may increase the present poll tax from \$1.50 to \$3.50, or such other figure as it may deem necessary and use the additional amount for pension fund purposes.

5. The three per cent sales tax levied upon the gross receipts of retail merchants in Senate Bill 23 is a valid and constitutional occupation tax.

6. The provisions of Senate Bill 23 for the levy and collection of such taxes are valid and constitutional, assuming that such bill meets the requirements set forth in paragraph No. 1 above.

7. Section 73 of House Bill 23, is unconstitutional and void insofar as it attempts to provide for the suspension of the license of any retail merchant by the Administrator without providing for a review of such action in the Courts because it violates the due process of law clause of the Constitution.

8. The provisions of this bill being severable, such unconstitutional clause does not affect the remaining portions.

9. The Legislature has the power to prescribe disqualifications of persons over sixty-five years of age by property ownership limitations, or by earning or income limitations, thus authorizing certain persons over sixty-five years of age to receive old age assistance or pensions out of any public funds created for the purpose and excluding other such persons coming within such age classification.

OFFICES OF THE ATTORNEY GENERAL,

Austin, Texas, September 29, 1935.

Hon. J. W. E. H. Beck, Chairman Subcommittee of the Senate Finance Committee, Austin, Texas.

DEAR SIR: Your letter of September 27th, 1935, addressed to Attorney General McCraw, has been referred to the writers for attention. You request the advice of this Department upon the following questions, namely:

1. Whether or not an old age pension bill, initiated in and passed by the Senate, would be valid if a revenue-raising provision is contained for the purpose of creating a fund out of which to pay the pensions?

2. If, under certain specific conditions, the Senate could pass a valid bill of that kind, then would a bill levying a per capita annual tax for pension fund purposes such as is contained in S. B. No. 22, be valid, if enacted?

3. Further, if under certain conditions, the Senate could enact a bill carrying the provisions for the levy and collection of taxes for the purposes of the bill, then would the provisions for such levy and collection contained in S. B. No. 23 be valid, if enacted by the Senate and the Legislature, having originated in the Senate?

4. If either of the measures pre-supposed in the foregoing, having originated in the Senate, been amended in the House, such amendments having been refused by the Senate and bills so having origin in the Senate referred to a conference committee from each of the two Houses for adjustment of differences, the report of which conference committee subsequently having been adopted by both Houses, be a valid and Constitutional enactment?

5. H. J. R. No. 19, passed by the 44th Legislature, Regular Session for submission to, and subsequently on the 24th day of August, 1935, adopted and ratified by a majority of the voters at such election, is referred to here (page 1229, Vol. 2, General & Special Laws of Texas, Regular Session, 1935) and particularly Sec. 1 thereof. Under said Resolution and Section does the Legislature have the power to prescribe qualifications for the inclusion of any persons other than those sixty-five years of age or older, or of the exclusion of any persons sixty-five years of age or over? Does the Legislature, in other words, have the power to prescribe disqualifications of persons over sixty-five years of age to receive old age assistance, or pensions, out of any public fund created for the purpose, and excluding other such persons coming within such age classification?

In reply to your question No. 1, in which you ask the general question of whether or not an Old Age Pension bill initiated in and passed by the Senate would be valid if a revenue-raising provision is contained for the purpose of creating a fund out of which to pay the pensions, we wish to advise that the only Texas

cases we have been able to locate which touch upon this question in any pertinent manner are the following:

Day Land and Cattle Co. vs. State, (Supreme Court of Texas) 4 S. W. 865.

Gieb v. State, (Court of Criminal Appeals of Texas) 21 S. W. 190.

Raymond, et al v. Kibbe, et al, (Court of Civil Appeals) (Writ of Error refused) 95 S. W. 727.

Stuard vs. Thompson, (Court of Civil Appeals, Fort Worth) 251 S. W. 277.

Article 3, Section 33, of the Texas Constitution, reads as follows:

“All bills for raising revenue shall originate in the House of Representatives, but the Senate may amend or refuse them as other bills . . .”

The question is whether or not a bill of the type set forth in your question No. 1 violates this constitutional provision.

The Texas cases above cited do not throw a great deal of light upon this question. The Day case, by the Supreme Court, which is widely quoted and followed in almost countless Texas decisions insofar as the question before us is concerned, merely holds that a bill setting apart the unappropriated public domain in Greer County for certain purposes without even undertaking to bring in the State Treasurer the proceeds of these lands is not such a revenue-raising measure as would be required to originate in the House of Representatives. The only significance of this case is that it quotes with approval the language of Judge Story, in his work on the Constitution, Section 880, which is hereinafter discussed and which is quoted with approval in the decisions of the United States Supreme Court, which we think are decisive of this question, as will be hereinafter shown.

The Gieb case, which is by the Court of Criminal Appeals, is the only other Texas case that seems to be of any help in deciding this question. In such case, the following language was used:

“The Act complained of is not a bill raising revenues, within the meaning of Article 3, Section 33 of the Constitution, which provides that ‘all bills for raising revenue shall originate in the House of Representatives’. This provision of the Constitution has reference to bills raising revenue for such *general purposes* as the Legislature is required or authorized to raise, and to cover such appropriations as are made by that body, and does not apply to *laws of special or local character*. . . . If the law be local in its operation and the tax an incident to it. . . it is not a revenue law within the contemplation of the cited provisions of the Constitution....” (Italics ours).

While this decision is by the Court of Criminal Appeals, it holds that a bill where the taxing feature is merely incident to the main purpose of the bill is not within such constitutional inhibition for the reason that such provisions of the Constitution

have reference to bills raising revenue for such general purposes as the Legislature is required or authorized to raise rather than to bills with an incidental tax provision in the bill for the purpose of carrying out the main purposes of the bill itself.

The Kibbe case, in 95 S. W., held that a certain bill imposing a tax on fishing boats and fish taken for market was not void as a revenue measure originated in the Senate, but this case was decided upon the theory that the fish in public waters were the property of the State as a representative of its citizens, and that therefore the State might impose such conditions, restrictions and burdens as it chose upon the taking and appropriation of its own property to private ownership and uses, and therefore, such case is really not pertinent to the issues involved in your question.

The Stuard case, in 251 S. W., held that an Act levying a poll tax on women was not unconstitutional as a revenue measure originating in the Senate instead of the House upon the grounds that the bill was clearly not one to create revenue, but a charge primarily imposed for the purpose of regulation. This case is not helpful except to the extent that it holds that the poll tax levied in this bill was but an incident to the main purpose of the bill in prescribing the necessary qualifications of the voters, and being incidental to the main purpose of the bill would not come within the constitutional inhibition against revenue measures originating in the Senate.

It will be noted that each and every one of these four (4) cases upheld the constitutionality of the laws therein involved, and we have been unable, in the brief time which we have had to consider this case, to find any case where the appellate courts of this State have held a law to be in violation of the constitutional inhibition against revenue bills originating in the Senate.

Article 1, Section 7, of the Constitution of the United States, reads as follows:

"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 . . ."

It will be noted that the language "all bills for raising revenue shall originate in the House of Representatives" is absolutely the same, word for word, in the Texas Constitution and in the Constitution of the United States.

The Supreme Court of the United States, on two separate occasions, has construed this language of the Constitution in connection with questions almost identical to the one now under consideration.

The case of *Twin Cities Bank vs. Nebeker*, in 167 U. S. Rep. 196, by the Supreme Court of the United States, was a case in which Congress had passed a National Banking Act dealing generally with the national banking situation in the United States, and providing particularly that National Banks might

put in circulation certain currency over its own signature not to exceed a certain amount by depositing bonds with the Comptroller of the Currency, such currency to be engraved under the direction of the Comptroller of the Currency. This bill also contained a taxing provision that provided that the plates and special dies to be procured by the Comptroller of the Currency for the printing of such circulating notes should remain under his control and direction, and that the expenses necessarily incurred in executing the provisions of such Act respecting the procuring of such notes and all other expenses of the bureau should be paid out of the proceeds of the taxes or duties levied in such bill and there was levied in such bill certain taxes for the payment of such expenses. The Supreme Court, in passing upon this question, used the following language:

“The contention in this case is that the Section of the Act of June 3, 1864, providing a national currency secured by a pledge of United States bonds, and for the circulation and redemption thereof, so far as it imposed a tax upon the average amount of the notes of a national banking association in circulation, was a revenue bill within the clause of the Constitution declaring 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,’ Art. I, Section 7; . . .

“The case is not one that requires either an extended examination of precedents, or a full discussion as to the meaning of the words in the Constitution ‘bills for raising revenue’. What bills belong to that class is a question of such magnitude and importance that it is the part of wisdom not to attempt by any general statement, to cover every possible phase of the subject. It is sufficient in the present case to say that an Act of Congress providing a national currency secured by a pledge of bonds of the United States, and which, in the furtherance of that object, and also to meet the expenses attending the execution of the Act, imposed a tax on the notes in circulation of the banking associations organized under the statute, is clearly not a revenue bill which the Constitution declares must originate in the House of Representatives. *Mr. Justice Story has well said that the practical construction of the Constitution and the history of the origin of the constitutional provision in question proves that revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue. 1 Story on Const. 880. The main purpose that that Congress had in view was to provide a national currency based upon United States bonds, and to that end it was deemed wise to impose the tax in question. The tax was a means for effectually accomplishing the great object of giving to the people a currency that would rest, primarily, upon the honor of the United States, and be available in every part of the country. There was no purpose by the Act or by any of its provisions to raise revenue to be applied in meeting the expenses or obligations to the Government.*” (Italics ours)

Nine years later, the Supreme Court of the United States, in the case of *Millard vs. Roberts*, 202 U. S. Rep. 429, expressly approved the decision in the *Twin Cities Bank* case above quoted from, and again quoted with approval the language of

Mr. Justice Story, in his 1 Story on Constitution, Sec. 880. This was also a case where the levying of a tax was incidental to the main purpose of the bill and for the purpose of effectually carrying out such main purpose of the bill. In answer to the contention that the law in question in the Millard vs. Roberts case violated the constitutional provision requiring that "all bills for raising revenue shall originate in the House of Representatives," the Supreme Court quoted with approval from Judge Story's work on Constitutions, and from the Twin Cities Bank case, and ended by saying:

"This language is applicable to Congress in the case at bar. Whatever taxes imposed are but means to the purposes provided by the Act"

The Day case, by our Texas Supreme Court, specifically approves the exact language used by Judge Story in his work on Constitutions that is approved by the Supreme Court of the United States and quoted by it as a basis for its decision upon the same general question as you have presented to us; and the Gieb case, by the Court of Criminal Appeals, holds practically the same thing as the two cases by the Supreme Court of the United States.

We think that one sentence in the Millard vs. Roberts case sums up the whole proposition:

"Whatever taxes are imposed are but means to the purposes provided by the Act"

We therefore respectfully advise you that it is the opinion of the writers that your question No. 1 should be answered in the affirmative, so long as the taxes imposed are but means incidental to the consummation of the main purpose provided by the Act and not for the purpose of raising revenue for the general purposes of the State. In reaching this conclusion, we have not had the time to examine the decisions of the appellate courts of other states of the Union, a large number of which have similar provisions in their State Constitutions, but we feel that in the absence of a direct expression upon this question by our own appellate courts that the decisions of the Supreme Court of the United States upon an identical clause in the Federal Constitution should be controlling.

There are various decisions of the inferior courts of the United States which we feel it unnecessary to quote from, that are to some extent conflicting and confusing upon this question, but we feel that while the decisions of the Supreme Court of the United States upon the construction of an identical clause in the Federal Constitution is not binding upon the appellate courts of Texas in construing the identical clause in the State's Constitution, such decisions are highly persuasive, especially where such Texas cases as touch upon the question involved indicate an agreement with such decisions, and will be followed by this Department.

Proceeding now to your question No. 2, in which you inquire if under certain specific conditions the Senate could pass a valid Old Age Pension bill of the kind mentioned in your question No. I, then would a bill levying a per capita annual tax for pension fund purposes such as is contained in Senate Bill 22, be valid if enacted, we beg to advise that the pertinent provision of said Senate Bill 22 reads as follows:

"Sec. 23. There is hereby created under the supervision of the Treasurer of the State of Texas a fund to be known as the Old Age Assistance Fund, the proceeds of which shall be used to pay the expenditures incurred under this Act. To provide money for said fund is hereby levied on all persons residing in this State and who are citizens of the United States between the ages of 25 and 60, not inclusive, except inmates in county or state institutions, an annual tax of \$2.00."

Parker vs. Busby, Court of Civil Appeals, 170 S. W. 1042, defines the words "poll tax" as follows:

"The words 'poll tax' mean a tax upon a person— a capitation tax . . ."

"Poll tax" has been so defined universally by authorities too numerous to quote in this decision, usually with the statement that it is a tax upon the person without regard to whether such person does or does not have property.

While Senate Bill 22 does not particularly denominate said tax as a poll tax, it is not described as any particular kind of a tax in the bill, and at any rate, it is not a question of what the tax is called, it is a question of what kind of a tax it is, and it is apparent that it is a poll tax within the definition of the words "poll tax" set out above. It is a tax upon the person without regard to whether or not such person has any property, and is therefore a poll tax.

Article 8, Section 1, of the Constitution, reads in parts as follows:

"... The Legislature may impose a poll tax . . ." (Italics ours).

Article 7, Section 3, of the Constitution of Texas, reads in part as follows:

"... and poll tax of one dollar on every inhabitant of the State between the ages of twenty-one and sixty shall be set apart annually for the benefit of the public free schools . . ."

Article 6, Section 2, of the Constitution of Texas, reads in part as follows:

"... and provided further that any voter who is subject to pay a poll tax under the laws of the State of Texas shall have paid said tax before offering to vote at any election in this State . . ."

Article 8, Section 17, of the Constitution of the State of Texas, reads 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 . . . ”

It does not appear from a reading of these Sections of the Constitution that there is any maximum limitation upon the power of the Legislature to levy A poll tax. There is, however, a minimum requirement, as shown above, that one dollar be levied for the benefit of the public free schools. There is no doubt in our minds but that the tax provided in Senate Bill 22 is a poll tax, and there is no doubt in our minds but that under the provisions of Article 6, Section 2 of the Constitution, that the Legislature would be powerless to provide that payment of said tax, if it be a poll tax, as we think that it is, be not a prerequisite to voting in this State.

We likewise have no doubt but that the Legislature has the power to provide for A poll tax of three and 50/100 dollars (\$3.50) or any other amount in excess of one dollar (\$1.00) that they may deem necessary, and that they may provide that two dollars (\$2.00) of said tax be used for Old Age Pension purposes just as they have already seen fit to provide an additional fifty cents (50c) for general revenue fund purposes, in addition to the one dollar (\$1.00) for the benefit of the public free schools. The present poll tax has been declared to be not in violation of the equal and uniform provision of the Constitution by reason of the right of the Legislature to classify in groups for taxation purposes. *Solon vs. State*, 114 S. W. 349; *Bluitt vs. State*, 121 S. W. 168.

The present poll tax law classifies as one class who are to pay a poll tax all persons between the ages of twenty-one and sixty, with certain named exemptions, whereas the poll tax provision in the proposed Senate Bill 22 sets up a different classification for poll tax purposes, that is: the tax is imposed upon those persons between twenty-five and sixty years of age, with certain exemptions, such exemptions being wholly different and distinct from those exemptions in the present poll tax law.

It therefore appears that notwithstanding the fact that a large number of persons will be included in both classes, nevertheless, the passage of the proposed Senate Bill 22 will set up a new separate and distinct class for the payment of a poll tax, and it would therefore appear that such tax of two dollars on those persons in the class set up in said proposed bill will be a separate poll tax upon such persons in said class rather than merely an additional tax to the present poll tax, and therefore only one tax.

In view of the fact that the Constitution provides that the Legislature may levy A poll tax, rather than providing that it may levy “poll taxes,” and, in view of the fact that the poll tax provided in the bill under consideration is a separate poll tax from the one now in existence, it is our opinion that such vio-

lates what we believe is a constitutional limitation that the Legislature may levy only one poll tax.

In view of the fact that this bill, along with the other pension bills heretofore introduced in the Senate, are now in the Finance Committee of the Senate for a study and revision, we will say that there is no doubt but that the same purpose may be easily accomplished by changing said tax provision in said bill so as to raise the necessary amount of revenue to discharge said pension fund requirements by raising the present poll tax by the necessary amount rather than by levying the same amount as a separate and distinct poll tax.

The only possible objection that we can conceive that would be raised to this procedure would be that the payment of such poll tax would be a prerequisite to the right to vote, but as we have pointed out already hereinabove, if the tax in the proposed Senate Bill 22 be a poll tax, as we think it is, under the provisions of Article 6, Section 2, of our Constitution, the payment of such tax would be a prerequisite to voting; whether it be so provided in the bill or not, and whether it be in the form of a separate tax or in increase of the present tax.

In reply to your question No. 3 with respect to the validity of the levy and collection provisions of Senate Bill 23, which is the Sanderford Old Age Pension Bill, with the sales tax provision, we beg to advise that it is our opinion that subject to the limitations set forth in our answer to your question No. 1, that is: if the tax is merely an incident to accomplishing the main purpose of the bill and is to be used only for such purposes and not for the general support of the government, the provisions levying and collecting such taxes are in all respects constitutional.

Article 8, Section 1 of the Constitution of Texas reads in part as follows:

"It, (the Legislature), may also impose occupation taxes both upon natural persons and upon corporations, other than municipal, doing business in this State . . ."

Article 8, Section 2, of the Constitution of Texas reads in part as follows:

". . . All occupation taxes shall be equal and uniform upon the same classes of subjects within the limits of the authority levying the tax."

It is obvious that this tax is an occupation tax as such tax is collected from all persons engaged in the business of making sales at retail for the privilege of engaging in such business, and is especially denominated an occupation tax in Section 38 of the bill.

The case of Texas Company vs. Stephens, by the Supreme Court of Texas, in 100 Tex. 628, is decisive of this question. We quote from said case:

"Another objection is that the statute discriminates between plaintiff and other pursuing occupations which belong to the same class, in imposing

heavier taxes upon plaintiff than are imposed upon them, and is therefore violative of the Constitution of the State, which provides that 'occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax,' and also violative of the fourteenth amendment of the Constitution of the United States in that it denies to plaintiff the equal protection of the laws. The very language of the Constitution of the State implies power in the Legislature to classify the subjects of occupation taxes and only requires that the tax shall be equal and uniform upon the same class. Persons who, in the most general sense, may be regarded as pursuing the same occupation, as for instance merchants, may thus be divided into classes and the classes may be taxed in different amounts and according to different standards. Merchants may be divided into wholesalers and retailers, and if there be reasonable grounds, these may be further divided according to the particular classes of business in which they may engage. The considerations upon which such classifications shall be based are primarily within the discretion of the Legislature. The courts, under the provisions relied on, can only interfere when it is made clearly to appear that an attempted classification has no reasonable basis in the nature of the businesses classified, and that the law operates unequally upon subjects between which there is no real difference to justify the separate treatment of them undertaken by the Legislature. This is the rule in applying both the State and Federal Constitutions, and it has been so often stated as to render unnecessary further discussion of it. (*The State v. Galveston, H. & S. A. R. R. Co.*, supra)

It is our opinion, however, that Section 73 of the proposed bill giving the Administrator the right, after hearing, to suspend the license of any person, under said conditions, is unconstitutional and void by reason of the fact that it violates the provisions of both the State and Federal Constitutions, which state that no person's property shall be taken without due process of law.

By reason of Section 78, of said proposed bill, which makes said bill severable and declares that if any part of same is Section of said bill that same shall not affect any other part, if the provision should be found to be unconstitutional, same would not affect the remaining portion of the bill.

It will be necessary, in order to make this provision valid, in our opinion, to provide for a review of the Administrator's action by a Court of Competent Jurisdiction where the aggrieved person may desire such a review. The effect of this provision would be to prevent a retail merchant from transacting his business as such during the period of time which his license was suspended and would have the effect of depriving him of his property without due process of law unless a review in court is provided.

In connection with your fourth question, we beg to advise that in view of the fact that such question is predicated upon a negative reply to your question No. 1, in view of our affirmative answer to such question, it is unnecessary that we answer this question.

In connection with your question No. 5, your attention is respectfully called to the first paragraph of Section 51-b of House Joint Resolution 19, proposing an amendment to the Constitution providing that the Legislature shall have the power to provide for old age pensions, which has been adopted as an amendment to Article 3 of the Constitution of the State of Texas, which reads as follows:

"Section 51-b. The Legislature shall have the power by general laws to provide, under such limitations and restrictions and regulations as may be deemed by the Legislature expedient, for old-age assistance, and for the payment of same not to exceed Fifteen (\$15.00) Dollars per month each to actual bona fide citizens of Texas who are over the age of sixty-five (65) years; provided that no habitual criminal, and no habitual drunkard while such habitual drunkard, and no inmate of any State supported institution, while such inmate, shall be eligible for such old age assistance; provided further that the requirements for length of time of actual residence in Texas shall never be less than five (5) years during the nine (9) years immediately preceding the application for old age assistance and continuously for one (1) year immediately preceding such application."

It is obvious that under the language "the Legislature shall have the power by general laws to provide *under such limitations and restrictions and regulations as may be deemed by the Legislature expedient*," that the Legislature has the power to prescribe disqualifications of persons over sixty-five years of age by property ownership limitations or by earning income limitations, thus authorizing certain persons over sixty-five years of age to receive old age assistance or pensions out of any public fund created for the purpose and excluding other such persons coming within such age classification.

If the language giving the Legislature the right to provide pensions by general law for persons not to exceed fifteen dollars (\$15.00) per month under such limitations and restrictions and regulations as may be deemed by the Legislature expedient means anything at all, it means that the Legislature has the right to make such limitations and restrictions and regulations as are contained in the proposed bills, and therefore your question Number 5 is answered in the affirmative.

We have in the brief time between Friday afternoon when the request was received, and Monday morning at eight o'clock, when you have stated your Committee must have this opinion in hand, given these important questions as serious and careful consideration as is possible in such time, but we have found it impossible, notwithstanding that we have worked night and day, as well as all day Sunday and practically all of Sunday night, to go into all the questions surrounding this inquiry as

exhaustively as we would like before attempting to give this opinion.

Respectfully submitted,

JOE J. ALSUP,
Assistant Attorney General.

W. W. HEATH,
Assistant Attorney General.

Considered in conference and approved and ordered filed.

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2973

1. The Board of Insurance Commissioners has the authority to prescribe the forms upon which all automobile insurance is to be written, and included in their powers is that to prescribe the form of the policy to be used in compliance with Section 11 of Article 911a and Section 13 of Article 911b of the Revised Civil Statutes of Texas, and the Railroad Commission cannot under the law compel the attachment of endorsements promulgated by it to the uniform policy prescribed by the Board of Insurance Commissioners.

2. The phrase "under such rules and regulations as it may prescribe" used in Article 911b relates only to the matter of the determination of the amount for which the policy or bond filed with the Railroad Commission shall be written.

3. Under Articles 911a and 911b, the Railroad Commission is not authorized to fix additional eligibility requirements that companies authorized to do business in Texas must meet before they can solicit or acquire insurance on motor busses and/or motor trucks operating in Texas.

4. The language in the uniform rider or endorsement supersedes the language in the uniform policy prescribed by the Board of Insurance Commissioners when both are executed at the same time.

5. The payment of premiums as a condition precedent to the effectiveness of an insurance policy is dependent upon the intent of the parties to the insurance contract, to be determined not only by the expression in the policy, but by other circumstances attending the delivery of the policy.

OFFICES OF THE ATTORNEY GENERAL,

Austin, Texas, November 1, 1935.

Hon. C. V. Terrell, Railroad Commission of Texas, Austin, Texas.

DEAR SIR: Under date of June 24, 1935, you addressed a letter to the Honorable William McCraw, Attorney General of Texas, concerning a uniform policy adopted by the Insurance Commission, which, together with a uniform rider or endorsement attached to the uniform policy, constitutes the insurance contract entered into by those operating motor busses and motor carrier lines with the various insurance companies that carry the

liability and property damage insurance provided for in Section 11 of Article 911a, dealing with motor bus regulation and provided for in Section 13 of Article 911b of the Revised Civil Statutes of Texas, 1925 Revision, concerning motor carrier regulation.

After considerable discussion of this matter with members of your Department and with the Casualty Insurance Commissioner, we received on September 11, 1935, a further inquiry from Senator Tom DeBerry in behalf of the Committee appointed under Senate Resolution No. 96 and assigned the duty of studying and revising the Insurance Code, in which he raised certain questions relating to the same general subject, and, for that reason, we herein treat with the inquiry of your letter, and also the inquiries of Senator DeBerry's letter.

You set out in your letter that the Insurance Commission has adopted what they call a uniform policy and have embraced ideas contained in insurance endorsements promulgated by the Railroad Commission, but along with those ideas they have a great many other terms in the policy. You then direct the following inquiry to this Department:

"Since this uniform policy has been approved by the Insurance Commission, is it mandatory on the Railroad Commission to accept these uniform policies without the endorsements which are attached thereto, or can the Railroad Commission, under the law, compel the attachment of the endorsements to the uniform policy?"

You then point out that we will find by comparing the endorsements promulgated by the Railroad Commission with the uniform policy prescribed by the Insurance Commission that the language has been changed.

As we understand the situation, the Insurance Department has a uniform rider which is attached to the policies which are to be filed with the Railroad Commission in compliance with the above named Sections of Article 911a and 911b, which fact we will take into consideration in the discussion contained herein. The Railroad Commission has prepared certain other riders or endorsements that they think should be attached to each policy filed by it under Articles 911a and 911b.

Senator DeBerry, after pointing out that there are prescribed forms, Nos. 77 and 77a, which the insurance companies are by order of the Board of Insurance Commissioners required to attach to their standard policy forms in such policies as are to be filed with the Railroad Commission, makes the following specific inquiries:

"1. We desire, therefore, to make specific inquiry as to whether or not the phrase 'under such rules and regulations as it may prescribe' in Article 911b relates to any matter in the Article, other than the determination of the amount for which the policy filed with it shall be written.

"2. . . . We ask the further question as to whether or not under Articles 911a and 911b, the Railroad Commission is authorized to fix additional eligibility requirements that companies authorized to do business in Texas must meet before they can solicit or acquire insurance on motor busses and/or motor trucks operating in Texas."

Article 4682 of the Revised Civil Statutes of Texas prescribes certain duties of the Commissioner of Insurance. Later these duties were placed upon the Board of Insurance Commissioners. By Acts 1927, 40th Legislature, p. 373, Chapter 253, additional duties were placed upon the Commissioner of Insurance in Section 5 of Article 4682b in the following language:

"In addition to the duty of approving classifications and rates, the Commissioner shall prescribe policy forms for each kind of insurance, uniform in all respects, except as necessitated by the different plans on which the various kinds of insurers operate, and no insurer shall thereafter use any other form in writing automobile insurance in this State; provided, however, that any insurer may use any form of endorsement appropriate to its plan of operation, provided such endorsement shall be first submitted to and approved by the Commissioner; and any contract or agreement not written into the application and policy shall be void and of no effect and in violation of the provisions of this Act, and shall be sufficient cause for revocation of license of such insurer to write automobile insurance within this State."

It is our opinion that this statutory provision gives the right to the Board of Insurance Commissioners to prescribe the policy form that is to be used by persons writing the type insurance here involved. We do not find any limitation upon this power in Articles 911a or 911b. Section 11, Article 911a provides:

"The Commission shall, in the granting of any certificate to any motor bus company for regularly transporting persons as passengers for compensation or hire require the owner or operator to first procure liability and property damage insurance from a company licensed to make and issue such insurance policy in the State of Texas, covering each and every motor propelled vehicle while actually being operated by such applicant. The amount of such policy or policies of insurance shall be fixed by the Commission by general order or otherwise, and the terms and conditions of said policy or policies covering said motor vehicles are to be such as to indemnify the applicant against loss by reason of any personal injury to any person or loss or damage to the property of any person other than the assured or his employees. Such policy or policies shall furthermore provide that the insurer will pay all judgments which may be recovered against the insured motor bus company based on claims for loss or damage from personal injury or loss of, or injury to his property occurring during the term of the said policy and arising out of the actual operation of such motor bus or busses, and such policy or policies shall also provide for successive recoveries to the complete exhaustion of the face amount thereof, and that such judgment will be paid by the insurer irrespective of the solvency or insolvency of the insured. Such liability and property damage insurance as required by the Commission shall be continuously maintained in force on each and

every motor propelled vehicle while being operated in common carrier service. In addition to the insurance hereinabove set forth, the owner or operator shall also protect his employees by taking out Workmen's Compensation insurance either as provided by the Workmen's Compensation laws of the State of Texas, or in a reliable insurance company approved by the Railroad Commission of the State of Texas. The taking out of such indemnity policy or policies shall be a condition precedent to any operation and such policy or policies as required under this Act (Art. 911a; P. C. art. 1690a), shall be approved and filed with the Commission and failure to file and keep such policy or policies in force and effect as provided herein shall be cause for the revocation of the certificate and shall subject the motor bus company so failing to the penalties prescribed herein."

Section 13 of 911b provides substantially the same thing in relation to motor carriers as is provided in the above quoted Article for motor bus carriers. The Article provides that bonds and/or insurance policies issued by some insurance company including mutuals and reciprocals or bonding company authorized by law to transact business in Texas in an amount to be fixed by the Commission under such rules and regulations as it may prescribe shall be filed with the Commission. The Article goes on to provide what coverage shall be had, but nowhere does it give the power to the Railroad Commission to prescribe the form upon which the policy shall be written. The duty is upon the Insurance Commission to prescribe some form which will give the coverage required in Articles 911a and 911b.

We think that the Railroad Commission can refuse to approve and file an insurance policy which does not provide for the coverage as set out in the statute, but that the form for writing such coverage should be promulgated by the Board of Insurance Commissioners, and that the Railroad Commission is without authority to approve and file an insurance policy except upon a form approved by the Board of Insurance Commissioners.

The question to be determined by the Railroad Commission resolves itself into whether or not the form which has been prescribed by the Insurance Department does cover what is intended should be covered by the statute, and if the form upon which the insurance is written does offer such coverage, the Railroad Commission should not refuse to file the policy because said Railroad Commission has a particular rider or endorsement promulgated by the Railroad Commission that it desires to have attached to the policy.

In answer to the first question presented by Senator DeBerry which is the second question set out herein, we answer that the phrase "under such rules and regulations as it may prescribe" as used in Article 911b relates only to the amount for which the policy or bond filed with the Railroad Commission shall be written. We think that this is the very apparent answer when we read the following portion of Section 13 of Article 911b, in which said phrase appears:

"Before any permit or certificate of public convenience and necessity may be issued to any motor carrier and before any motor carrier may lawfully operate under such permit or certificate, as the case may be, such motor carrier shall file with the Commission bonds and/or insurance policies issued by some insurance company, including mutuals and reciprocals or bonding company authorized by law to transact business in Texas in an amount to be fixed by the Commission under such rules and regulations as it may prescribe, which bonds and insurance policies shall provide", (then is set out what shall be provided in the bond or policy).

The phrase follows and refers back to the fixing of an amount by the Commission, and we see no authority for writing anything further into the phrase.

In answer to the next inquiry, the second presented by Senator DeBerry, it is plain that under Articles 911a and 911b the Railroad Commission is not authorized to fix additional eligibility requirements that companies authorized to do business in Texas must meet before they can solicit or acquire insurance on motor busses and/or motor trucks operating in Texas. The law provides that the bonds and/or insurance policies filed shall be issued by some insurance company, including mutuals and reciprocals or bonding company authorized by law to transact business in Texas.

As concerns Workmen's Compensation Insurance, which is also required by Section 11 of Article 911a and Section 13 of Article 911b, there is possibly a duty on the part of the Railroad Commission to refuse to file a policy taken out in an unreliable insurance company, in the light of the definite provisions prescribed, both in Section 11 and Section 13 of the respective Articles relating to the taking of Workmen's Compensation insurance in a *reliable* insurance company, approved by the Railroad Commission of the State of Texas, but we are not concerned with that question here.

After a conference had between members of the Casualty Division of the Insurance Department, a member of the staff of the Railroad Commission and members of the Attorney General's Department, it seems to have been fairly well concurred in by all parties that the Insurance Commission should prescribe the form, and that the only question actually before us resolves itself into one as to whether or not the form prescribed by the Board of Insurance Commissioners with the prescribed rider attached satisfies the statutory requirement contained in Section 11 of Article 911a and Section 13 of Article 911b. The Railroad Commission's objections to the form prescribed by the Board of Insurance Commissioners were discussed in conference, and it appeared that their objections would be satisfied if the language in the endorsement or rider prepared by the Insurance Department superseded the language in the original policy form, and if the failure to pay the premium under the terms of the prescribed insurance contract would not destroy the consideration of such contract, and thereby vitiate the policy. Therefore, it was pro-

posed that the Attorney General's Department answer the following question:

"1. Does not the language in the endorsement supersede the language in the policy, when both are executed at the same time?

"2. Is payment of premium in cash a condition precedent to effectiveness of policy?

"3. Would the changing of the language in the policy to 'premium charge' change the rule?"

In answer to the first question above set out, we wish to quote beginning at P. 311 of Section 159 of Couch's Cyclopaedia of Insurance Law, Volume I:

"A lawful rider attached to, and forming a part of the contract is supported by the consideration stated in the policy, and the policy and rider together comprise the contract, even though the result is a new and different contract. And a rider becomes a part of the contract as of its date, rather than as of the date upon which it was actually pasted or otherwise physically attached thereto. *When, however, a lawful rider is properly made a part of the policy, it supersedes the policy; especially so where the obvious intention of the rider is to substitute its conditions, exceptions, and provisos for those of the policy, or its terms are inconsistent and irreconcilable with the terms of the policy.* But if the rider is not irreconcilable with a printed clause, such clause must stand, since a rider supersedes the policy only when it is expressly substituted for the terms of the policy itself, or is inconsistent therewith. And a rider purporting to modify the effect of a particular clause should be confined to such clause, and not be regarded as applicable to other provisions of the contract, it being clear that a rider may be so limited that it will apply only to certain clauses or provisions. *And when a rider is attached to a policy and portions of the body of the policy relating to the same subject-matter as is found in the rider are deleted, it will be assumed that the provisions of the rider were intended to be substituted for those deleted, so that effect will be given to all undeleted portions of the contract unless irreconcilable with the provisions of the rider...*"(Italics ours)

Numerous authorities are cited in the footnotes to sustain the statements made in the foregoing quotation. The same authority as above quoted at Page 375 in Section 183 of Volume I, discusses written and printed parts of a contract and points out that:

"The written parts become the immediate and chosen language of the parties to a contract, and although they should be construed together with the printed clauses, and reconciled with them if possible, so as to give effect to every part of the contract, yet, if the printed and written clauses are repugnant to each other and cannot be reconciled, the written part, having been especially chosen for the occasion to express the agreement of the parties, will be given effect over the more general printed ones, especially where conflicting printed clauses should have been stricken out, but were left in, according to the usual custom. *And for the purposes of this rule, a printed or typewritten rider attached to a policy may be construed as if written...* And the rule that in case of ambiguity or con-

flict the written controls the printed part is especially applicable, where the risk is novel and the parties have attempted to use a standard form by writing in modifications." (Italics ours.)

We would quote from Volume II of Gooley's Briefs on Insurance, Second Edition, P. 1012, as follows:

"While riders, if consistent with the stipulations of a policy, will simply be read in with them, *it is in accord with the general rule as to the controlling effect of written over printed clauses that riders, if inconsistent and irreconcilable with the printed clauses of the policy must control.*" (Italics ours.)

Numerous authorities are cited for this statement.

It is logical to say that the rider or endorsement prescribed by the Insurance Department for attachment to the standard policy form is attached to meet the requirements of a particular type of coverage and therefore supersedes conflicting language appearing in the standard policy form. Since that logic is supported by the above cited authorities, together with many adjudicated cases, we respectfully advise that the language in the rider or endorsement properly attached to the standard policy form supersedes the language in the original policy, when both are executed at the same time. We would further substantiate this statement by pointing to the fact that the insurance contract under discussion makes reference to the statute providing for the coverage intended, and the provisions of that statute will be read into the contract by the Courts.

In discussing questions two and three, as proposed in conference between representatives of the Railroad Commission, the Board of Insurance Commissioners and the Attorney General's Department, concerning whether or not payment of a premium in cash would be a condition precedent to effectiveness of a policy, written on the prescribed forms, we would treat the two together.

We find that according to Couch, Cyclopedia of Insurance Law, Volume I, P. 188, Section 104:

"Where it is expressly provided, as it often is, especially in case of life insurance, that the policy shall not take effect until the first premium is paid, prepayment is a condition precedent, and it is no binding contract until the payment is made, *unless the requirement is waived.*" (Italics ours.)

We find further in the same Section, at Page 191:

"On the other hand, the actual payment in advance of the first premium upon a contract of insurance is not necessary to its validity, unless such a payment is, by the express terms of the policy, or by necessary implication, made a condition precedent to any liability of the insurer on the contract.

And it has been said that a condition that a policy shall not attach until the premium is paid cannot be implied, and that prepayment is a condition precedent only where it is expressly so stipulated."

In the same authority at Page 200, Section 109, we find that:

"The power of an insurance company to give credit for premiums necessarily results from its power to write insurance. . . . Consequently an insurance contract may be rendered binding without actual prepayment of the premium by an agreement to give credit therefor. And if a policy is delivered on an agreement for future payment of the premium, it becomes effective immediately, although the premium is not paid. In fact, credit will be presumed to have been given if the policy is unconditionally delivered without prepayment. Stating it another way, the unexplained delivery of a policy without payment of the premium is prima facie proof of the extension of credit."

We then come to a Texas case, styled *East Texas Fire Insurance Company vs. J. A. Mimms, 1 White & Wilson, Texas Court of Appeals, Civil Cases, Section 1323*, reading as follows:

"It seems now to be established doctrine that a condition in the policy to the effect 'that the company shall not be held liable until the actual payment of the policy' may be answered that where credit has in fact been given, the policy remains in force until cancelled for nonpayment of the premium; that the very fact of the delivery of the policy without prepayment of the premium establishes prima facie the fact that credit had been given (citing authorities) and where a credit is extended, a policy is valid though the premium be never paid (citing authority) so where the agent of the insurance company gave an assurance that 'the payment of the money' on delivery of the policy 'made no difference,' this was a waiver of the condition."

In the light of the above quoted authorities, we think that a fact question is presented in each case as to whether or not credit is extended, or whether or not it is intended that actual payment of the policy shall be condition precedent. Since there is possibly some doubt as to what might be the construction of the standard form prescribed by the Insurance Department, we would suggest that it would obviate a necessity for changing the language of that form if the Railroad Commission would simply require upon the filing of each policy that the person filing same either give evidence, by a receipt, cancelled check, or otherwise satisfactory to the Railroad Commission, that the premium had been paid, or else that the person so filing the policy present evidence from the Insurance Company that they had extended credit to the insured and waived the prepayment of premium as a condition precedent to the effectiveness of the policy, together with an assurance on the part of the company that the Railroad Commission would be notified prior to a cancellation of the policy for non-payment of the premium, that the difficulty with which

we would otherwise be faced can thereby be averted, and you are so advised.

WILLIAM MCCRAW,
Attorney General of Texas.
VERNON COE,
Assistant Attorney General.
W. W. HEATH,
Assistant Attorney General.
SAM LANE,
Assistant Attorney General.

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

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2974

ACT CONSTRUED—WORDS DEFINED, “ENTER UPON”, “TRESPASS”,
“HUNT”—GAME LAWS—TRESPASS ON INCLOSED
PRIVATE LAND.

1. A person need not make an actual, physical, personal entry upon the inclosed land of another, without the consent of the owner, etc., thereof, to “enter upon” such land within the meaning and in violation of Article 1377, Penal Code, as amended’ (Acts 1929, 41st Legislature, Second Called Session, Chapter 26, p. 41).

2. The words “enter upon,” as used in Article 1377 Penal Code, as amended, (Acts 1929, 41st Legislature, Second Called Session, Chapter 26, p. 41), and “trespass” have the same legal, everyday and common meaning; and one may “trespass” upon the land of another without actually physically and personally going thereon.

3. One who, with any firearm, shoots on, into or across the inclosed land of another, without the consent of the owner thereof, at any animal or fowl, “enters upon” and “hunts with firearms” within the meaning and in violation of Article 1377, Penal Code, as amended, (Acts 1929, 41st Legislature, Second Called Session, Chapter 26, p. 41).

4. “Inclosed land” need not be “posted” or used for “agricultural or grazing purposes” for an offense to be committed thereon by “entering upon” and “hunting with firearms” contrary to the provisions of Article 1377, Penal Code, as amended, (Acts 1929, 41st Legislature, Second Called Session, Chapter 26, p. 41).

5. An affidavit, information or indictment charging a violation of Article 1377, Penal Code, as amended, (Acts 1929, 41st Legislature, Second Called Session, Chapter 26, p. 41), must allege the want of consent of the named person who has actual care, control and management of the property which has been entered upon by one who hunts with a firearm thereon without the consent of the owner, etc., thereof.

OFFICES OF THE ATTORNEY GENERAL,

Austin, Texas, November 23, 1935.

Game, Fish and Oyster Commission, Austin, Texas.

ATTENTION: Honorable Wm. J. Tucker, Executive Secretary.

DEAR MR. TUCKER: This acknowledges receipt of your letter, dated November 19th, 1935, and addressed to the Attorney General of Texas, which has been referred to the writer for attention. Your letter requests the opinion of this Department relative to construction of the provisions of Article 1377, Penal Code, 1925, as amended, the pertinent parts of your letter reading as follows:

"The question has been raised with this department as to whether it is a violation of the provisions of Article 1387, P. C. 1925, as amended, for a person while on property on which he has a legal right to be, to shoot across a fence into another pasture, in which pasture he has no legal right, and there kill a deer or other game animal, then leave his gun and go over and bring his game back to the premises from which he fired the shot.

"This department takes the position that such a person is guilty of a violation of the above cited provisions of the Penal Code. The questions which I wish to submit are whether or not the above facts constitute a violation of the provisions of Article 1377, P. C. 1925 as amended, and if not, what offense, if any, could such a person be prosecuted for."

Before discussing the provisions of Article 1377 of the Penal Code of Texas, as amended, it would perhaps be advisable to trace the history of such Article as it has developed in the penal statutes of Texas to ascertain its purpose and design. With an understanding of the historical background of the present Article 1377 of the Penal Code, we may then more readily understand the true meaning and significance of the provisions of that Article in its present form.

It is a fundamental and well established principle of our law that the title to all wild game within the boundaries of a state is vested in the people thereof in their sovereign capacity, each of the citizens thereof having an equal right to kill such game subject to at least two limitations. The first of these is that the state, in its exercise of its police power, may regulate and control the killing, taking, subsequent use and property rights that may be acquired therein; and secondly, the exclusive right to hunt on a given tract of real estate is vested in the owner thereof, and no person can trespass on such private premises without the permission of the owner. (12 R. C. L., 687, 20 Tex. Juris., 587.) These principles have not only been consistently maintained by all of the highest courts of the states in which the question has arisen, but also have had the approval of the Supreme Court of the United States in every case which has come before it. (*Lacoste vs. Department of Conservation of Louisiana* (U. S. Supreme Court, 1924) 263 U. S. 545; 68 L. Ed 437; *United States vs. Shauver*, 214 Federal, 154, and cases

therein cited.) It has further been judicially established that the exclusive use of an individual's property is a property right of the owner, which is protected by the Constitution, and not even a Legislature can authorize another to enter such premises for the purpose of taking game. Therefore, a hunting license issued by the state, even if it purports to do so, gives the holder no right to invade the private hunting ground of another person. (12 R. C. L. 688; Diana Shooting Club vs. Lamoreaux, 114 Wis. 44; 89 N. W. 880.)

The above principles of law being recognized and applicable in Texas, the Legislature, in an effort to protect and safeguard private premises from unwarranted intrusions, and to some extent, the hunting rights of private owners of property, enacted by its Acts of 1885, p. 80, later amended by the Acts of 1893, p. 87, and the Acts of 1903, p. 159, a statute which made it a misdemeanor offense for any person to enter upon the inclosed land of another, without the consent of the owner, proprietor or agent in charge, and therein hunt with firearms, or therein catch or take any fish, or in any manner deplete upon the same. This Act did not apply to premises including 2,000 acres or more in one enclosure. This is the Article which was carried forward into the 1925 codification of the Penal Code of Texas as Article 1377. After judicial construction of the aforementioned statute, the Legislature by its Acts of 1899, p. 173, enacted a statute, making it a misdemeanor offense for any person knowingly, without the consent of the owner or agent, to enter the inclosed and posted lands of another, and with firearms or dogs hunt on such lands. "Inclosed lands" was defined in the Article as being such lands as were in use as agricultural lands or for grazing purposes, having cattle, etc., grazing thereon and inclosed by any structure for fencing. This Article was carried forward into the 1925 codification of the Penal Code of Texas as Article 1378. As was pointed out by the Court of Criminal Appeals of Texas in the case of *Berry v. State*, 156 S. W. 626, in an able and learned opinion written by Justice Harper for the Court, these two statutes were not conflictory. Justice Harper clearly discloses that the Act of 1903 (Article 1377, P. C. 1925) applied to inclosed lands containing *less* than 2,000 acres and which need not be posted, while the Acts of 1899 (Article 1378, P. C. 1925) applied to inclosed *and posted* lands containing *more* than 2,000 acres and used for *agricultural* or *grazing* purposes, and says:

"... the distinction in the two Acts being that in inclosed lands of less than 2,000 acres the lands need not be posted, while in inclosures of 2,000 acres or more, at each entrance, the owner must conspicuously notify the public that it is 'posted'—the punishment varying. *This is a proper distinction and classification and neither Act repealed the other.*" (Italics ours)

The validity of these above Acts, incorporated in the Revised Penal Code of 1925, as Article 1377 and Article 1378, was upheld by the Court of Criminal Appeals, as against the contention that

they were invalid because they were indefinite. In *Hughes v. State*, 279 S. W. 846, decided in 1926, in an opinion written by Justice Baker, the Court said:

"Appellant questions the validity of the statute and the sufficiency of the information based thereon, upon the ground that same is uncertain and too indefinite and does not describe or give any constitutional elements of the alleged offense with that degree of certainty required by law, and is of such doubtful meaning that it can not be understood. *We see no merit in this contention, and are of the opinion that said statute making it an offense for any person without the consent of the owner or someone in his stead to hunt with firearms upon the inclosed land of another, meets all of the requirements and is sufficient to apprise any person of the meaning thereof.*" (Italics ours)

These two above Articles were amended by the Legislature in 1929, Acts of the 41st Legislature, First Called Session, Ch. 100, p. 242, and incorporated into one Article, being 1377 of the Penal Code, as amended; Article 1378, thereby being repealed. Article 1377, Penal Code, as amended, made it a misdemeanor offense for any person to enter upon the inclosed lands of another without the consent of the owner, proprietor or agent in charge thereof, and therein hunt with firearms or thereon catch or take any fish from any pond, etc., or in any manner depredate upon the same, the offense being punishable by a fine of not less than \$10.00, or not more than \$200.00, and by forfeiture of hunting license, and the right to hunt for a period of one year from the date of conviction. "Inclosed lands" was defined in the Article to be such lands as are in use as agricultural lands or for grazing purposes *or for any other purpose*, and inclosed by any structure for fencing, either of wood or iron or combination thereof, etc. It was further provided that the provisions of the law should apply only to such inclosed lands, the owner whereof has not leased or rented for hunting, fishing or camping privileges, etc., and received therefor, a total rental for one year or less a sum in excess of 25c per acre or more than \$4.00 per day per person charge for such hunting, fishing or camping purposes.

The foregoing Article was amended by the 41st Legislature, Acts 1929, Second Called Session, Ch. 26, p. 41, being the statute as it now exists, which reads as follows:

"Whoever shall enter upon the inclosed land of another without the consent of the owner, proprietor or agent in charge thereof, and therein hunt with firearms or thereon catch or take or attempt to catch or take any fish from any pond, lake, tank or stream, or in any manner depredate upon the same, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined any sum not less than \$10.00 nor more than \$200.00 and by a forfeiture of his hunting license and the right to hunt in the State of Texas for a period of one year from the date of his conviction. By 'inclosed lands' is meant such lands as are in use for agriculture or grazing purposes or for any other purpose, and inclosed by any structure for fencing either of wood or iron or combination thereof, or wood and wire, or partly by water.

or stream, canyon, brush, rock or rocks, bluffs or island. Proof of ownership or lease may be made by parol testimony. Provided, however, that this Act shall not apply to inclosed lands which are rented or leased for hunting or fishing or camping privileges where the owner, proprietor, or agent in charge or any person for him by any and every means has received or contracted to receive more than twenty-five cents per acre per year or any part of a year for such hunting, fishing or camping privileges, or where more than \$4.00 per day per person is charged for such hunting, fishing or camping privileges. And provided further that this exemption shall exist for a period of one year from the date of the receipt of such sum or sums of money.

"Sec. 2. Any person found upon the inclosed lands of another without the owner's consent, shall be subject to arrest by any peace officer, and such arrest may be made without warrant of arrest."

The validity of this Article, immediately hereinabove set forth, was passed upon by our Court of Criminal Appeals, in the case of *Ex Parte Helton*, 79 S. W. (2d) 139, decided in 1935, in a splendid opinion written by Judge Christian of the Commission of Appeals. This case arose upon an original application for a writ of habeas corpus, the relator having been convicted in the Justice Court for a violation of the provisions of Article 1377, Penal Code, as amended (Vernon's Ann. Penal Code, Article 1377), and upon appeal to the County Court was again convicted. Relator's main contention was that the complaint against him was fundamentally defective in failing specifically to negative consent of the named owner, proprietor or agent in charge of the land, and in failing to negative the exceptions set forth in the statute. After holding that habeas corpus was an improper procedure by which to raise the contentions presented by relator, and that the only question in habeas corpus is whether the indictment described a class of offenses of which the court has jurisdiction and alleges the defendant to be guilty, Judge Christian said:

"However, it appearing that the complaint attempts to charge an offense *denounced by a valid statute*, the writ of habeas corpus is not available to relator to test the sufficiency of said complaint." (Italics ours.)

This opinion was approved by the Judges of the Court of Criminal Appeals. On motion for rehearing Judge Hawkins, writing for the Court, said:

"Appellant now insists that the statute under which he was prosecuted is vague and indefinite and is, therefore, violative of Article 6, Penal Code, which denounces as inoperative a penal statute which is so indefinitely framed or of such doubtful construction that it cannot be understood. The Article of the Penal Code under which appellant was prosecuted is set out in our original opinion. *We discover no such defects therein as appellant claims to exist.* The statute was upheld against a similar attack in *Hughes vs. State*, 103 Tex. Cr. R. 38 27; S. W. 846." (Italics ours)

The answer to the question presented by you in your inquiry will be found in the determination of whether or not, under the

provisions of Article 1377, as amended, an *actual, personal, physical entry* must be made by *a person* upon the inclosed lands of another, to hunt therein with firearms, before an offense is committed under the provisions of such Article. This will be ascertained, of course, by a proper construction of the pertinent provisions of that Article.

At the outset, before undertaking to construe the provisions of Article 1377, Penal Code, as amended, the writer recognizes that it is an elemental and fundamental principle of law, which does not require the citation of authorities, that criminal statutes are strictly construed. However, there is likewise a well recognized and fundamental rule of statutory construction, that words used in legislative enactments are given their everyday meaning and definition, unless they be technical words, in which event they are given the meaning as comprehended and understood in the particular trade, science or profession wherein such technical terms are most generally used.

The important portion of the Article under consideration which particularly requires our construction, reads as follows:

"Whoever shall *enter upon* the inclosed land of another without the consent of the owner, proprietor or agent in charge thereof, and *therein hunt with firearms* or in any manner depredate upon the same, shall be guilty of a misdemeanor . . ." (Italics ours.)

The Italic words in the above quoted section of the Article under consideration are the key words which necessitate and are required to be construed and defined in order that we may ascertain the acts which constitute an offense and which are prohibited by the Act.

The word "enter" is defined by Webster's New International Dictionary, 1927, as meaning:

"To go or come in, to a place or condition; to make or effect an entrance; to come or go in to; to pass into the interior of; to pass within the outer cover or shell of; to penetrate; *to cause to go (into), or to be received (into)*; to put in; to insert; to go into or upon, as land." (Italics ours.)

It is further defined in 20 Corpus Juris, p. 1265 as follows:

"ENTER. The word primarily means to go or come into a place or condition; to make or effect an entrance; but it has many derivative meanings, being employed in elliptical expressions, and quite apt to be so used that the literal or more obvious meaning cannot be attributed to it."

In law, and in a legal sense, one who *enters upon* the land or premises of another, without the consent of the owner, is a "trespasser." The word "trespasser" being defined in law as:

"One who makes an unauthorized entry on another's property; one who goes upon the premises of another without invitation, express or implied, and does so out of curiosity, or for his own purposes or convenience, and not in the performance of any duty to such owner; one who unlawfully enters

or intrudes upon another's land or unlawfully and forcibly takes another's personal property." (63 Corpus Juris, 887, Jones et al. v. First State Bank of Hamlin, 140 S. W. 116, 118.)

A Fortiori, a "trespasser" is one who has committed a trespass. The Common, everyday meaning of the term "trespass", as given in Webster's New International Dictionary, 1927, is as follows:

"(1) To pass beyond a limit or boundary; (2) Law. To commit a trespass; esp., to enter unlawfully upon the land of another. (3) to encroach on another's presence, privileges, rights or the like; to intrude."

Therefore, it necessarily follows that one who "enters upon" the land or premises of another without the consent of the owners is a "trespasser", inasmuch as he has thereby committed a "trespass".

At the common law every man's land was deemed to be inclosed either by a visible or invisible fence, and every unwarrantable entry on such land necessarily carried with it some damage for which the trespasser was liable. An entry on land in the peaceable possession of another is deemed a trespass without regard to the amount of forcé used. *Neither the form of instrumentality by which the close is broken, nor the extent of the damage is material. Any invasion of the close of another, whether above, below, or on the surface of the ground, constitutes a trespass.* (26 R. C. L. 938, 939) *The entry need not be in person, but may be by the projection of force beyond the boundary of the land where the projecting instrument is employed. Thus, the trespass may be committed by casting earth or other substances upon another's land, by projecting anything into, over or upon the land, by discharging water thereon, or by shooting onto or over the land.* (63 Corpus Juris 897, 898; 12 R. C. L. 939, and authorities there cited.) A Fortiori, *for an unlawful entry or trespass to be committed by a person upon the land of another, he need not be actually, physically or personally present thereon.* The legal and everyday significance of the words "enter upon" as used in Article 1377, Penal Code, as amended, is identical with that of the word "trespass"; these two terms, having the same significance, could be used interchangeably in this Act without their meaning being affected.

However, every unlawful entry upon the land of another would not in itself violate the terms of Article 1377, Penal Code, as amended. It is not enough to constitute a violation of the terms of the statute that an unlawful entry, i.e., without the consent of the owner, proprietor or person in charge, be made upon the lands of another. The unlawful entry must be made to "therein hunt with firearms" etc. One who crossed the lands of another, without the consent of the owner, would commit a "trespass" and be a "trespasser", but he would not have committed an offense within the purview of Article 1377, Penal Code, as amended, unless he likewise did one or all of the three acts anumerated in that statute, i.e.: 1, hunt therein with firearms; 2, catch or take or

attempt to catch or take any fish from any pond, etc.; 3, or in any manner deplete upon such land. It, therefore, behooves us to determine what is meant by the word "hunt" as used in that Article. The term "hunt" is defined as meaning:

"To catch; to follow with dogs or guns for sport or exercise; to go in pursuit of wild animals for food or feather; to pursue for the purpose of catching or killing; to fish for or follow after, as game or wild animals; (30 Corpus Juris, p. 476, and authorities therein cited.)

In these modern days of proficient shooting paraphernalia a hunter's range is the shooting limit or extent of his rifle's range. It is a matter of common knowledge that the modern rifle is fatally effective at distances greater than a mile. It is likewise common knowledge that the modern shotgun, with its super-speed and super-load shells, has a killing range to the extent of at least 500 feet, and beyond. It follows, therefore, that the territory upon which one hunts is not confined solely to his immediate physical vicinity, but to the contrary it extends to the effective killing limit of the firearm which he is at the time utilizing in his pursuit for game, whether animal or fowl. Therefore, one who stands upon a given tract of land, and, seeing game upon an adjacent tract divided by man-made fence or natural boundary, fires upon it, is in fact hunting upon the tract where the game was shot at or killed.

Such appears to the writer to be the plain import of the meaning of the words "enter upon" and "hunt therein with firearms" as used in the provisions of Article 1377, Penal Code, as amended. This view is strengthened by the previous history and purposes of these provisions as they have developed in our law; and it is given further added weight by the plain expression of the legislative intent as contained in the emergency clause of the Acts of 1929, 41st Legislature, First Called Session, Ch. 100, p. 242, which reads as follows:

"Section 4. The fact that there is now no law providing for an adequate protection of the owners of farms and ranches . . . from unjust depredations by unscrupulous hunters . . . creates an emergency and an imperative public necessity."

While the question which you have presented has not been passed upon, so far as this writer can ascertain, by any of the higher courts of Texas, there are numerous cases arising in other jurisdictions, in which are involved substantially the same facts and principles. In the old English case of *Horn v. Raine*, 19 Cox, C. C., 119, it was held that a person who, being on his own land shoots at, and kills, a grouse, which is on the land of another, but does not at the time enter such land to pick the bird up, commits a trespass by entering such land in pursuit of game within the meaning of the statute, if some hours after the bird was killed he enters such land and searches for it, although prior to such entry the dead bird was removed from the land by another

person. In *Osbond v. Meadows*, 12 C. B. (N. S.) 10, 15, it was held that if a hunter shoots where he had a right to kill a bird in the air, and thereafter stepped upon the land of another to pick up the dead bird, the act of going onto the land to pick up the bird relates to the act of shooting, and the whole act is one transaction, constituting a trespass at common law, even apart from the statute. In the case of *State v. Shannon*, 36 Ohio State, 423, 38 Am. R. 599, it is held that it was unlawful to shoot at or kill wild ducks on the land of another person, although it was within the center of a navigable river, when the owner of the land has set up in a conspicuous place on the shore a posted sign. In *Herin v. Sutherland*, 241 Pac. 328, in an opinion by the Supreme Court of Montana, rendered in 1925, it was held that one who, while engaged in hunting ducks and other waterfowl and other migratory game birds, and *while standing on the lands of another*; repeatedly discharged a shotgun at waterfowl in flight over the plaintiff's premises, committed a *trespass*, and was responsible in damages to the owner of the land shot over. Chief Justice Callaway, speaking for the Court, said

"It must be held that when the defendant, although standing upon the land of another, fired a shotgun over plaintiff's premises, dwelling and cattle, he interfered with the 'quiet, undisturbed, peaceful enjoyment' of the plaintiff, and thus committed a technical trespass at least. The plaintiff was the owner of the land. 'Land', says Blackstone, 'in its legal signification, has an indefinite extent, upwards as well as downwards; whoever owns the land possesses all the space upwards to the indefinite extent; such is the maxim of the law.' Cooley's Blackstone, Book II, 18; vol. 1, 445; Kent's Com. 401."

Chief Justice Callaway further said:

"It seems to be the consensus of the holdings of the courts in this country that the air space, at least near the ground, is almost as inviolable as the soil itself. *Harrington v. McCarthy*, 169 Mass. 492, 48 N. E. 278, 61 Am. St. Rep. 298. It is a matter of common knowledge that the shotgun is a fire-arm of short range. To be subjected to the danger incident to and reasonably to be anticipated from the firing of this weapon at waterfowl in flight over one's dwelling house and cattle would seem to be far from inconsequential."

Chief Justice Callaway says again:

"Beyond question, whenever land is inclosed, a person who hunts or fishes thereon without the consent of the person entitled to the possession thereof is a trespasser. The exclusive right of hunting or fishing on land owned by a private individual is in the owner of the land, or in those who have a right to be there by his permission, as his guests, or by his grant. 27 C. J. 943; *Shulte v. Warren*, 218 Ill. 108, 75 N. E. 783, 13 L. R. A. (N. S.) 745. The fact that all have the right to hunt and take such game as is allowed by statute upon the public domain does not warrant one in entering upon privately inclosed lands for that purpose. Said Mr. Justice Champlin in *Sterling v. Jackson*, 69 Mich. 488, 37 N. W. 845, 13 Am. St. Rep. 405;

“ ‘Since every person has the right of exclusive dominion as to the lawful use of the soil owned by him, no man can hunt or sport upon another’s land but by consent of the owner. It will be conceded that the owner of lands in this State has the exclusive right of hunting and sporting upon his own soil. Whatever may be the view entertained when the land belongs to the United States or to the State, there can be no question when the land passes to the hands of private owners.’

“It follows that the owner has a right to recover damages from those who trespass. And under the provisions of Section 11482, R. C. 1921, when the owner posts his land warning persons that they may not hunt or trespass thereon, *and they do hunt or trespass within the prohibitions of that section, they are subject to criminal prosecution.*” (Italics ours.)

After a further discussion, Judge Callaway likewise quoted from the case of *Kellogg vs. King*, 46 Pac. 166, in an opinion by the Supreme Court of California as follows:

“ ‘While these wild birds, therefore, are within the plaintiff’s inclosure, he has under this statute such rights in them as entitle him to protect them from invasion by those not authorized to be there, and any person violating such rights is as much a trespasser as though entering unbidden the plaintiff’s dwelling’

“Whether or not the plaintiff under his pleading may assert a qualified ownership in the wild ducks in question, it is clear that the defendant, a trespasser, had no right to kill or capture them upon the plaintiff’s land.”

In *Whittaker vs. Stangvish*, 111 N. W. 295, the Supreme Court of Minnesota, in an opinion rendered in 1908, held that a hunter, although standing where he has a legal right to be, has no right to shoot over the premises of an adjoining owner, or to go on the premises to get game which has fallen there; and that such action is a trespass. Justice Jaggard, writing the opinion for the Court, after a learned and comprehensive discussion of the history of the law of trespass, insofar as it applies to one who shoots upon, on or across the land of another, said:

“The defendants’ right to properly use the navigable lakes did not give them any more right to shoot over plaintiff’s land than a neighboring proprietor would have had to shoot from his own premises. *It has been definitely determined in this Court that the neighboring proprietor may not lawfully do so.* *Lamprey vs. Danz*, 86 Minn. 317, 90 N. W. 578. The mere fact that damage from falling shot or birds would be insignificant, as has been shown, has no logical bearing at all upon the question. The record, besides, conclusively shows substantial damage to the premises. At common law, trespass or case would have lain. *The inherent danger to land-owners from guns in the hands of hunters, often irresponsible and reckless, and sometimes malicious, must be adequately guarded against if the law is to be more than a name.*” (Italics ours.)

If it should be held that the provisions of Article 1377, Penal Code, as amended, require an actual, physical, personal entry upon the ground of another without his consent, before an offense is committed, the law would be practically ineffectual to

fulfill the purpose and afford the protection that the Legislature, by its enactment, hoped for. Such an interpretation would be foolishly technical, and a mockery of the purpose and intent of our lawmaking representatives of the people. Such a construction was not intended by the Legislature, and in the opinion of the writer no such strained meaning can be given to the words used in the statute.

It is perhaps advisable to direct your attention to several cases which discuss the sufficiency of an affidavit or information which alleges and charges a violation of the statute under consideration, in order that this information may be given to the various county or district attorneys in Texas, who desire it. In *Boubel vs. State*, 221 S. W. 291, in an opinion written by Presiding Justice Davidson for the Court of Criminal Appeals, decided in 1920, it was held that a want of consent of either the owner, proprietor or agent in charge of the inclosed land, must be alleged in the complaint. In *Lehmann vs. State*, 71 S. W. (2d) 513, it would appear that the Court of Criminal Appeals, held, in an opinion written by Judge Lattimore, one of the most learned and able judges ever to grace that bench, that lack of consent need not be alleged in the complaint, but that such consent should properly be offered and established by the accused as a matter of defense. Judge Lattimore, however, refers to the case of *Boubel vs. State*, supra, and recites the holding of that case, to the effect that a complaint is sufficient which alleges that the hunting, etc., *was without consent*, and does not expressly overrule the holding in that case. It appears to the writer that the court held, and no more, that want of consent of the person in the actual care, control and management of the tract of land in question, is a sufficient allegation in the complaint; and that if the accused hunted, or claimed to hunt, with the consent of *some authorized person other than the one in actual control and management of the land, then in such event* it is incumbent upon the accused to establish *that fact* as a matter of defense. In *Ex Parte Helton*, 79 S. W. (2d) 141, Judge Christian of the Commission of Appeals, in an opinion approved by the Court of Criminal Appeals, said:

“We do not approve the form of the complaint, and *concede that consent by a named, proper party should have been negatived.*” (Italics ours.)

The writer, therefore, advises that in preparation of an affidavit, information or indictment charging a violation of Article 1377, Penal Code, as amended, want of consent of the named person who has actual care, control and management of the property should be alleged. It is likewise deemed advisable to direct your attention to the fact that the present Article 1377a, Penal Code, as amended, does *not* require that the inclosed lands be *posted*, nor that they be used for agricultural or grazing purposes.

Inquiry is not made concerning the validity of the "exemption" provisions of the Act under consideration, nor do we here pass upon the question.

In answer to your inquiry, therefore, it is the opinion of the writer, and you are accordingly so advised, that it is a violation of the provisions of Article 1377, Penal Code, 1925, as amended, for a person, while on property on which he has a legal right to be, to shoot across a fence into another inclosed pasture or tract of land, in which pasture or tract of land he has no legal right, and there shoot at or kill any deer or other game animal. You are further advised that it would likewise be a violation of the provisions of such Article for any person so shooting across a fence on, into or across another inclosed tract of land, in which he has no legal right, to leave his gun and go over and bring the game back to the premises from which he fired the shot.

Very truly yours,

HARRY S. POLLARD,
Assistant Attorney General.

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

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2976

INTOXICATING LIQUOR—WHOLESALE DRUGGIST RECEIVING
WHOLESALE'S PERMIT IN DRY AREAS.

A bona fide wholesale druggist located in a dry area, as prescribed by House Bill No. 77 passed by the Second Called Session of the Forty-fourth Legislature, is entitled to receive a wholesale druggist's permit under the provisions of Section 15 (e) of the Act, authorizing the importation, transportation, possession for the purpose of sale and to sell liquor for strictly medicinal purposes.

OFFICES OF THE ATTORNEY GENERAL,

Austin, Texas, November 26, 1935.

Texas Liquor Control Board, Austin, Texas.

GENTLEMEN: I am in receipt of your letter of November 25, 1935, in which you submit the following question:

"Does the Texas Liquor Control Board have the authority to issue a wholesale druggist's permit to a wholesale druggist located in a dry area for the purpose of selling medicinal liquor to retail druggists?"

The Legislative purpose and intent of excepting medicinal liquors from the prohibition of the Act are too clear to admit controversy.

The general provisions are contained in Section 4 of the Act and make it unlawful for any person to manufacture, sell, possess for the purpose of sale, import or transport any liquor in this State. Section 4, however, releases these general provisions in favor of acts that are specifically authorized by the Act. Section 4 reads as follows:

“Unless otherwise herein expressly excepted it shall be unlawful for any person to manufacture, sell, possess for the purpose of sale, import into this State, or transport any alcohol or any liquor. Unless the exceptions hereinafter made to this section are clear and specific they shall not obtain in favor of any person with respect to any prohibited act and they shall be strictly construed for the accomplishment of this purpose. It is further expressly provided that any rights or privileges that are granted herein to any person as exceptions to the prohibitions contained in this section shall be enjoyed and exercised only in the manner provided by this Act.”

Section 4 (a) makes it unlawful for any person to manufacture, sell, possess for the purpose of sale, import or transport any liquor in a wet or dry area without a permit as will be hereinafter shown specific provision was made for the issuance of permits for medicinal liquors in wet and dry areas. Section 4 (a) reads as follows:

“It shall be unlawful for any person to manufacture, sell, possess for the purpose of sale, import into this State, or transport liquor in wet areas or dry areas without first having obtained a permit or without first having complied with all other terms and provisions of this Act; provided however, that the prohibition contained in this Section against the transportation of liquor shall not apply to a person who has purchased such liquor for his own consumption and is transporting the same from a place where the sale thereof was lawful and to a place where its possession by him is lawful; provided further, that the prohibition contained in this section against the importation and transportation of liquor shall not apply to a person who is bringing into this State not more than one (1) quart of liquor for his own personal use.”

Section 4 (b) makes still further exceptions to the general prohibitions contained in Section 4 in favor of medicinal permits and medicinal liquors. There is a further general provision that clearly operates as an exception to the effect that said Section 4 (b) shall not apply to liquors of a type or alcoholic content that has been legalized in any prescribed area. Clearly medicinal liquors have been legalized in all areas of the State. Section 4 (b) reads as follows:

“It shall be unlawful for any person to manufacture, sell, transport or possess for the purpose of sale in any dry area under this or any other act in this State any liquor containing alcohol in excess of one-half of one per centum by volume; provided however, it shall be lawful for the holders of carrier permits and private carrier permits to transport such liquor from one wet area to another wet area where, in the course of such transportation, it is necessary or convenient to cross such dry area; provided further,

that this section shall not apply to the holders of industrial or medicinal permits; provided further, that this section shall not apply to liquor of a type or alcoholic content that has been legalized in any such prescribed area."

Still another clear exception in favor of medicinal liquors is found in Section 6 (g) which reads as follows:

"To license, regulate, and control the use of alcohol and liquor for scientific pharmaceutical and industrial purposes, and to provide by regulation for the withdrawal thereof from warehouses and denaturing plants and to prescribe the manner in which the same may be used for scientific research or in hospitals and sanatoria, in industrial plants, and for other manufacturing purposes, tax free."

Under this provision the Board is granted broad powers to regulate the use of liquor for pharmaceutical purposes, which purposes are undoubtedly broad enough to cover all medicinal use of liquor. Under this section the Board undoubtedly has the power to regulate and to grant permits for the sale of liquor for medicinal purposes without reference to any other section of the Act.

Section 15 (e), which reads as follows:

"Wholesaler's Permit. A wholesaler's permit shall authorize the holder to purchase liquor from persons authorized by law to manufacture and sell the same in this State and to import such liquor from points outside the State and to sell the same to holders of permits in this State at wholesale. Such permit shall also authorize the holder thereof to sell and deliver such liquor to persons outside this State. It shall be unlawful for the holder of such permit to sell such liquor in this State to any other person than the holder of a permit lawfully entitling him to purchase and receive the same from such wholesaler. Except as is specifically authorized for rectifiers, beer and wine wholesalers and distillers, it shall be unlawful for any other person that the holder of a wholesaler's permit to import liquor into this State. A separate permit shall be obtained and a separate fee paid for each wholesale outlet in this State. *Wholesale druggists* possessing the necessary qualifications, as well as other qualified persons, shall be entitled to a wholesaler's permit. The annual permit fee shall be Twelve Hundred Fifty Dollars (\$1,250.00)."

specifically authorizes the issuance of wholesaler's permits to wholesale druggists possessing the necessary qualifications. This section has no limitations whatever upon the Board's authority to issue such permits.

Section 15 (n) reads, in part, as follows:

"Medicinal Permit. Retail druggists, hospitals, sanatoria and other like businesses and institutions shall be entitled to receive a permit to purchase and sell to qualified persons liquors for medicinal purposes. *Medicinal permits shall allow the holders thereof to purchase liquor for medicinal purposes from only wholesale druggists holding wholesaler's permits under Subsection (e) of this Section. Such businesses and institutions:*

shall secure permits before handling liquor and no such permits shall be issued for any other than strictly medicinal purposes, . . ."

This section specifically authorizes the issuance of medicinal permits. By necessary implication it likewise authorizes the purchase, sale, transportation and possession for the purpose of sale of medicinal liquors.

The term "such businesses", above quoted, follows the reference to wholesale druggists and as clearly refers to such wholesale druggists as it does to retail druggists, hospitals, sanatoria and other like businesses and institutions.

The provisions above quoted make it mandatory for persons handling medicinal liquor, including wholesale druggists, to obtain permits from the Texas Liquor Control Board. The reference to Section 15 (e) therein is intended to make it clear that if a wholesale druggist desires to handle medicinal liquors he must obtain a wholesaler's permit in the manner prescribed by Section 15 (e) and states the prescribed fee for wholesalers.

There is no other deduction to be drawn from a reading of the entire Act than that it was the clear intention of the Legislature to provide for such permits to be issued as it uses the expression "wholesale druggist". If it were not the intention to so provide, it is hard to understand why the expression "wholesale druggist" as under the general provisions of the Act a wholesale druggist could obtain a permit in wet areas for the purpose of being a wholesale liquor dealer and it must be admitted that this expression was used to permit legitimate wholesale druggists in dry areas to provide the retail druggists with medicinal liquors.

Section 15 (t) reads as follows:

"It shall be unlawful to issue a permit authorizing the manufacture, transportation or sale of liquor of a type, or of an alcoholic content which is illegal in the area where such permit is sought or where any act is to be performed thereunder which is illegal in the prescribed area."

Since the possession and sale of medicinal liquors in dry areas as well as in wet areas is clearly legalized, it would be absurd to impute to the Legislature an intention of denying to those who hold medicinal permits the opportunity of purchasing medicinal liquor from one authorized to sell the same. To hold contrary to this opinion would mean that legitimate wholesale druggists in dry areas who have been for years pursuing the occupation of legitimate wholesale druggists would be barred from selling and trading medicinal liquor and would create and give a monopoly to druggists in wet areas, which clearly is not and was not the intention of the Legislature.

When all of the provisions of the Act are construed together, as it must be, it is clear that a wholesale druggist in a dry area may obtain a medicinal permit authorizing him to import, transport, possess for the purpose of sale and to sell liquor for strictly medicinal purposes. To hold otherwise is a clear contradiction of the Act itself as it provides that anyone may import liquor into

this State except one holding a wholesaler's permit. A retail druggist must purchase all of his liquor from a wholesale druggist holding a wholesaler's permit. It is possible under this Act that every county in the State could vote dry by local option as provided therein and in this event there would be no source whatever for the retail druggist to purchase his medicinal liquor. Therefore, it is evident that it was the intention of the Legislature to legalize medicinal liquor in every area of this State.

The Act provides that druggists holding medicinal permits shall purchase medicinal liquors from only wholesale druggists holding wholesale permits. This was clearly done with the viewpoint of making the rules and regulations of the Liquor Board easily enforced as it is evident that liquor violations in a dry area will be one of the most difficult problems of the Board, and with only one source for retail druggists to purchase their medicinal liquor, it will enable the Board, through its inspectors, the means of ascertaining at all times the amount of liquor that such drug stores handle.

Section 6 (a) and (d) read as follows:

"(a) To control the manufacture, possession, sale, purchase, transportation, importation, and delivery of liquor in accordance with the provisions of this Act, and make all necessary rules and regulations to fully and effectually accomplish such purpose."

"(d) To exercise all other powers, duties, and functions conferred by this Act, and all powers incidental, convenient, or necessary to enable it to administer or carry out any of the provisions of this Act and to publish all necessary rules and regulations and mail the same to all interested parties."

It is the duty of the Board to give effect to the manifest Legislative intent. Especially is this true in view of the above sections quoted of this Act making it the duty of the Board to exercise all convenient and necessary powers to carry out the provisions of this Act.

The Legislature, in Section 2 of this Act, makes a declaration of its intention in regard to the enforcement of this Act. It reads as follows:

"This entire Act shall be deemed an exercise of the police power of the State for the protection of the welfare, health, peace, temperance, and safety of the people of the State, and all *its provisions shall be liberally construed* for the accomplishment of that purpose."

It is the writer's opinion, therefore, that a bona fide wholesale druggist who possesses the necessary qualifications and whose place of business is located in a dry area is entitled to receive a wholesaler's permit under the provisions of Section 15 (e) of the Act, authorizing him to import, transport, possess for the purpose of sale and to sell liquor for strictly medicinal purposes. I am further of the opinion, however, that so long as the business of such wholesale druggist is located in a dry area, as defined by the Act, that the permit issued to him should limit his privilege

of handling liquor to strictly medicinal purposes and that he should not be permitted to sell such liquor to any others than the holders of medicinal permits under the provisions of Section 15 (n) of the Act.

A careful study of the entire Act as a whole can lead to no other opinion than it was manifestly the intention of the Legislature to provide for retail druggists in dry areas a source to purchase medicinal liquors and it is my opinion that the Board is authorized to grant such permits to wholesale druggists in dry areas.

Very truly yours,
LEON O. MOSES,
Assistant Attorney General.

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

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2977

THE UNIVERSITY OF TEXAS—ARTICLE 2654c—ARMY OFFICERS—
DOMICILE—RESIDENCE CLASSIFICATIONS
FOR FEE PURPOSES.

1. A wife who is living amicably with her husband in Texas can not establish a legal residence in Texas for fee purposes when her husband retains his legal residence in another state.

2. A wife who is not separated or divorced from her husband can not establish legal residence in Texas under the terms of the statute referred to if her husband lives or has legal residence in another state.

3. When a husband and wife come to Texas after their marriage when they have previously been residents of two different states, the wife's legal residence is the same as her husband's.

4. The residence status under the terms of the statute referred to of students who are minor children of American citizens who live in Mexico or some other foreign country is a fact question determined largely by the intention of the father of the children, if living, or of the mother, if the father is dead.

5. An army officer can have legal residence in Texas for fee purposes under the terms and provisions of the statute in question.

6. The residence status under Article 2654c of an army officer who is stationed in Texas and who has been so stationed for at least twelve (12) months prior to the registration in the University of Texas of his minor child would depend largely upon the bona fide intention of the army officer.

7. If an army officer has been in Texas for less than twelve (12) months prior to the child's registration in the University of Texas, the child could not be classified as a resident student because of the specific particular provision of Article 2654c, which provides that a student is a non-resident unless he has resided in Texas twelve (12) months prior to the date of

registration. Since a minor child's domicile is that of its parents, the length of time of the residence of the parents would determine under this statute.

8. The residence classifications of an army officer may be affected by his legal residence at the time he entered the army. Unless he had some reason to change his place of residence, which would have to be coupled with both facts and intention, his place of residence would be that of his legal residence at the time he entered the army.

9. If an army officer stationed in Texas establishes a home for his family in the place where he is stationed, but not on the government reservation, if his bona fide intention was that of becoming a resident of the State of Texas, he would be entitled to the benefits of a resident citizen of Texas under this statute after he had resided in Texas with bona fide intentions to become a resident of the State of Texas for twelve (12) months prior to the registration in the University of Texas of his minor children. The same conclusion would be reached even though he resided on government reservations with the intention of making Texas his domicile.

10. If an army officer who has served for one or more years in Texas, followed by one or more years of service out of Texas, he may immediately claim the benefits of Texas residence for a minor child if at the time he was in Texas he established his legal residence in Texas and did not abandon his legal residence when he moved out of Texas.

11. The general rules and principles covering residents and domiciles generally would apply to an army officer who is classified as a non-resident of Texas. If conditions, coupled with the intention of the officer, did not change his legal residence from the state in which he was a resident at the time he enlisted, then he would be classified as a resident of the State from which he enlisted; but, if facts and circumstances, coupled with his intentions, changed his place of residence, then he would be classified according to the state under the circumstances which claimed him as a resident.

OFFICES OF THE ATTORNEY GENERAL,

Austin, Texas, January 10, 1936.

Dr. H. Y. Benedict, President, The University of Texas, Austin, Texas.

DEAR SIR: This will acknowledge receipt of your letter of December 13th, 1935, addressed to Honorable William McCraw, Attorney General of the State of Texas, which letter has been referred to the writer for attention. Your letter reads as follows:

"I am writing to ask for further advice concerning the residence status of certain students in the University under the terms and provisions of Chapter 196, Acts of the Regular Session of the Forty-third Legislature. The Attorney General's Office has furnished previous opinions concerning this statute under dates of September 13, 1933, and March 15, 1935.

"The points on which I seek information are:

"1. May a wife who is living amicably with her husband in Texas establish legal residence in Texas for fee purposes even though her husband retains his legal residence in another state?

"2. May a wife who is not separated or divorced from her husband establish legal residence in Texas, under the terms of the statute referred to, if her husband lives and has legal residence in another state? Such cases arise when a mother and children come to Texas from without the State for the purpose of sending the children to the University?

"3. In the event a husband and wife come to Texas after their marriage, they having previously been residents of two different states, is the wife's legal residence the same as her husband's or may she be classified as a resident of the state in which she had legal residence prior to her marriage?

"4. What is the residence status, under the terms of the statute referred to, of students who are minor children of American citizens who live in Mexico or some other foreign country? May these students be classified as residents of the foreign country in which their parents are living, or should these students be classified as residents of the specific state in which the parent had legal residence at the time he moved to the foreign country, or the state (of the U. S.) in which he now maintains legal residence? Does the length of time the parent has lived in the foreign country have any bearing on the student's residence classification?

"5. The question of the legal residence (for fee purposes) of army officers stationed in Texas whose minor children are registered in the University presents several problems which need solution.

"A. May an army officer have legal residence in Texas for fee purposes under the terms and provisions of the statute in question? What general principles determine his residence?

"If an army officer may have legal residence in Texas:

"1). What is the residence status under the statute referred to of an army officer who is stationed in Texas and who has been so stationed for at least twelve months prior to the registration of his minor children in the University?

"2). Is his residence status different if he has been in Texas for less than twelve months prior to the child's registration in the University?

"3). Is the residence classification of the officer affected by his legal residence at the time he entered the army?

"4). If an army officer stationed in Texas establishes a home for his family in the place where he is stationed but not on the government reservation, does that affect his legal residence under the terms of the statute?

"5). Army officers are moved from station to station by the government. If an officer who has served for one or more years in Texas, followed by one or more years of service out of Texas, returns for further duty in Texas, may he immediately claim the benefits of Texas residence for a minor child, or must he reside in Texas for twelve months immediately preceding the child's registration in the University before claiming Texas residence?

"B. What, if any, general rules or principles should we follow in determining the state of which an officer is a resident when he is classified as a non-resident of Texas?

"I shall appreciate your consideration of these questions."

Those portions of Chapter 196, Acts of the Regular Session of the 43rd Legislature material to the determination of the questions which you have propounded, read as follows:

"1. From each resident student, who registers for twelve (12) or more semester hours of work per semester or four and one-half (4½) months, Twenty-five (\$25.00) Dollars per semester; or, who registers for twelve (12) or more term hours of work per term of three (3) months, Sixteen (\$16.67) Dollars and sixty-seven cents per term.

"2. From each non-resident student, who registers for twelve (12) or more semester or term hours of work an amount equivalent to the amount charged students from Texas by similar schools in the State of which the said non-resident student shall be a resident, said amount to be determined and fixed by the governing boards of the several institutions in which said students may register, but in no event shall such amount be less than that charged to students resident in Texas. Provided, however, that if this paragraph shall be held to be unconstitutional or void from any cause, there shall be collected from each non-resident student the sum of One Hundred (\$100.00) Dollars for each semester, or Sixty-six (\$66.67) Dollars and sixty-seven cents for each term. A non-resident student is hereby defined to be a student of less than twenty-one (21) years of age, living away from his family and whose family resides in another state, or whose family has resided within this State for a period of time less than twelve (12) months prior to the date of registration, or a student of twenty-one (21) years of age or over who resides out of the State or who has resided within the State for a period of less than twelve (12) months prior to the date of registration."

The proper answers to the questions propounded rest largely upon what is meant by the term "resident", as it is used in the statutory provision above quoted.

The word resident is a very elastic, flexible and relative term, and is difficult of precise definition, as it has no fixed meaning applicable alike to all cases. Its meaning depends upon the subject matter and connection in which it is used, and the sense in which it should be used is controlled by reference to the object. See 54 Corpus Juris, pg. 705, sec. 1.

The meaning, therefore, depends upon the meaning and intent of the Legislature that passed this law.

On September 13, 1933, the Attorney General's Department, through Assistant Attorney General Gaynor Kendall, rendered an opinion construing this particular statute, in which he said:

"In order to answer the first six questions above set out, it is necessary to first determine what is meant by the term 'resident' as it is used in the statutory provision above quoted. 'Resident' is sometimes used to denote one who is bodily present in a defined geographical subdivision, but is not so used in the statute under consideration, since a student under the age of twenty-one (21) years is defined to be a 'non-resident' student where his family does not 'reside' in the State or has 'resided' within the State for a period of less than twelve (12) months prior to the date of registration, and a student of twenty-one (21) years of age or more is defined to be a

'non-resident' student where he 'resides' out of the State, or has 'resided' in Texas less than twelve (12) months prior to the date of registration.

"In view of the fact that a minor has no residence separate from his domicile, except where the word 'residence' is used to denote merely the place where one is bodily present, the statute under consideration evidently uses the term 'resident' to mean one who is domiciled in Texas. *G. C. & S. F. Ry. Co. v. Lemons*, 109 Tex. 244, 206 S. W. 75, 5 A. L. R. 943."

It is therefore our opinion that the word "resident" as used in Chapter 196, of the Acts of the Regular Session of the 43rd Legislature, has the same legal meaning as "domicile".

It is the right of the husband to choose and establish the domicile of the family and the law fixes the domicile of the wife by that of the husband. 19 *Corpus Juris*, pg. 414, Sec. 33; 23 *Tex. Juris*, pg. 18, Sec. 8; *Russell Heirs v. Randolph*, 11 *Tex.* 460; *Richards, et al v. Sangster*, 217 S. W. 723; *State v. Skidmore*, 5 *Tex. R.* 469; *Flowers v. State*, 3 S. W. (2) 1111.

In the case of *Flowers v. State*, 3 S. W. (2d) 1111, the Court said:

"He maintained a home, and the law contemplates that the home of the husband shall be that of the wife. . . ."

It is the husband's right to choose and establish the matrimonial domicile. 30 *Corpus Juris* 511.

In law, the matrimonial domicile is where the husband resides at the time of marriage. 23 *Texas Juris* 19.

If a person leaves his domicile for a temporary purpose with an intention to return there is no change of domicile. The mere temporary absence from one's permanent domicile will not effect a change of domicile. 19 *Corpus Juris* 407, Sec. 19. Quoting from *Corpus Juris*:

"If a person leaves his home or domicile for a temporary purpose with an intention to return, there is no change of domicile."

Hardy, et al v. De Leon, 5 *Tex.* 211

Sabriego, et ux, v. White, 30 *Tex.* 585

Russell Heirs v. Randolph, 11 *Tex.* 460

State v. Skidmore, 5 *Tex. R.* 469

Quoting from *Sabriego, et ux v. White*, 30 *Tex.* 585, the Court said:

"No length of absence from one's domicile when one's purpose is to return to it operates as a change of domicile."

Corpus Juris, in Vol. 19, page 406, Sec. 18, states:

"The original domicile is not changed even by a long absence if there is any intention of returning."

In the case of *Lumpkin v. Nicholson*, 30 S. W. 568, in an opinion by the Court of Civil Appeals, in which a writ of error was denied by the Supreme Court, it was held that there was some evidence that the object of the removal was to obtain better educational

facilities for the children, that the widow had not entirely given up the intention of returning to Texas and that deceased had stated his intention of reserving his home there as a "nest egg" for his family, held that a finding that plaintiff had not abandoned the home was justified.

In the case of *Gaar Scott & Co. v. Burge, et al*, 110 S. W. 181, in an opinion rendered by the Court of Civil Appeals, wherein a writ of error was denied by the Supreme Court, it was held that a removal to another state intended to be temporary only and accompanied at all times during the absence by an intention to return and reoccupy the homestead will not defeat a homestead right once enjoyed within the State.

A person's legal residence or domicile is governed to a large extent by his intention.

In the case of *State v. Skidmore*, 5 Tex. R. 469, it was held that where the husband was in the Republic at the date of the declaration of Independence, and returned soon after, and did not bring his family until near three years after, he was entitled to a league and labor of land, upon his making proof that it was his intention to make Texas his permanent residence, when here, and to remove his family as soon as he conveniently could, and his wife's bad health accounted for his long delay. In these cases, *the intention of the parties*, when here, without their families, of making Texas their permanent residence, and to bring their families was construed to mean heads of families at the date of the declaration of Independence, under the Constitution. The principle of these cases is, that constructively their families were with them, when the husbands acquired a residence in this country; and the principle is well sustained by eminent juriconsults, both American and foreign, that the domicile of the husband is the domicile of his wife and children.

In the case of *Russell's Heirs v. H. Randolph*, 11 Tex. 460, it was held:

"If Russell, the grantee, had acquired a residence in Texas, *animo manendi*, constructively his wife and children were here too; because his residence, by operation of law, would also be their residence; and if he only left his new residence, and returned to his old, for temporary purposes, either on business or on a visit, it did not annul the new residence, nor could it, by his death so happening during his temporary absence, divest his heirs of the title to the land he had acquired as a colonist."

In *Corpus Juris*, Vol. 19, page 406, Sec. 15, it is said:

"If the requisite intention is shown to exist, the law will not generally scrutinize the motive or purpose prompting a change of domicile."

Corpus Juris, Vol. 19, page 406, Sec. 19, says:

"Intention to acquire a domicile of choice necessarily involves an exercise of volition or freedom of choice."

Corpus Juris, Vol. 19, page 406, Sec. 14, reads as follows:

"To effect a change of domicile, the intention must be bona fide and unequivocal."

The residence of a minor when the father is living and the parents are not divorced is that of the father. *G. C. & S. F. Ry. Co. v. Lemons*, 206 S. W. 75. But when the father is dead, the minor child takes the domicile of its mother. *Wheeler v. Hollis*, 19 Tex. 522.

The answers to your questions are as follows:

1.

It is our opinion that a wife who is living amicably with her husband in Texas can not establish a legal residence in Texas for fee purposes when her husband retains his legal residence in another state.

2.

It is our opinion that a wife who is not separated or divorced from her husband can not establish legal residence in Texas under the terms of the statute referred to if her husband lives or has legal residence in another state.

3.

It is our opinion that when a husband and wife come to Texas after their marriage, when they have previously been residents of two different states, that the wife's legal residence is the same as her husband's. This is based upon the legal premise that a wife's residence is that of her husband, and that her residence merges into that of the husband's when and after the marriage.

4.

The residence status under the terms of the statute referred to of students who are minor children of American citizens who live in Mexico or some other foreign country is a fact question determined largely by the intention of the father of the children, if living, or of the mother if the father is dead.

The fact that they are living in Mexico, in our opinion, would not prevent them from being classified as a resident of Texas if when they moved to Mexico their intention was to return and they did not abandon their intention after the move.

However, if the intention of the father was to permanently live in Mexico, or should he determine to make his domicile in Mexico, then, under this statute, they could no longer be termed as residents of the State of Texas if they were originally residents of the State of Texas.

If they were residents of some other state of the United States before they moved to a foreign country, then they would remain residents of the state from which they moved if their intention was to return to that state after their temporary absence in the foreign country.

The determination of this question is largely a matter of fact governed by the intention of the father of the child. The length of time the parent has lived in the foreign country does not have any bearing on the student's residence qualifications.

5.

A. An army officer can have legal residence in Texas for fee purposes under the terms and provisions of the statute in question. The general principles determining his residence are the same as those determining the residence of any other person. The bona fide intention of the army officer would largely control the question of residence in connection with the statute in question.

Of course, he would have to comply with the provisions of Article 2654c, and would have to reside within the State of Texas for a period of time of at least twelve (12) months prior to the date of registration of the student before he would be entitled to be classified so as to receive the benefits of a resident of the State of Texas.

1). The residence status under the statute referred to of an army officer who is stationed in Texas and who has been so stationed for at least twelve (12) months prior to the registration in the University of his minor children would depend largely upon the bona fide intention of the army officer.

If a bona fide intention was to become a resident of the State of Texas when he so moved to Texas, we see no reason why at the end of twelve (12) months his minor child would not be entitled to register in the University as a resident student.

2). If an army officer has been in Texas for less than twelve (12) months prior to the child's registration in the University of Texas, the child could not be classified as a resident student because of the specific particular provision of Article 2654c, R. C. S., which provides that a student is a non-resident unless he has resided in Texas twelve (12) months prior to the date of registration. Since a minor child's domicile is that of its parents, the length of time of the residence of the parents would determine under this statute.

If, however, at the time of the moving of the army officer to Texas his intention was to make Texas his domicile, then at the end of twelve (12) months after he has become a resident of Texas, his minor child can register as a resident student.

3). The residence classification of an army officer might be affected by his legal residence at the time he entered the army. Unless he had some reason to change his place of residence, which would have to be coupled with both facts and intention, his place of residence would be that of his legal residence at the time he entered the army. Most army officers retain their legal residence which they had at the time they entered the army, but this is not mandatory or compulsory. If conditions were to change or facts were to shift wherein they desired to change

their residence, there is nothing under the law to prevent them from doing so.

We do not think they could arbitrarily choose out a state as their place of residence without some facts which would permit them to do so, but if facts were such as would permit them to become a resident of a certain state, and if their intention was to become a resident of that state, then there would be no reason why they could not do so.

4). If an army officer stationed in Texas establishes a home for his family in the place where he is stationed but not on the government reservation, if his bona fide intention was that of becoming a resident of the State of Texas, he would be entitled to the benefits of a resident citizen under this statute after he had become a resident of the State of Texas for twelve (12) months prior to the registration in the University of Texas of his minor children.

As in determining many of the questions asked in this letter, the intention of the army officer would largely govern.

5). If an army officer who has served for one or more years in Texas followed by one or more years of service out of Texas, he may immediately claim the benefit of Texas residents for a minor child if at the time he was in Texas he established his legal residence in Texas and did not abandon his legal residence when he moved out of Texas.

B. It is our opinion that the general rules and principles governing residences and domiciles generally would apply to an officer who is classified as a non-resident of Texas. If conditions, coupled with the intention of the officer, did not change his legal residence from the state in which he was a resident at the time he enlisted, then, of course, he would be classified as a resident of the state from which he enlisted; but if facts, and circumstances, coupled with his intentions, changed his place of residences, then he would be classified according to the state under the circumstances which claimed him as a resident.

We do not think that an army officer could arbitrarily pick any state in the Union as his place of residence, if he had never been stationed there, or had never lived there, but we do think that an army officer can change his residence from the state from which he enlisted if he resides in a state and at the time of his residence in the said State it is his intention to choose that state as his legal residence.

Yours very truly,

MERTON HARRIS,
Assistant Attorney General.

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

WILLIAM McCRAW,
Attorney General of Texas.

No. 2978

TAXATION—WAR RISK INSURANCE—ETC.—EXEMPTION.

Money paid to the Guardian of an Insane Veteran or to the Guardian of the Beneficiaries of a Deceased Veteran received as benefits under the World War Veteran's Act, which money has been converted into property, is not exempt from payment of the ad valorem tax in the State of Texas, either under the World War Veteran's Act of Congress, as amended, or under the Constitution and Laws of this State.

OFFICES OF THE ATTORNEY GENERAL,

Austin, Texas, February 3, 1936.

Hon. Howard Steere, Assistant District Attorney, Dallas, Texas.

DEAR SIR: Your letter of November 18, 1935, addressed to Honorable William McCraw, Attorney General, has been referred to the writer for attention and reply. In said letter you requested an opinion as to whether or not real estate acquired by the Guardian of an Insane Veteran, the Guardian of an Insane Dependent of a Veteran or the Guardian of the Minor Children of a Veteran with money paid to said Guardian from war risk insurance, disability compensation, death compensation or adjusted compensation benefits paid by the United States Government under the provisions of the World War Veteran's Act of Congress and amendments thereto, is exempt from the payment of ad valorem taxes so long as such real estate remains in the hands of the Guardian. You desire to know further whether or not such land is exempt from ad valorem taxation under the Constitution and Statutes of the State of Texas.

The question as to whether or not lands purchased by the Guardian of a Veteran or by the Guardian of the Beneficiaries of a Deceased Veteran are subject to the payment of taxes levied by the respective states wherein the land is situated has been definitely decided by the Supreme Court of the United States speaking through Justice Cardozo in the case of Trotter, Guardian, vs. the State of Tennessee, 54 Sup. Ct. 138, 78 L. Ed. 128, in which case one Joseph A. Leake became mentally incompetent by reason of his service in the army during the World War. Since May, 1922, the United States Government had paid compensation to his Guardian at the rate of \$100.00 per month in accordance with the provisions of Part II of the World War Veteran's Act, and disability benefits at the rate of \$57.50 per month under the provisions of a policy of war risk insurance in accordance with Part III of the same Act. On June 3, 1924, the Guardian purchased certain lands and buildings located in Blount County, Tennessee, paying therefor \$2,500.00 in cash out of the moneys heretofore received from the government, \$2,000.00 in promissory notes which were later paid out of money derived from the same source and \$1,500.00 by assuming the payment of a mortgage which had been discharged by the

use of the proceeds of fire insurance covering one of the buildings.

State and County taxes assessed against the land for the year 1929 were in arrears with interest and penalties. The State of Tennessee, the respondent, brought suit in the Chancery Court to declare the tax lien enforceable by sale. The Guardian and his ward answered that by force of the Federal Statute the land was exempt. The Chancellor sustained the defense and dismissed the complaintants bill, which judgment was reversed by the Supreme Court of Tennessee and directed the Court of Chancery to award judgment to the State. *State vs. Blair*, 165 Tenn. 519, 57 S. W. (2d) 455. The case was before the Supreme Court on certiorari.

The Court in construing the provision of the Act which provides,

“The compensation, insurance, and maintenance and support allowance payable under Parts 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 Parts II, III, IV; and shall be exempt from all taxation.”

Said,

“Exemptions from taxation are not to be enlarged by implication if doubts are nicely balanced. *Chicago Theological Seminary vs. Illinois*, 188 U. S. 662, 674, 23 S. Ct., 386, 47 L. Ed. 641. On the other hand, they are not to be read so grudgingly as to thwart the purpose of the lawmakers. The moneys payable to this soldier were unquestionably exempt till they came into his hands or the hands of his guardian. *McIntosh vs. Aubrey*, 185, U. S. 122, 22 S. Ct. 561, 46 L. Ed. 834. We leave the question open whether the exemption remained in force while they continued in those hands or on deposit in a bank. Cf. *McIntosh vs. Aubrey*, supra; *State vs. Shawnee County Commissioners*, 132 Kan. 233, 294 P. 915; *Wilson vs. Sawyer*, 177 Ark. 492, 6 S. W. (2d) 825; and *Surace vs. Danna*, 248 N. Y. 18, 24, 25, 161 N. E. 315. Be that as it may, we think it very clear that there was an end to the exemption when they lost the quality of moneys and were converted into land and buildings. The statute speaks of ‘compensation, insurance, and maintenance and support allowance payable’ to the veteran, and declares that these shall be exempt. We see no token of a purpose to extend a like immunity to permanent investments or the fruits of business enterprises. Veterans who choose to trade in land or in merchandise, in bonds or in shares of stock, must pay their tribute to the State. If immunity is to be theirs, the statute conceding it must speak in clearer terms than the one before us here.

“The judgment of the Supreme Court of Tennessee disallowing the exemption has support in other courts. *State vs. Wright*, 224 Ala. 357, 140 So. 584; *Martin vs. Guilford County*, 201 N. C. 63, 158 S. E. 847, 76 A. L. R. 978. There are decisions to the contrary, but we are unable to approve them. *Rucker vs. Merck*, 172 Ga. 793, 159 S. W. 501; *City of Atlanta vs. Stokes*, 175 Ga. 201, 165 S. W. 270; *Payne vs. Jordan*, 36 Ga. App. 787, 138 S. W. 262.

"Our ruling in *Spicer vs. Smith*, 228 U. S. 430, 53 S. Ct. 415, 77 L. E. 875, 84 A. L. R. 1525, leaves no room for the contention that the exemption is enlarged by reason of payment to the guardian instead of payment to the ward."

It is a well settled rule of law that the Guardian and his ward occupy the position of trustee and cestui que trust, and such trust not being of a character which would give the Guardian the legal title to the ward's estate, but the title to property or moneys acquired by the Guardian as such, is vested in the ward and the possession of the Guardian is the possession of the ward. Therefore, when the money is paid by the Veteran's Bureau to the Guardian of the Insane Veteran, or the Guardian of the Beneficiaries of a Deceased Veteran, the title to such money then passes from the United States Government to the ward, or wards, to be administered upon by the Guardian as the law in the particular state designates and the United States Government has no further interest in and to said moneys, or property acquired with the same.

In support of the foregoing statement, we quote from the case of *Spicer vs. Smith*, Special Deputy Banking Commissioner, etc., 53 S. Ct. 415, 288 U. S. 430, in which Justice Butler said,

"The guardian, appointed by the county court, was by the laws of the state given the custody and control of the personal estate of his ward and was authorized to collect and receive the money in question. Ky. Stats. Section 2030. And unquestionably payment to the guardian vested title in the ward and operated to discharge the obligation of the United States in respect of such installments. *Taylor vs. Bemiss*, 110 U. S. 42, 45 3 S. Ct. 441, 28 L. Ed. 64; *Lamar vs. Micou*, 112 U. S. 452, 5 S. Ct. 221, 28 L. Ed. 751; *Maclay vs. Equitable Life Assurance Society*, 152 U. S. 499, 503, 14 S. Ct. 678, 38 L. Ed. 528; *Martin vs. First National Bank of Rush City (D. C.)* 51 F. (2d) 840, 844; *In re Estate of Stude*, 179 Iowa, 785, 788, 162 N. W. 10; *State ex rel vs. Shawnee County Commissioners*, 132 Kan. 233, 243, 294 P. 915, certiorari denied 283 U. S. 855, 51 S. Ct. 648, 75 L. Ed. 1462. *Schouler*, Dom. Rel. (6th Ed.) Section 892."

It is therefore the writer's opinion that land purchased by the Guardian of an Insane Veteran or land purchased by the Guardian of the Beneficiaries of a Deceased Veteran, which land was acquired with money derived from the United States Government, either as war risk insurance, disability compensation, death compensation or adjusted compensation benefits is subject to the payment of ad valorem taxes as levied by the State of Texas unless the payment of such ad valorem taxes on property acquired in the manner herein set out is exempt under the Constitution and Statutes of the State of Texas.

In discussing the question of whether or not land purchased with the money as hereinabove set out is exempt from the payment of ad valorem taxes under the Constitution and Statutes

of the State of Texas, we quote Article 7145, Revised Civil Statutes of 1925, which reads as follows:

"All property real, personal or mixed, except such as may be hereinafter exempted, is subject to taxation and the same shall be rendered and listed as herein prescribed."

It follows that unless property purchased with the proceeds of any money received from the United States Government as war risk insurance, disability compensation, death compensation, or adjusted compensation benefits is expressly exempted by the Constitution and Laws of this State that such property in the hands of the Guardian of an Insane Veteran or in the hands of the Guardian of the Beneficiaries of a Deceased Veteran is subject to taxation in the same manner as other property of like kind and character.

In view of the requirement of Article 7145, supra, we will now consider whether or not the property herein under consideration is exempt under the provisions of Article 8, Section 2 of the Constitution of the State of Texas, which Article sets forth the kind and character of property which the Legislature may exempt from taxation, and which Article reads as follows:

"All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; but the Legislature may, by general laws, exempt from taxation public property used for public purposes; actual places of religious worship, also any property owned by a church or by a strictly religious society for the exclusive use as a dwelling place for the ministry of such church or religious society, and which yields no revenue whatever to such church or religious society; provided that such exemption shall not extend to more property than is reasonably necessary for a dwelling place and in no event more than one acre of land; places of burial not held for private or corporate profits; all buildings used exclusively and owned by persons or associations of persons for school purposes and the necessary furniture of all schools and property used exclusively and reasonably necessary in conducting any association engaged in promoting the religious educational and physical development of boys, girls, young men or young women operating under a State or National organization of like character; also the endowment funds of such institutions of learning and religion not used with a view to profit; and when the same are invested in bonds or mortgages, or in land or other property which has been and shall hereafter be bought in by such institutions under foreclosure sales made to satisfy or protect such bonds or mortgages, that such exemption of such land and property shall continue only for two years after the purchase of the same at such sale by such institutions and no longer, and institutions of purely public charity; *and all laws exempting property from taxation other than the property above mentioned shall be null and void.*"

It is readily seen that there is no provision under this Article whereby land purchased by a Guardian of an insane Veteran or by a Guardian of the Beneficiaries of a Deceased Veteran with the proceeds of money derived from the United States Govern-

ment, either as war risk insurance, disability compensation, death compensation or adjusted compensation benefits shall be exempt from the payment of the ad valorem tax to the State of Texas.

We will now consider whether or not Article 7150, Section 12, Revised Civil Statutes, 1925, which is the Article dealing with exemptions, authorizes the exemption of the property under consideration here from the payment of ad valorem taxes. Section 12 of said Article reads as follows:

"All annual pensions granted by the State or the United States. . . ."

It is therefore apparent that there is no attempt by the Legislature to exempt property acquired with the proceeds of a pension paid by the United States Government and bearing in mind the rule of construction which prevails in construing statutes which attempt to exempt certain property from taxation, we are forced to conclude that such property so acquired is not exempt from the payment of taxes and that said statute cannot be enlarged upon by implication.

The Supreme Court of Texas speaking through Chief Justice Cureton in the case of *Jones vs. Williams*, 45 S. W. (2d) 131, clearly states the rule which is to be followed in the construction of statutes seeking to exempt property from taxation, from which opinion we quote:

"Exemptions from taxation are regarded not only as in derogation of sovereign authority, but of common right as well. They must be strictly construed, and not extended beyond the express requirements of the language used, not only as to the meaning of statutes granting exemptions, but as to the power of the Legislature to enact them. *Cooley on Taxation* (4th Ed.) Vol. 2, Sec. 672; *Yazoo & M. V. R. Co. vs. Thomas*, 132 U. S. 174, 10 S. Ct. 68, 33 L. Ed. 302; *Berryman vs. Board of Trustees*, 222 U. S. 334, 350, 32 S. Ct. 147, 56 L. Ed. 225; *City of Dallas vs. Cochran* (Tex. Civ. App.) 166 S. W. 32."

In view of the foregoing we are of the opinion that property acquired by the Guardian of an Insane Veteran or the Guardian of the Beneficiaries of a Deceased Veteran are not exempt from taxation under the provisions of the World War Veteran's Act. (38 U. S. C. A. Sec. 471, et seq.), and that such property so acquired is not subject to exemption under the Constitution or the Laws of the State of Texas from the payment of ad valorem taxes.

All opinions to the contrary are hereby overruled.

Yours very truly,

LETCHER D. KING,
Assistant Attorney General.

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

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2979

CONSTITUTIONAL LAW—CAPTION TO ACT—PUBLIC LANDS.

1. Where the caption of an Act provides for withdrawing from sale *the bed of Caddo Lake and all public and school lands adjacent thereto* and the body of the Act adds after the words "Caddo Lake" the phrase "and tributaries thereto," that part of the Act adding said phrase is of no effect.

Construing: Constitution Article 3, Section 35; Senate Bill No. 125, Chapter 127, page 242, Special Laws of the Regular Session of the Forty-second Legislature, 1931.

OFFICES OF THE ATTORNEY GENERAL,

Austin, Texas, February 13, 1936.

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

DEAR SIR: This Department acknowledges receipt of your letter of the tenth instant, in which you state that your Department has heretofore advertised the sale of a lease on a tract of 324 acres of land in Marion County, Texas, known as Survey 148, S. F. 9134; that this survey is not adjacent to Caddo Lake but is adjacent to one of its tributaries.

You call attention to Senate Bill No. 125, Chapter 127, page 42 of the Special Laws of the Regular Session of the Forty-second Legislature (1931), which Act withdraws from sale certain lands, and ask to be advised whether that part of the Act withdrawing from the sale lands adjacent to the tributaries to Caddo Lake is valid in view of the fact that such lands are not mentioned in the caption of the Act.

The relevant portions of the caption of this Act read as follows:

"An Act withdrawing from sale the bed of Caddo Lake and all public and school lands adjacent thereto, preserving the same to public use as a Fish and Game Reserve and a public park;"

Section 1 of the Act reads as follows:

"That all public lands and school lands situated in and under the bed of Caddo Lake and tributaries thereto, and all public lands and school lands adjacent thereto, in the Counties of Marion and Harrison, in the State of Texas, are hereby withdrawn from sale and preserved to the public use as a State Game and Fish Reserve."

It is noticed that the caption of the Act withdraws from sale and preserves same for a game reserve and public park *the bed of Caddo Lake and all public and school lands adjacent thereto*, while the body of the Act not only withdraws from sale the lands mentioned in the caption, but in addition thereto, withdraws from sale *all of the public and school lands in and under the tributaries to Caddo Lake and adjacent to said tributaries.*

This brings us to a consideration of Article 3, Section 35, Constitution of Texas, which reads as follows:

"No bill, (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an Act, which shall not be expressed in the title, such Act shall be void only as to so much thereof, as shall not be so expressed."

In *Stone vs. Brown*, 54 Texas 330, it is stated:

"Article 3, Section 35 of the Constitution is complied with if the title to an Act gives such reasonable notice of the subject matter of the statute itself as to prevent the mischief intended to be guarded against."

This provision of the Constitution is interpreted liberally and substantially and not strictly or literally. *Consolidated Underwriters vs. Kirby Lumber Company*, 267 S. W. 703 (Com. App.)

The Constitution intended to remedy a practice by which clauses were inserted in bills of which the title gave no intimation and to reasonably apprise the Legislature of the contents of bills, so that surprise and fraud might be prevented. *Holman vs. Cowden and Southerland*, 158 S. W. 571 (C. C. A.) It is true, however, that if the part of the Act objected to could be considered as appropriately connected with or subsidiary to the main object of the Act as expressed in the title, the constitutional provision is not violated. *Providence Insurance Company vs. Levy & Rosen*, 189 S. W. 1035 (C. C. A.).

In *Arnold vs. Leonard*, 114 Tex. 543, 273 S. W. 799, it is said:

"A caption concealing the true purpose of a statute, and stating an altogether distinct and foreign purpose, is necessarily deceptive, and cannot be sustained as complying with Section 35 of Article 3 of the Constitution."

In *Hamilton vs. St. Louis, S. F. & T. Ry. Co.*, 115 Texas 455, 283 S. W. 475, the court held unconstitutional the second clause of Section 1 of Chapter 143, page 288 of the Acts of the Regular Session of the Thirty-third Legislature, (1913) in so far as said clause attempted to fix liability for the death of a person when caused by the negligence of the agents or servants of another person, because no such purpose was declared in the caption of the Act. The caption of the Act stated that the Act amended a certain article of the Revised Civil Statutes by giving a cause of action where injuries resulting in death are caused by the negligence of a *corporation, its agents or servants*, while the body of the Act inserted before the word "corporation" the phrase "another person" so as to make the body of the Act read to give a cause of action where the injury is caused by the negligence of "*another person or corporation.*"

By giving the Act under consideration a liberal construction, we do not feel that same can be so construed as to uphold the

validity of that part of same which includes the tributaries of Caddo Lake. To uphold that part of said Act would, in our opinion, do violence to the above quoted constitutional provision, for the reason that the caption of said Act does not give any notice whatever that the tributaries to Caddo Lake are included within the Act and thereby does not meet the requirements of the rules set out in the above authorities. We do not believe that withdrawing from sale lands in and under the tributaries to Caddo Lake and the lands adjacent to said tributaries can reasonably be considered as appropriately connected with or subsidiary to the main object of withdrawing from sale lands situated in the bed of Caddo Lake or lands adjacent to the said lake. A member of the Legislature in voting on the bill as introduced might be perfectly willing to support the same when it provides for withdrawing from sale the lands in Caddo Lake or adjacent thereto, but at the same time be opposed to withdrawing from sale, or including same in a game reserve, all of the lands in the tributaries to said lake or adjacent to said tributaries. In other words, the caption does not apprise any one of the fact that any lands other than those in Caddo Lake or adjacent thereto are withdrawn from sale and made a part of the game reserve and park.

We also believe that the decision in *Hamilton vs Ry. Co.* supra, is identically in point. We can see no difference between adding in the body of the Act the term "another person" to the term "corporation" and in adding in the body of the Act the term "and tributaries thereto" to the term "Caddo Lake."

This opinion is not to be construed as holding that the entire Act above mentioned is void, for under the clear provisions of Article 3, Section 35 of the Constitution above quoted and authorities construing same, the Act is void only as to that part as is not expressed in the title. It is our opinion that said Act is to be construed as if the same did not contain the term "and tributaries thereto" in Section 1.

Yours very truly,

H. GRADY CHANDLER,
Assistant Attorney General.

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

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2981

RACING COMMISSION—POWER TO MAKE RULES AND REGULATIONS
—COLLECTION OF LICENSE FEES.

Under Article 655a providing that the Racing Commission shall promulgate rules and regulations to govern race tracks, the Racing Commission does not have authority to levy a license fee on jockeys for the benefit of a jockey fund.

The funds that have been collected in the past under rule 152 should be turned over to the Racing Commission as trustees for the benefit of the jockeys, the same not being public funds and have no place in the treasury.

ATTORNEY GENERAL'S DEPARTMENT,

March 31, 1936.

Mr. J. J. Biffle, Chief Clerk, Department of Agriculture, Austin, Texas.

DEAR MR. BIFFLE: Your letter of recent date, addressed to Hon. William McCraw, has been received and referred to the writer for reply. In your letter you ask four questions, requesting this Department to advise you, in substance, the status of funds collected by the Texas Racing Commission under Rule 152 of the rules as adopted and promulgated by the Texas Racing Commission. In answer to your inquiries, we are not restating the questions in the order submitted, but will endeavor to answer your questions in the manner which we believe will be more fully understood.

Article 655-a, of the Penal Code, same being Acts of 1933. Forty-third Legislature, page 428, Chapter 166, as amended Acts of 1933, Forty-third Legislature, First Called Session, page 32, Chapter 10, Acts of 1935, Forty-fourth Legislature page 804, Chapter 344, known as the law permitting racing in Texas, provides, in part, as follows:

"The Racing Commission shall have the power, and it shall be its duty, to prescribe and enforce reasonable rules and regulations, reasonable restrictions and conditions under which all horse races and exhibitions of riding horses are held under this Act; likewise prescribe and enforce rules governing the conduct of all persons who engage in or carry on the racing or such exhibitions of horses. The Commission shall have power to exclude from participation in such races or exhibitions any person or persons who omit, fail or refuse to comply with the reasonable rules, regulations, restrictions and conditions prescribed by said Commission, and to impose, as a penalty for such omission, failure or refusal, the denial of the right of such persons to conduct or participate in such races or exhibitions."

The Texas Racing Commission acting pursuant to and by authority of the provisions of the above quoted statute, adopted and promulgated rules governing racing in Texas. Rule 152 of the Racing Rules, as adopted and promulgated by the Texas Racing Commission, reads in part as follows:

"152. Any person who may desire to train or ride any horse upon tracks licensed by this Commission shall first procure from the Texas Racing Commission a license to do so.

"(1) Each such application shall be accompanied by the fee and with the written statement of two reputable persons to the effect that the applicant is personally known to them and that he is a person of

good reputation and capable of satisfactory performance of the vocation he seeks to follow.

"(2) Each trainer, jockey and apprentice jockey shall pay five (\$5.00) dollars for his license, providing the application therefor shall be made prior to May 1st of each calendar year. After that date the fee for license of each trainer and jockey shall be ten (\$10.00) dollars, while the fee for an apprentice jockey shall be five (\$5.00) dollars.

"(4) Money received from these license fees is to be held and regarded as a voluntary subscription or contribution by applicant to a fund to be created by the Texas Racing Commission for the purpose, among other things, of caring for jockeys injured while in the discharge of their duties, upon tracks under the jurisdiction of this Commission. Distribution and expenditures of the fund thus created to be wholly within the direction of the Texas Racing Commission, part of which may be used for the purpose of defraying any expense incident to its administration or for such other purpose as the Commission may deem expedient."

Under date of April 11, 1934, the Honorable H. D. Bishop, former Assistant Attorney General, in a letter to Howard Anderson, County Attorney of Potter County, advised that the Texas Racing Commission was authorized to require the payment of a fee of \$5.00 or \$10.00 by jockeys, trainers or apprentice jockeys under subdivision No. 2, Rule 151, page 58 of the "Texas Law and Rule Governing Horse Racing." The rule referred to is now Rule 152 of the 1935 rules by racing above quoted.

We disagree with the opinion above referred to and with all due respect to precedent feel that is the duty of this Department to overrule the same. While it is true that the Texas Racing Commission have broad powers with reference to the promulgation of rules and regulations for the purpose of regulating racing, we feel that the rule set out above goes further than merely regulating and attempts to lay an occupation tax upon jockeys. Although the rule recites that such contribution by the various jockeys should be considered as a voluntary subscription in truth and in fact and it is mandatory that the jockeys fulfill the terms of this rule on penalty of not being able to follow their respective professions. This provision goes further then, laying down a merely regulatory measure and lays an occupation tax on each and every jockey who desires to pursue his occupation. Without question, the only authority that may levy a tax as the one above described is the Legislature itself or at least under its direction. Delegation of authority by the Legislature must be strictly construed, and the Legislature is to presume to delegate in expressed terms all that it intended to. Not even by implication could we reach the conclusion that the Racing Commissioner had power to levy the above mentioned fees. The purpose set forth in this rule is clearly without the scope of a mere regulation as the same contemplates the raising of a revenue for the purpose of discharging bills of private individuals. It is so clearly without the

scope of the powers of the Racing Commissioner that we feel it is unnecessary to discuss the same further.

Under Section 5 of Article 655-a of the Penal Code all monies collected by the Racing Commission should be immediately turned over to the State Treasury in a fund to be designated as the "Special Racing Fund." Clearly the funds collected heretofore under Rule 152, supra, were illegally collected and consequently may not be considered as public funds, neither do they come within the purview of Article 655-a, supra. For this reason these funds were never referred to the Special Racing Fund but was kept in a suspense account in the State Treasury under the terms of Article 4388 Revised Civil Statutes. As stated above, these funds are not public funds and consequently have no place whatsoever in the State Treasury or in a Special Suspense Fund. Since said funds were collected illegally the same should immediately be paid out of the Suspense Fund by a refund warrant to be written and signed by the Treasurer to the Racing Commission as trustee to the beneficiary jockeys herein referred to. The Commission not having a right to collect the fees in the first instant, the State has no legal title to said funds and is consequently relieved of all liability upon refunding the same to the trustee for the benefit of the various beneficiaries. For authority for this statement see the case of Baker vs. Panola County, 30 Tex. 87.

Trusting that this will assist you in reaching the correct solution of your problem, we are

Yours respectfully,

JOE J. ALSUP,
Assistant Attorney General.

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

WILLIAM McCRAW,
Attorney General of Texas.

No. 2982

CONFEDERATE PENSION LAW.

EFFECT OF THE REPEALING CLAUSE IN CHAPTER 82, ACTS FIFTH CALLED SESSION OF THE FORTY-FIRST LEGISLATURE, PAGE 231, SECTION 5.

EFFECT OF SECTION 51B, ARTICLE 3, OF THE CONSTITUTION OF TEXAS, AND OLD AGE ASSISTANCE ACT OF THE FORTY-FOURTH LEGISLATURE, ACTS SECOND CALLED SESSION, HOUSE BILL NO. 26, UPON THE RIGHT OF CONFEDERATE SOLDIERS OR WIDOWS TO RECEIVE PENSION FROM THE STATE AND ALSO OLD AGE ASSISTANCE.

1. Section 5 of Chapter 82, Acts of the Fifth Called Session of the Forty-first Legislature repeals, both expressly and by implication, Chapter

153, Acts of the Regular Session of the Forty-first Legislature, pages 330-331.

2. Confederate soldiers and widows, not inmates of any State supported institution, who can qualify under the standards and conditions of the Constitution, and the provisions and requirements of the Old Age Assistance Act, are eligible to receive old age assistance notwithstanding they may be drawing pensions from the State, at the same time.

This opinion pretermits any conclusion as to the constitutionality, in whole or in part, of the Old Age Assistance Act, Acts Second Called Session, Forty-fourth Legislature.

OFFICES OF THE ATTORNEY GENERAL,

Austin, Texas, April 10, 1936.

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

DEAR SIR: I have before me your recent request wherein you desire an opinion upon the following two questions:

"1. Did the Act of the Fifth Called Session of the Forty-first Legislature, in its order to repeal Article 6214, Revised Civil Statutes of 1925 as amended by Chapter 95 of the General and Special Laws of the Fortieth Legislature, also repeal the Act passed by the Regular Session of the Forty-first Legislature, under Chapter 153, Section 2, Article 6214?

"2. Under the Confederate Pension Law as it now exists will a person who is receiving old age assistance be entitled to receive from the State of Texas the pension allowed Confederate soldiers or widows?"

Answering your questions in their order, you are advised:—

1. An adequate answer to the first question requires a consideration of the history of the several amendments to Article 6214, Revised Statutes of 1925, as well as of the terms of the Article and such amendments. The Article, as it appears in the said revision, reads as follows:—

Article 6214. (6272) What constitutes indigency.

"To constitute indigency within the meaning of this title, neither the applicant nor his wife, if married, nor both together, nor the widow, shall own property real or personal, exceeding in value one thousand dollars, exclusive of homestead, and if its assessed value be not in excess of two thousand dollars, and exclusive of household goods and wearing apparel; and such applicant shall not have an income, annuity or emoluments of office or wages for services in excess of three hundred dollars per year, nor in receipt of aid or of a pension from any State of the United States or from any other public source, nor an inmate of the Confederate Home or other public institution at the expense of the State. Only the indigent under the foregoing definition shall be entitled to a pension under this title." (Acts 1909, p. 231; Acts 1913, p. 228; Acts 1917, p. 412; Acts 1923, p. 202.)

The Regular Session of the 40th Legislature, by Chapter 95, amended said Article, and thus it stood until the 41st Legislature

again rewrote it, as shown by Section 2, Chapter 153, Acts Regular Session, pages 330 and 331. The only change made in Article 6214, by the Regular Session of the 41st Legislature, Chapter 153, was to add after the word "pension" the word "fund", making the sentence read: "nor the aid of a pension *fund* from *another* State of the United States". Apparently the purport and effect of the Article was not materially changed by this amendment and it was left, practically, just as amended by the 40th Legislature, under Chapter 95.

At the 5th Called Session of the 41st Legislature, however, by Chapter 82, page 251 of the Session Acts, the Legislature again amended the pension law in several important respects. Section 5 of said Chapter 82, reads as follows:

"Article 6214 of the Revised Statutes of 1925, as amended by Chapter 95 of the General and Special Laws of the Fortieth Legislature, and Article 6216 of said Revised Statutes, are hereby repealed."

It will be observed that this repealing clause refers to Article 6214, as amended by Chapter 95, Acts of the 40th Legislature, but nowhere refers to the amendment passed by the 41st Legislature, namely Chapter 153. The subject matter of all these enactments related to Confederate pensions, and laid down the standards for determining the financial qualifications of applicants and undertook to define "indigency". It is thought that the history of this part of the legislation, and the relevant provisions of the amendments, are, for the purposes of this opinion, sufficiently summarized above.

At this point, it may be useful to state certain well established rules of statutory construction, particularly with relation to repeals, express and implied. The cardinal rule, of course, is that the intention of the Legislature, when ascertained, is paramount and will always prevail over mere literalism, in all cases of ambiguity. For obvious reasons, express repeals usually reveal the legislative intent and define their effect, by the direct and explicit language employed. However, as here, express repealing clauses are not always without doubt; and recourse must be had to construction. In the case of implied repeals, it is well settled that repeals by implication are not favored.

In Sutherland on Statutory Construction, Second Edition, section 247, page 461, we find the rule stated thus:

". . . . An implied repeal results from some enactment the terms and necessary operation of which cannot be harmonized with the terms and necessary affect of an earlier Act. In such cases the later law prevails as the last expression of the legislative will; therefore, the former law is constructively repealed, since it cannot be supposed that the law-making power intends to enact or continue in force laws which are contradictions. The repugnancy being ascertained, the latter Act or provision in date or position has full force, and displaces by repeal whatever in the precedent law is inconsistent with it.

"Subsequent legislation repeals previous inconsistent legislation whether it expressly declares such repeal or not. In the nature of things it would be so, not only on the theory of intention, but because contradictions cannot stand together. . . ."

The rule is similarly stated by Mr. Black, in his excellent work on the Interpretation of Laws, Second Edition, 351-352.

In *Townsend vs. Terrell*, 16 S. W. (2nd) 1063, our Supreme Court said:—

"It is only where Acts are so inconsistent as to be irreconcilable that a repeal by implication will be indulged. If there exists such conflict, then there is a presumption of the intention to repeal all laws and parts of laws in conflict with the clear intention of the last Act. This is necessarily true where both Acts cannot stand as valid enactments."

In *Citizens National Bank vs. Del Rio B. & T. Co.*, 11 S. W. (2nd) 243, the Fourth Court of Civil Appeals recognized the rule in these words:

"If the last Act is in conflict with the former one, then the former one must give way to the latter."

ADDITIONAL AUTHORITIES

- Sayles vs. Robison, 103 Tex. p. 430.
- Conley vs. Daughters of Republic, 106 Tex. p. 80.
- Berry vs. State, 69 Cr. R. 602; 156 S. W. 626.
- Gaddes vs. Terrell, 101 Tex. 574.
- Garrison vs. Richards, 107 S. W. 861.
- T. & P. Ry. Co. vs. Mosley, 103 Tex.
- Lasater vs. Lopez, 110 Tex., 179.
- St. Louis, B. & M. Ry. Co., vs. Marvocich, 221 S. W., 582.
- Jesse vs. De Shong, 105 S. W. 1011-14.
- Cole vs. State, 106 Tex. 472.

The case of *Jesse vs. De Shong*, supra, is an instructive case, with a lengthy review of the principles and rules applying to implied or constructive repeals and citing many cases.

In proper cases, the caption of an Act and even the emergency clause of a statute may be looked to, in order to determine the proper construction and to aid in ascertaining the legislative intent. Our Supreme Court has said that the caption is a part of the law and must be considered in construing it, when enlightening.

AUTHORITIES.

- Hodge vs. Donald, 55 Tex., 344.
- M. K. & T. Ry. Co., vs. Mahaffey, 105 Tex., 394.
- Commonwealth Ins. Co. of New York vs. Finegold, 183 S. W. 833.

In the light of the above authorities and the principles announced therein, let us proceed to examine the question whether Chapter 82, supra, expressly repealed Chapter 153. As before

stated, express repeals ordinarily present no difficulties, but here it is somewhat different. It may well be argued that since the repealing clause in Chapter 82 (Sec. 5) specifically referred to Article 6214 of the Revised Statutes, as amended by Chapter 95 of the General and Special Laws of the 40th Legislature, but nowhere mentioned Chapter 153, of the Acts of the 41st, the intention was clearly to leave the latter unrepealed and in full force and effect. The argument is not without force, but it is not believed to be admissible. To so conclude would be to carry mere literalism too far. The cold letter of the law must not be permitted to defeat the will of the Legislature, the plain objects of the Act, as ascertained from intrinsic evidence within the statute itself. But even the letter is here consistent with the intention of the Legislature as expressed. Section 5 unequivocally declares that Article 6214 is "hereby repealed". This must be taken to mean the Article as it stood at the very time, with all its amendments. Not merely the repeal of an Article and a number, the shadow; but the complete abrogation of a conflicting statute and its contents, the substance. The further reference to one of the amendments did not militate against the intention to be rid of Article 6214, once and for all, in its entirety; and to remove all impediments to the new policy to be established. It is evident that, in adopting Chapter 82, the 41st Legislature was expressing a new policy, wholly at variance with that of prior statutes. This may well be said to have been the major purpose of the Act, and the repeal of all conflicting statutes was necessary to the accomplishment of that purpose. To leave Chapter 153 in effect would manifestly have defeated the prime object of the later amendment; or have created a serious confusion and conflict, a situation both futile and intolerable.

Further the caption in Chapter 82 shows that the Legislature intended thereby to set aside and do away with Article 6214, with *all* amendments, in their entirety. The broad language of the caption, "to repeal Article 6214, as amended", colors and illumines the body of the Act, including the scope and effect of the repealing clause in Section 5. If necessary, the language of that section will be enlarged to affect the full intention of the repeal. Hence we conclude that Chapter 153 was, in legal effect, expressly repealed and is no longer in existence.

At all events, the argument that the omission of any reference, in the repealing clause of Chapter 82, to the amendment embraced in Chapter 153, was fatal to the claim of a repeal of the latter, has relevancy only to the theory of express repeal. It has no application to the matter of repeal by implication. The latter theory rests upon entirely different grounds. And if there should remain any doubt that an express repeal was effected, we, nevertheless, have no difficulty in concluding that Chapter 153 was repealed by implication.

The new policy disclosed by the provisions of Chapter 82, as a whole, radically differs from that of prior statutes, and especially

is at variance with the provisions of Chapter 153. In truth, the two enactments are so repugnant as to be wholly irreconcilable, and they cannot possibly be harmonized. In these circumstances, the rule stated by Mr. Sutherland has special application; namely, "In such cases, the later law prevails as the last expression of the legislative will; therefore, the former law is constructively repealed, since it cannot be supposed that the law-making body intended to enact or continue in force laws which are contradictions." Indeed, in the very nature of things this must be so. Two contradictions cannot stand. This may be possible physically, but never intellectually. There is no place in the mental field for the existence, at one and the same time, of two laws entirely repugnant and irreconcilable. They would be mutually destructive and impossible of performance.

Hence we conclude that Chapter 153 has been wholly abrogated, abandoned and repealed: if not expressly, then clearly by implication. It follows that your first question must be answered in the affirmative.

2. As to the second question, which inquires as to whether the present Confederate Pension Law will permit a person, who is receiving old age assistance, to also receive the pension allowed Confederate soldiers or widows, we answer as follows.

Article III of the Constitution of Texas has been recently amended, so as to provide for a system of Old Age Assistance, in these terms:—

"Section 51—b. The Legislature shall have the power by general law to provide, under such limitations and restrictions and regulations as may be deemed by the Legislature expedient, for old age assistance and for the payment of same not to exceed Fifteen (\$15.00) Dollars per month each to actual bona-fide citizens of Texas who are over the age of sixty-five (65) years; provided that no habitual criminal and no habitual drunkard, while such habitual drunkard, and no inmate of State supported institution, while such inmate, shall be eligible for such old age assistance. . . ."

The legislative reaction to this constitutional authority was the speedy enactment of an Old Age Assistance Act. The relevant portions are these:—

"Sec. 2. Aid may be granted under this Act to any person who

- (a) Has attained the age of 65 years.
- (b) Is a citizen of the United States.
- (c) Has resided in the State of Texas for five (5) years, or more, within the last nine years, preceding the date of application The term 'residence' and 'resided', as used in this Act, shall denote actual physical presence within this State as distinguished from the word 'domicile' and 'residence' as used in their broader meaning.
- (d) Is not at the time of receiving such aid an inmate of any public or private home for the aged, or any public home or any public or private institution of a custodial, correctional or curative character; provided, however, that aid may be granted to persons temporarily confined in a private institution for medical or surgical care."

Section 7 provides for the giving, by applicant, of certain information to the Old Age Assistance Commission; and among various requirements we find the following to be pertinent to this discussion:—

“(e) If receiving aid from any source, the amount received and from whom, or if such aid be not in cash money, then a description of such aid. . . and from whom; the amount received from the United States Government, State or county, public or private charitable organizations, corporations, or private individuals.”

The proviso in the Constitutional Amendment, *supra*, declares: “that no inmate of any State supported institution, while such inmate, shall be eligible for such old age assistance.” It is clear that this proviso expressed a positive inhibition against the receiving of aid thereunder, or under any legislation passed pursuant thereto, as to Confederate soldiers, their widows and others who were or are inmates of a State supported institution, while they remain such inmates. On the other hand, it may be reasonably inferred that it was intended to confer its benefits to all others receiving State aid, including Confederate soldiers and their widows, provided they comply with and meet the standards and conditions prescribed in the Amendment or any valid law thereunder. In preparing the Amendment for submission, the Legislature evidently had in mind, when inserting the provision with reference to inmates of State supported institutions, Confederate soldiers and their widows who might not be inmates, yet were or might be drawing a pension from the State. If it had been intended to exclude the latter class from the benefits of the assistance assured by the Amendment and laws passed thereunder, appropriate language to that end would have been inserted. The people adopted the Amendment as written, and the standards and inhibitions therein set out may not be enlarged. They are a limitation upon the authority of and binding upon the Legislature. We do not wish to be understood as here implying that the Old Age Assistance Act is, in any respect, unconstitutional. It is the policy of this Department, rarely, departed from, to refrain from declaring legislative Acts to be in conflict with the Constitution. We see no occasion, for the purposes of this opinion, to depart from that custom, and the constitutionality of the Act in question is assumed. While pretermittting any discussion of the validity of the Act or any part thereof, we deem it proper to say that the doctrine is well established in this State, that where an Act is susceptible of two constructions, one of which would place it in conflict with the Constitution and the other would avoid any repugnance to that instrument, the courts will adopt the latter. Section 2, sub-division (d) must be regarded as an attempt by the Legislature to comply with the Constitution, and it does not purport to exclude, specifically at least, Confederate soldiers and their widows, who are non-inmates, from the benefits of the Act. The difference in language between the Amendment and sub-division (d) of the Act may furnish room

for argument, but it suffices to say that the Constitution is supreme and controlling, should it be found that they cannot be harmonized.

For the reasons given, we answer the second question thus: That if the Confederate soldier or widow is not an inmate of any State supported institution, and can qualify under the standards and conditions of the Constitution, and the provisions and requirements of the Old Age Assistance Act, not in conflict therewith, there is no legal inhibition against such person's receiving old age assistance and drawing a pension from the State, at the same time.

Respectfully,
WILLIAM MCCRAW,

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

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2983

OLD AGE ASSISTANCE LAW—LIMITATION OF ADMINISTRATIVE
EXPENSE—LIABILITY OF STATE COMPTROLLER
FOR EXCESS ADMINISTRATIVE
EXPENSE.

1. The limitation contained in the Act covering the expense of administering the same to five per cent (5%) applies to the biennium covered by the appropriation.

2. The State Comptroller of Public Accounts would not be liable for any excess expended in the administration of the Old Age Assistance Act, but such liability rests upon the Old Age Assistance Commission and the Director thereof.

OFFICES OF THE ATTORNEY GENERAL,

April 17, 1936.

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

DEAR SIR: Your letter of recent date addressed to the Honorable William McCraw has been received by this Department. Your letter reads as follows:

"I will thank you to refer to letter opinion written by Fred C. Warner, Jr., Assistant Attorney General, January 16, 1936, to Honorable Orville S. Carpenter, Executive Director of the Texas Old Age Assistance Commission, interpreting Sections 9 (c) 9 (d) and Section 6 of the Old Age Assistance Act—House Bill No. 26, Acts of the Second Called Session of the Forty-fourth Legislature.

"In view of the magnitude of the expenditure under this Act, this Department request that you consider the above mentioned opinion in conference and certify it to this Department as a conference opinion.

"Section 6 of this bill provides 'The expense of administering this Act shall never exceed five per cent (5) of the total amount of State funds expended for Old Age Assistance. . . .'

"Assuming that the total amount of moneys received under the present tax levy for the Old Age Assistance Commission does not exceed five million dollars per annum (which is of course an estimate) would this Department be authorized to issue warrants in excess of five per cent of the estimated amount received under the levy or against the estimated amount spent for Old Age Assistance.

"In the event this Department issues warrants in excess of the five per cent limitation within the biennium, would the Comptroller be held accountable or liable for such excess."

Section 9 (b) of House Bill No. 26, Second Called Session of the Forty-fourth Legislature, known as the "Old Age Assistance Act," provides as follows:

"For the purpose of paying the aid and assistance to needy citizens of Texas as herein provided for, and for the purpose of defraying the expenses of administering this Act there is hereby created and established a special fund in the Treasury of the State of Texas, to be kept by the State Treasurer separate and apart from all other funds, and to be known as the 'Texas Old Age Assistance Fund,' and for the purposes above set out there is hereby appropriated out of such fund the sum of Twenty-five Million Dollars (\$25,000,000.00) or so much thereof as may be necessary, for the biennium ending September 1, 1937. Provided that if the fund is insufficient to pay all grants in full the same shall be paid pro rata based on the amount granted to each recipient."

Section 6 of House Bill No. 26 contains the proviso that the expense of administering the Act shall never exceed five per cent (5%) of the total amount of the funds expended for Old Age Assistance. In the letter opinion by Honorable Fred C. Varner, Jr., Assistant Attorney General, under date of January 16, 1936, referred to in your inquiry, the opinion was expressed that Section 6 did not purport to limit, from day to day or any other corresponding period of time, the administrative expenditures to five per cent of the sum that had, at that particular moment, been expended for aid and assistance to the aged and needy citizens of this State. The construction was placed upon Section 6 that the ratio of five per cent was to be calculated by considering the total amount expended over the whole period of the appropriation, from the effective date of the bill to September 1, 1937, and over no shorter period. The following quotation from the above mentioned letter is so expressive of our present opinion that we find it appropriate to set out the same herein.

"From the very nature of the Texas Old Age Assistance Commission, as created, and the powers and duties placed on it by the law, when effective, and the purposes for which the law was passed, it is evident that the Legislature contemplated that the expenses of administration would be larger at the inception than at any other time. It could not have cou-

templated, in the writer's opinion, that restrictions were to be placed on the expenses that might be incurred in organizing and setting up the machinery, to start administering the law, with such expenses necessarily relative and determinate in amount only on the number of applications that would be made for assistance.

"And, too, such expenses of administration that will be necessarily incurred are of such a kind, from the very nature of the organization, that it would be inconceivable that the Legislature intended that at all times from month to month or other intervals the expenses should never exceed for the interval taken, 5% of the amount expended for assistance. If the Commission performs the duties placed on it by this law, relatively the expenses will be larger during the first months of operation than at any time after the bulk of the applications have been received and acted upon by the Commission.

"Clearly, therefore, the Legislature intended, in the opinion of the writer, that the determination of the ratio of expenses to the amount expended for assistance should be made and considered only over the whole period from the effective date of the bill to September 1, 1937, and over no shorter period."

Our answer to your first inquiry is that the Comptroller's Department is authorized to issue warrants in an amount equal to five per cent of the sum expended for aid and assistance, that sum to be determined as of September 1, 1937. The said sum must, of necessity, remain until that time an approximation.

Section 3 provides for the setting up of an Act known as the Texas Old Age Assistance Commission whose duties are, among other things, to provide such methods of administration other than those relating to selection, tenure of office and compensation of personnel, as are found by the United States Social Security Board to be necessary for the efficient operation of the plan of Old Age Assistance.

Section 4 provides for the appointment by the Commission of certain officers, namely, the executive director of the Texas Old Age Assistance Commission and a chief auditor. Subsection (b) of Section 4 provides as follows:

"The Executive Director to the Texas Old Age Assistance Commission shall be the Chief Administrative Officer of such Commission *and, as such, shall be responsible for the proper and economical administration of the affairs of such Commission.* He shall have the power and authority, with the consent and approval of a majority of the members of the Commission, to select, appoint and discharge such assistants, clerks, stenographers, auditors, bookkeepers and clerical assistants as may be necessary in the administration of the duties imposed upon such Commission *within the limits of the appropriations that may be made for the work of said Commission;* salaries of all such employees to be fixed by the Executive Director, in keeping with salaries paid other State employees performing like work and holding similar positions."

Section 5 provides:

"The Texas Old Age Assistance Commission shall have full power and authority to provide such method of local administration in the various counties and districts of Texas as it deems advisable, and shall provide such personnel as may be found necessary for carrying out in an economical way the administration of this Act; provided, however, that all employees of any Local Administrative Agency, whether county or district, shall have been residents of that particular county or district where employed for a period of at least four (4) years next preceding their employment."

Section 6 provides as follows:

"The expenses of administering this Act shall never exceed five per cent (5%) of the total amount of State funds expended for Old Age Assistance; provided however, that the Texas Old Age Assistance Commission is empowered to accept any funds appropriated and allocated to the State of Texas for administrative expense by the Federal Government or the Social Security Board and same may be expended for administrative purposes in addition to that allowed for administrative purposes out of State funds expended."

Section 12 provides:

"All Old Age Assistance benefits provided for under the terms of this Act shall be paid by vouchers or warrants drawn by the State Comptroller on the Texas Old Age Assistance Fund; for the purpose of permitting the State Comptroller to properly draw and issue such vouchers or warrants, the Texas Old Age Assistance Commission shall furnish the Comptroller with a list or roll of those entitled to assistance from time to time, together with the amount to which each recipient is entitled. When such vouchers or warrants have been drawn by the State Comptroller, the same shall be delivered to the Executive Director of the Texas Old Age Assistance Commission, who in turn shall supervise the delivery of the same to the persons entitled thereto."

It is the opinion of this Department that the Executive Director of the Texas Old Age Assistance Commission (who can act only with the consent and approval of a majority of the members of the Commission) is saddled with the burden of so curtailing his expenditures as to come within the clear mandate of Section 6. The conclusion that we have reached is in our opinion bolstered by the language used in Section 4 (b) and Section 5 as seen above.

The Comptroller is a purely ministerial officer. He would be unable solely upon his own instinct of right without evidence to refuse to issue warrants because of the fact that he felt that the costs of administering the Act were apt to exceed the statutory limit of five per cent. The expenses having been incurred by the Commission, acting through the Executive Director (by the authority of Section 4 (b) and Section 5), and the list of claims having been presented to the Comptroller, that officer

can but issue the warrants in compliance with the request of the Commission.

We conclude that the Comptroller is not liable in the event that the costs of administration at the end of the period, September 1, 1937, are in excess of five per cent of the fund expended for Old Age Assistance.

Very truly yours,

WILLIAM MCCRAW,
Attorney General of Texas.

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

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2984

RURAL AID APPROPRIATION—HIGH SCHOOL TUITION.

High School tuition provided for in House Bill No. 327 and House Bill No. 158, Acts, Regular Session, Forty-fourth Legislature, should be disbursed by the same method as that used for other rural aid.

ATTORNEY GENERAL'S DEPARTMENT,

April 9, 1936.

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

DEAR SIR: This will acknowledge receipt of your letter under date of April 7, 1936 addressed to Attorney General William McCraw, wherein you refer to House Bill No. 327, Acts Forty-fourth Legislature, and House Bill No. 158 of the same Legislature, and more particularly to Section 10 of House Bill No. 327 and Section 22 thereof, and desire a conference opinion upon the question as to whether or not high school tuition should be paid on the same percentage basis as all other allotments and claims provided for in said Equalization Law (House Bill No. 327, *supra*).

Section 10 of House Bill No. 327, Acts, Regular Session, Forty-fourth Legislature, the same being a part of a bill creating a rural aid appropriation and defining the method of distributing the same, reads as follows:

"Sec. 10. (High School Tuition) It is hereby expressly provided that a sufficient amount of funds appropriated by this Act shall be used for the payment of high school tuition not to exceed Seven Dollars and Fifty Cents (\$7.50) per pupil per month. High School tuition shall be paid according to the provisions of House Bill No. 158, General Laws, Regular Session, Forty-fourth Legislature. Providing that the provisions of this Section shall not apply to granting of aid under terms of this Section for Vocational Education or Crippled Children. It is further provided that high

school tuition aid, as above set out, shall be granted for pupils transferred outside high schools from the State Home for Dependent and Neglected Children at Waco and from the Alabama and Coushatta Indian Reservation near Livingston, provided the Aid so granted shall not exceed the per capita tuition charged other schools' transferred high school pupils by the high school affected hereby."

There is other aid provided for throughout this Bill such as transportation aid, teachers' salary aid, industrial aid, etc. We feel it unnecessary to refer to these provisions except to point out that the funds provided for in said Bill are paid by the State on a percentage basis under certain qualifications. Section 22 of House Bill No. 327, supra, as it pertains to the question under discussion reads as follows:

"Sec. 22. It shall be the duty of the State Board of Education and the State Superintendent of Public Instruction to pay by warrant not more than fifty per cent (50%) of the total amount allotted to any one school as an initial payment, and that the remaining payments shall be made on a percentage basis to the schools in such manner and amounts that the total expenditures for any one year shall not exceed the total appropriation for that year.

"The State Board of Education and the State Superintendent of Public Instruction are hereby prohibited from paying any one or more schools its or their allotments in an amount greater, on a percentage basis, than is paid any other school. This provision shall apply to all allotments and claims and/or appropriations provided for in this measure."

The provision last above quoted limits the authority of the State Superintendent and State Board of Education in the matter of disbursing the funds set out in this appropriation. This provision applies to every fund set out in this Act.

As it will be noted upon reviewing Section 10, above quoted, the high school tuition fund is to be disbursed subject to the conditions set out in House Bill No. 158, supra. Upon referring to House Bill No. 158, supra, we find that said Bill makes no appropriation or any wise limits the terms of House Bill No. 327, except to lay down certain conditions as a prerequisite to receiving aid under the appropriations provided for in House Bill No. 327. One must comply with the terms of House Bill No. 158 to be entitled to the benefits of Section 10 of House Bill No. 327. Section 4 of House Bill No. 158, reads in part as follows:

"It is further provided that the State per capita available fund for each pupil transferred for high school purposes under this Act, who has enrolled in the school to which he has been transferred, shall be distributed to the districts to which such pupils have been transferred *as the apportionment is paid by the State*. If any district fails to pay this portion of the State per capita according to the provisions of this Act, then the State Superintendent, when notified by the superintendent of the receiving districts, accompanied by an affidavit of such failure, shall withhold from such district, *when the next per capita payment is ready for distribution*,

such an amount as such district may owe any other district until such obligation has been paid; provided further, that the State Superintendent shall investigate such accounts and determine that they are just accounts and obligations of the district before their *portion of the per capita allotment is withheld.*"

This Section of House Bill No. 158 clearly indicates that the provisions of this law are subject to the terms of House Bill No. 327 in respect to the method of disbursing said funds. As stated above, House Bill No. 158 merely lays down the qualifications that the school must have before being entitled to high school tuition aid. House Bill No. 158, by reference to Section 10, *supra*, is merely made a part of House Bill No. 327, and we fail to see why it would not come within the same inhibitions as found in that law as all other funds do.

In view of what has been said, the writer is of the opinion, and you are accordingly advised that high school tuition should be paid on the same percentage as all other allotments of aid. This method of distribution, of course, is found in Section 22 above quoted.

Very truly yours,

JOE J. ALSUP,
Assistant Attorney General.

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

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2985

CONSTRUCTION OF STATUTES—PRESUMPTION OF VOLUNTARY
PAYMENT OF TAXES.

1. Section 13, H. B. 89, Acts of the Regular Session, 44th Legislature, should not be construed as authorizing the Comptroller to credit current taxes paid under House Bill No. 154 with taxes erroneously paid prior to the effective date of said House Bill No. 89.

2. It should properly be presumed by the Comptroller that one having erroneously paid taxes by reason of House Bill No. 154 and prior to the effective date of House Bill No. 89, but having failed to protest such payment in accordance with the then existing law prescribing the only statutory method for protesting the payment of illegal taxes, paid such illegal taxes voluntarily.

OFFICES OF THE ATTORNEY GENERAL,

Austin, Texas, April 28, 1936.

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

DEAR SIR: Under date of March 9, 1936, Assistant Attorney General Hubert Faulk advised you, in reply to your letter of March 7, 1936, addressed to this Department, to the effect that:

"Deductions on account of erroneous payments of taxes cannot be made behind the effective date of H. B. 89, which date was May 30, 1935."

Subsequent to the time of writing that opinion your letter of April 6, 1936, addressed to the Honorable William McCraw, Attorney General of Texas, has been referred to the writers for attention and reply, said letter reading as follows:

"I have been asked to request a conference opinion from your Department in lieu of the one issued by your Mr. Faulk on March 9, 1936, which refers to Subsection 13 of Section 1 of House Bill 89 of the Forty-fourth Legislature. It reads as follows:

" 'When it shall appear that a taxpayer to whom the provisions of this Act shall apply has erroneously paid more taxes than were due during any tax paying period, either on the account of a mistake of fact, or law, it shall be the duty of the State Comptroller to credit the total amount of taxes due by such taxpayer for the current period with the total amount of taxes so erroneously paid.' "

"House Bill 89 of which the above quotation is a part, became effective May 30, 1935. House Bill 89 was an amendment to House Bill 154 which was passed by the Forty-third Legislature.

"Please tell me if I may allow deductions on current tax payments of errors, in connection with crude oil production, which occurred prior to May 30, 1935, and back to the effective date of House Bill 154."

According to the understanding of these writers, it is contended by interested parties that by reason of Subsection 13 of Section 1 of H. B. 89 of Acts of the Forty-fourth Regular Session of the Legislature, above set out in quoting your letter, the Comptroller should credit the total amount of taxes due by a taxpayer for any current period with the total amount of taxes erroneously paid by such taxpayer prior to the effective date of said H. B. 89, whether such payment was made on account of mistake of fact or of law. In considering the effect of the above quoted portion of H. B. 89, there are two provisions of the Constitution that should be borne in mind. First, attention is called to Section 16, Article 1 of the Constitution of Texas, providing that:

"No bill of attained, ex post facto law, retroactive law or any law impairing the obligation of contracts, shall be made."

Second, attention is called to Section 44 of Article 3 of the Constitution of Texas reading, insofar as applicable to this case, as follows:

"The Legislature . . . shall not grant, by appropriation or otherwise, any amount of money out of the Treasury of the State, to any individual on a claim, real or pretended, when the same shall not have been provided for by pre-existing law . . ."

Assuming that Section 16 of the Constitution, above quoted, may be so construed as not to prohibit amendments to or the enactment of retroactive statutes merely providing a *remedy*,

as is indicated in *Caldwell County vs. Harber*, 68 Tex. 321; *City of Rising Star vs. Dill*, 259 S. W. 652; *Ward vs. Hubbard*, 62 Tex. 559; nevertheless, we conclude that such construction would be of no benefit to the claimants in this controversy.

In order for the Legislature to authorize the crediting of taxes due for the current period with an amount equal to the taxes erroneously paid in the past, there must have been a right existing at the time the taxes were paid upon which a valid claim enforceable at law could have been made. It is the opinion of the writer that the provision of Section 13 of said H. B. 89 cannot give any right to any person to have current taxes due, credited with the amount of taxes erroneously paid in the past except insofar as the statute provides a remedy. In other words, if there was no right to recover the taxes by reason of a pre-existing law, then no right exists by reason of Section 13 of said H. B. 89 to have taxes credited in accord with the provisions of said Section, where such taxes were paid prior to the effective date of such Act. The effect of the Act allowing the *credit* of taxes erroneously paid is the same, insofar as constitutional inhibitions are concerned, as the *appropriation of money* for such payment.

We believe that the applicable principles of law for determining whether or not a given taxpayer is entitled to be credited with the amount of excess taxes erroneously paid are laid down in the case of *Austin National Bank vs. Sheppard*, 71 S. W. (2d) 242; *Corsicana Cotton Mills, Inc., vs. Sheppard*, 71 S. W. (2d) 247. We here quote some of the principles of law laid down by Judge Critz in the first of the above cited cases as follows:

"A person who voluntarily pays an illegal tax has no claim for its repayment

"A person who pays an illegal tax under duress has a legal claim for its repayment

"Duress in the payment of an illegal tax may be either express or implied, and the legal duty to refund is the same in both instances

"When the statute provides that the taxpayer who fails to pay the tax shall forfeit his right to do business in the State, and have the courts closed to him, he is not required to take the risk of having his right to resort to the courts disputed and his business injured while the invalidity of the tax is being adjudicated

"In the absence of a specific statute to the contrary the fact that an illegal tax is or is not paid under protest is of no importance"

In the *Corsicana Cotton Mills Case*, *supra*, the Court held that one having voluntarily paid an illegal tax had no right to recover same.

Attention is here called to the fact that the Courts favor placing a prospective construction upon a statute, rather than a retroactive one, especially where the retroactive construction would render the statute unconstitutional.

It occurs to the writers that a remedy was provided by statute, which statute was effective in June, 1933, which gave to one paying taxes erroneously an exclusive method of expressing his protest of the payment of such taxes. This exclusive method was provided by House Bill 11 of the Acts of the Regular Session of the Forty-third Legislature, providing in effect that when demand was made by the head of a State Department upon a taxpayer for taxes which such taxpayer considered illegal, he had the prescribed method of reducing his protest to writing, paying the amount demanded, having it placed in a Suspense Account with the State, and bringing suit within ninety days from the date of filing such protest upon the grounds stated therein to recover the amount so paid. One having failed to so express his protest when he was charged with notice of the existence of such a law is in a poor position to come now to the Comptroller or to the Courts or to the Legislature and show that there was a payment made under duress. We believe therefore that the Comptroller should properly refuse to credit current taxes due with the amount of taxes erroneously paid prior to the enactment of said House Bill 89. If the taxes were not paid under protest, the Comptroller is justified in presuming that there was a voluntary payment, or that not having complied with the statutory method for expressing a protest against an illegal demand under duress, the taxpayer waived his right to urge the proposition that he paid his illegal occupation taxes under duress. But if the taxes were paid under protest, the taxpayer should follow the statutory remedy to completion and procure a refund of the money which has been placed in the Suspense Account for the purpose of refunding such taxes upon determination by the Court that there was actually an erroneous payment.

It is our opinion that the provision in H. B. 11 of the Acts of the Regular Session of the Forty-fourth Legislature, designated "6a," now repealed, had reference solely to taxes erroneously paid during a taxpaying period previous to the effective date of said H. B. 11, which effective date was June 1933, prior to the effective date of H. B. 154 of the Acts of the Regular Session of the Forty-fourth Legislature, and could not, therefore, be construed as giving a right to a refund of any taxes erroneously paid by reason of H. B. 154.

It is our further opinion, and you are so advised, that you would properly refuse to credit current taxes with payments erroneously made upon taxes due under H. B. 154 prior to the effective date of H. B. 89.

Accordingly, the herein quoted conclusion reached by Assistant Attorney General Faulk in his letter opinion of March 9, 1936, is affirmed. Any opinion or statement in any opinion

heretofore rendered by this Department contrary to the views herein expressed is hereby withdrawn.

Yours very truly,

VERNON COE,
Assistant Attorney General.

W. W. HEATH,
Assistant Attorney General.

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

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2986

PWA REGULATIONS—STATE HIGHWAY DEPARTMENT
REGULATIONS—STATUTORY CONSTRUCTION.

1. Where there is an inconsistency between Federal PWA regulations and State regulations, PWA regulations will control to the extent of such inconsistency, conditioned that same be not in violation of prevailing statutes.

2. Article 6674-m, Revised Civil Statutes, providing ninety (90%) per cent partial payment on work done, without defining and classifying "work done", is a general statute permitting such percentage payment on contractor's certified estimates, based on preparatory work necessarily and indispensably performed, pursuant to actual construction, under the terms and specifications of such contract.

OFFICES OF THE ATTORNEY GENERAL,

Austin, Texas, June 11, 1936.

*Hon. Harry Hines, Chairman Highway Commission of Texas,
Austin, Texas.*

ATTENTION: Mr. T. H. Webb, Assistant State Highway Engineer.

DEAR SIR: This will acknowledge receipt of your letter under date June 2, 1936, requesting an opinion of this Department as to whether or not a conflict exists between Item 33 of the Highway Department's Special Provisions and Article A-11 PWA Regulations, and, if so, is it such a conflict as would render Item 33 void, which items are reflected in the contract and specifications awarded on the PWA 8080, Neches River Bridge, and requesting further an opinion as to whether the contractor's estimate covering preliminary work preparatory to actual construction could under the provisions of our statutes be legally paid.

The pertinent portions of the contract specifications relating to the partial payment of estimates reads as follows:

“Chapter A, Paragraph a-11 (a) and (c):

“(a) The contractor shall provide all labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner and the State Director, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 90 per cent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

“(c) Within the first 15 days of each calendar month to the Owner will make partial payment to the contractor for work performed during the preceding calendar month on estimate certified by the contractor, the Owner, and the Government Inspector, except as otherwise provided by law, 10 per cent of each approved estimate shall be retained by the Owner until final completion and acceptance of all work covered by this contract, provided that at any time after 50 per cent of the work covered by this contract has been completed, if progress satisfactory to the Owner and Government Inspector is being made in accordance with the terms of this contract, subsequent approved estimates, will be paid, in full unless otherwise provided in this contract.”

The above paragraphs are quoted from the construction regulations of the Federal Emergency Administration of Public Works Bulletin PWA Form No. 179, dated July 22, 1935, and are a part of the contract covering the construction of this project. Chapter B, Item 33 of the Special Provisions of the State Highway Department reads as follows:

“No payments, either partial or final, are to be made for any material which is to be used for falsework or plant, but payment is to be made only for materials which are left permanently in the finished structure and form a part of it.”

Chapter A, Article A 18 of the PWA Regulations reads as follows:

“Any provisions of this contract in conflict or inconsistent with the regulations of these Regulations, except such provisions as are required by applicable law or regulation, shall be void to the extent of such conflict or inconsistency.”

Your attention is further invited to Article 6674m, Revised Civil Statutes, which reads as follows:

“Said contracts may provide for partial payments to an amount not exceeding (90%) of the value of the work done. Ten per centum of the contract price shall be retained until the entire work has been completed

and accepted, and final payment shall not be made until it is shown that all sums of money due for any labor, materials, or equipment furnished for the purpose of such improvements made under any such contract have been paid."

Your first inquiry concerns itself as to whether a conflict exists between Chapter B, Item 33, Special Provisions, State Highway Department, and Chapter A, Paragraph 11-a, Subsections (a) and (c), PWA Regulations.

Considering the foregoing PWA Regulations, we conclude that Section A of said paragraph simply provides a method and a time of payment to be observed by the contractor. We further conclude that Section C of said paragraph provides the manner and time for partial payment to be made by the Owner to the contractor for expenditures made by the contractor under Section A of said paragraph, and based upon certified estimates of the contractor. Carefully reading and considering the purpose of both sections of said paragraph, we can reach but one conclusion, and that is that the method of partial payment to be made by the Owner to the contractor is specific and unequivocal, and obligatory on the owner. There is no doubt in our minds but that the Federal Governmental Agencies, in drafting PWA Specifications, intended to compel by contract the expenditure of vast sums of money within a limited time by the contractor in payment of preparatory work, indispensable and necessary in the performance of the purposes of such Federal Aid Contract. We are likewise of the opinion that in compelling the contractor to expend such vast sums of money for such classifications of work, that the Federal authorities, in the drafting of Section C of said paragraph, intended and provided that the Owner will make a partial payment to the contractor for such expenditures provided in Section A of said paragraph. This intent and purpose clearly was drafted into Section C of said paragraph, which set a time limitation in which the Owner will make partial payment to the Contractor for work performed during the period reflected in his certified estimate, which must be approved by the Owner and Government Inspector, and, in order to protect the Owner for such partial payments provided in said subsection, permits the Owner to deduct from the total certified estimate ten (10%) per cent and retain the same until completion and acceptance of the project. It may be incidental to the purpose of this opinion to mention that the owner not only is protected with such retentions, but by a bond as required in the letting of said contract. In arriving at the purpose and the intent of PWA regulations, and especially the paragraph supra, we must consider all of the subsections of said paragraph in order to arrive at the true and real intent and especially the extent of its effectiveness. Surely it could not logically be contended that the Federal provisions would compel the contractor to expend vast sums of money in meeting expenses incurred by him in performance of his contracted obligations on a Federal Aid Project and not provide adequate regulations permitting

partial payments to the contractor for work done under and by virtue of such contract, for the period of time and to the extent reflected in his certified estimate. The Federal Government, realizing the tremendous financial obligations imposed on the contractor by Section A of said Regulations, provided in the same paragraph, being Section C thereof, a regulation whereby the contractor will be permitted partial payments for work completed during the preceding calendar month, to the extent of ninety (90%) per cent of the amount reflected in his certified estimate to the owner. To compel a contractor to comply specifically with the provisions of Section A of said paragraph, and deny partial payment to him, would dangerously jeopardize the completion of such Federal Aid Projects. We conclude this in view of the tremendous financial output required of the contractor, as reflected from your letter of inquiry revealing expenditures by the contractor in preparatory work of approximately \$45,512.22. From carefully reading and considering the subsections of said paragraph, we conclude that the PWA regulations, not only intended for the contractor to make such expenditures periodically for preparatory work necessary and indispensable in completing contracted obligations, but provided and intended, by reason of Subsection C of said paragraph for partial payment to be made to him periodically, based upon certified estimate without distinction as to classification of "work done", as distinguishable from preparatory work, necessary and indispensable, done pursuant to specific performance of the contractor's contract and "actual work" done under the terms of said contract.

We conclude, therefore, that the Subsections of said paragraph simply provide that the contractor must timely pay preparatory expenses for work done in the performance of his contract, and that the Owner will make timely partial payments of ninety (90%) per cent of the amount reflected from the contractor's certified estimate. We are not unmindful of the possible contention that partial payment by the Owner may constitute an acceptance of the work reached by such period for which partial payment is made. We have seriously concerned ourselves with this contention, and conclude that partial payment by the Owner under the provisions of the PWA paragraph aforesaid does not legally constitute an acceptance of the work done during such period of partial payment. The contract provides the manner and method whereby the completed job is to be accepted and there can be no other manner of acceptance.

The State Highway Department's regulations, Chapter B, Item 33, provides in substance that no payments, either partial or final, are to be made for any material which is used for falsework or plant, but payment is to be made only for materials which are left permanently in the finished structure and form a part of it. Under this Item of the State's Regulations, preparatory work, or "work done" by the contractor pursuant to performance of his contract, not permanent in its nature and

forming a part of the structure, must be excluded from the certified estimate required for partial payment. We have seen that under and by virtue of PWA Regulations, the contractor is entitled to partial payment for "work done" under and by virtue of his said contract; whereas, under the State Regulations he is not entitled to partial payment, except for materials left permanently in the finished structure and forming a part of it. The conflict, as we view the two Regulations, concerns itself with work done by the contractor which material is not left permanently in the finished structure, but which work is necessary and indispensable in completing said project. The Federal provisions permit partial payment on work performed and done by the contractor which is necessary and indispensable to the performance of the contractor's obligations, and the State Regulations prohibit such partial payment. This conflict is clear and to that extent you are here advised that Section C, Paragraph A-11, Chapter A, PWA Regulations, will control.

The legal effectiveness of said PWA Regulations is determined by a conflict, if any, with existing statutes of this State.

Article 6674-m, Revised Civil Statutes, *Supra*, provides for partial payments to be made to contractors on work done under and by virtue of State contracts. This statute provides that contracts may contain provisions for partial payments to an amount not exceeding ninety (90%) of the value of the work done, and further provides in substance that the owner may retain ten (10%) per cent of such partial payment to this extent the PWA Regulations do not conflict with Article 6674-m, Revised Civil Statutes. It is interesting to note that said Article does not contain a limitation on the character of "work done"; that it does not specifically inhibit partial payments on *preparatory work* pursuant to the actual construction provided in the contract. The statute providing for partial payment concerns itself with "work done," and, in not containing limitations or classifying such work done, makes of it a general statute. The State Highway Department in letting its contract PWA 8080, Neches River Bridge, included therein PWA provisions. Article 6674-m, Revised Civil Statutes, permits partial payments of ninety (90%) per cent of the value of work done, without limitation as to character or classification of "work done." Such a general statute legally permits partial payment on work done, provided the same is work done under and by virtue of said contract. The aforesaid Article, being a general statute permitting partial payments on work done, certainly was intended by the Legislature to include within its purview any and all classifications of work done by the contractor that falls within the classification of necessary and indispensable work done in accomplishing contracted obligations. Such a construction follows the general purpose and intent of the Legislature, who saw fit in its enactment to make it a general statute, applicable to "work done", without limiting or defining the same.

You may, therefore, be advised that the P. W. A. Regulations above set out are not inconsistent with Article 6674-m, Revised Civil Statutes, and partial payments made to the contractor or on preparatory work falling within the test of being necessary and indispensable work, done in specific performance of the contract based upon certified estimate of the contractor, may be legally paid; this for the reasons above stated, and in summary controls over the State Regulations to the extent of the inconsistency above set out and not being inconsistent with prevailing State Law.

Respectfully submitted,

JOHN POPE, JR.

Assistant Attorney General

LEONARD KING,

Assistant Attorney General

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

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2987

GROSS PRODUCTION TAX ON GAS.

1. The residue gas or dry gas which is the gas left after the gasoline has been extracted is subject to the payment of the gross production tax levied upon gas provided for by House Bill No. 547, Acts of the 42nd Legislature, Regular Session, page 111, when sold by the producer, or casinghead plant.

2. The gas produced and saved in paying quantities although used by the producer is subject to the payment of the gross production tax levied upon gas for the reason that the production and the use of such gas would consist of a use of such gas for profit.

OFFICES OF THE ATTORNEY GENERAL,

AUSTIN, TEXAS, June 5, 1936.

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

DEAR SIR: Your letter of April 6, 1936, addressed to Honorable William McCraw, Attorney General of Texas, has been referred to the writer for attention and reply. The pertinent part of your letter reads as follows:

"The producer of casinghead gas sells the wet gas to a casinghead gasoline plant as a rule on a percentage basis, for example, one-third of the casinghead gasoline that may be extracted, some contracts require the plants to return to the producer the revenue received from the sale of the residue gas. The residue gas is the dry gas after the gasoline is taken out.

"The question before me is, must the producer include in the gross receipts the revenue received from the residue gas. Some operators object to paying the tax on the residue, stating that it is a by-product of the casinghead gas.

"Another question which I should appreciate your advising me on is about the gross receipts tax that applies to the gas that is used by the operator."

In reply to the first question propounded to us, we call your attention to Section 1, Subdivision (a) of House Bill No. 547, Acts of the 42nd Legislature, Regular Session, 1931, which reads as follows:

"That from and after the date herein fixed, every person engaging or continuing within this State *in the business of producing and saving in paying quantities*, for sale or for profit, any natural gas, including casinghead gas, from the soil or waters of this State."

Section 3 of said Act further provides that,

"A tax equivalent to two per cent of the market value of the total amount of gas produced and saved within this State, or sold, if imported into this State, at the average market value thereof, as and when produced,"

After a careful consideration of the above quoted sections of this Act and bearing in mind the intent and purpose of the Bill itself, we are of the opinion that where a producer of gas sells the gas so produced to a casinghead gasoline plant under a contract by the terms of which the producer of such gas is to receive a percentage of the casinghead gasoline recovered by such plant, and a percentage of the money realized from the sale of the residue or dry gas, that the original producer would be liable for the payment of the two per cent tax provided for upon the amount realized out of his pro rata share of the casinghead gasoline recovered, and a tax upon his pro rata share of the money realized out of the sale of the residue or dry gas by the casinghead plant. Further, that in the event the residue or dry gas was returned to the original producer of said gas after the casinghead gasoline had been extracted from it, that if the producer should sell such residue or dry gas, that he would be liable for the payment of a two per cent tax on the amount realized out of the sale of said gas, which is to be in addition to the two per cent tax which should be paid on the casinghead gasoline.

In reply to the second question propounded by you, we are of the opinion that in view of Section 1, Subdivision (a) of said Act hereinabove quoted, wherein it is provided that every person engaging in the business of producing and saving in paying quantities "*for sale or for profit any natural gas . . .*" that an operator who produces gas and uses said gas in the furtherance of his own business for example, for lighting purposes, fuel purposes, or to operate machinery located upon his property,

etc., that such use would constitute such a saving of gas in paying quantities as would require the payment of the two per cent tax of the market values of the gas so used, for this would certainly constitute a saving of gas for profit. It is obvious that if the producer did not have the gas available for his use that he would necessarily have to go into the market and purchase such gas for whatever purpose he found its use necessary, and, therefore, the fact that he has produced such gas and has it available for his own use, would not relieve him of the necessity of paying the tax provided for by the Act here under discussion on the gas so produced and used.

Trusting we have satisfactorily answered your inquiry, I am

Yours very truly,

LETCHER D. KING,
Assistant Attorney General.

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

WILLIAM McCRAW,
Attorney General of Texas.

No. 2989

SCHOOLS—TRANSFER OF SCHOLASTICS UNDER RURAL AID—
EFFECT UPON STATUS OF DISTRICT—DE FACTO
CONSOLIDATION TERMINATION OF CONTRACTS
UNDER RURAL AID LAW.

A contract made under the provisions of the Rural Aid Law of Texas and with reference to funds supplied by said law would necessarily terminate with the expiration of law.

The transfer by agreement of trustees of scholastics under the Rural Aid Law does not amount to a de facto consolidation.

In case a transfer of scholastics is made from a school entitled to rural aid to a school not entitled to rural aid the transfer does not effect the amount of rural aid granted to the respective schools.

Transfer of scholastics of rural aid schools may only be made under Section 383 of the Rural Aid Law.

ATTORNEY GENERAL'S DEPARTMENT,

May 22, 1936.

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

DEAR SIR: This will acknowledge receipt of your letter under date of May 4, 1936, and your supplementary letter under date of May 18, 1936, addressed to Attorney General William McCraw, wherein you request a conference opinion upon the following questions which have been rearranged by the writer in such a manner as to be more conveniently answered. Consider-

ing your two letters together we draw therefrom the following information and questions:

"Several complicated situations are arising in connection with Section 18 of the Equalization Law passed by the 44th Legislature which makes it necessary that I call upon you for conference rulings in regard to the matters submitted herein."

Section 18 of the law reads as follows:

"(Transfer of Entire District.) On the agreement of the board of trustees of the districts concerned or on petition signed by a majority of the qualified voters of the district and subject to the approval of the county superintendent and State Superintendent, the trustees of a district which may be unable to maintain a satisfactory school may transfer its entire scholastic enrollment, or any number of grades thereof, to a convenient school of higher rank, and in such event, all of the funds of the district, including the State aid to which the district would otherwise be entitled under the provisions of this Act, or such proportionate part thereof as may be necessary may be used in carrying out said agreement."

Questions:

"First: When a contract is drawn up stating that said contract is made under Section 18 of the Equalization Law, we take it for granted such contract can last no longer than the life of said Equalization Law which is September 1, 1937. Is this correct?

"Second: If all grades are so transferred leaving no school to be taught in the local district, and all per capita apportionment, local maintenance taxes, and salary aid to which the district may be entitled are turned over to the school of higher rank, does such action constitute de facto consolidation?

"Third: If the school so discontinued has a tax rate which does not conform to the requirements of the Equalization Law, what effect would such contract have upon the granting of State aid for the school of higher rank?

"Fourth: Since Section 18 is a part of the Equalization Law and refers to schools participating in the distribution of rural aid as provided in Section 14 of this same law, we take it to be evident that transfer by contract under Section 18 can take place only by those districts which are eligible for rural aid under the provisions of this Act. Is this correct?

"Fifth: District A has 532 scholastics, so that it is ineligible for aid under the terms of Section 2 of this law. It takes in by contract District B with 24 scholastics, and District C with 35 scholastics, thus serving three districts. Does it become eligible for aid because of the clause in Section 2 which reads, 'and consolidated and/or rural high school districts which have an average of not more than 200 scholastics of each original district composing the consolidated and/or rural high school districts unit?' (In above case there would be 591 scholastics and three districts involved.)

"Sixth: In the situation outlined under Question 4, if aid is granted because of consolidation (de facto) would it be legal for the State to also pay High School Tuition on these same pupils? (District A becomes the home district, and teaches all grades, hence, the pupils are not entitled to have tuition paid.)"

In answer to your question number one, the writer desires to call your attention to the fact that the Rural Aid Law of Texas is bi-annually enacted by the Legislature to cover a period of two years, the present Rural Aid Law and Equalization Fund as created and enacted by the Forty-fourth Legislature, governs the disbursement of rural aid assistance for the years 1935-1937. Of course, any contract made by a school district under the terms of this law would be subject to such law and the Rural Aid Law automatically becomes a part of the contract so entered into. The provision which you quote as Section 18 of the Equalization Law is reported in the Rural Aid Law as Section 383. Since, as stated above, the law becomes a part of the contract and this law expires on September 1, 1936, the contracts would of necessity be also terminated. The General Law (Article 2699 R. C. S. 1925) also authorizes the transfer of scholastics upon agreement of trustees but according to the statement found in your letter this Article was not followed but on the contrary Article 383 of the Rural Aid Law was followed, hence we feel that this Article of the General Law has no application to this particular instance.

Passing now to your question number two, we wish to advise that in our opinion the trustees acting under and by authority of Section 383 of the Rural Aid Law do not by such action constitute a consolidated school district de facto. While the writer is not certain as to the exact import of the terms "de facto consolidation" we do not feel that in any sense would such action on the part of the Board constitute a consolidation within the meaning of law. *Drake, et al vs. Yawn, et al*, 248 S. W. 756. The *Drake* case just mentioned holds that the action of the respective school trustees under the terms of Article 2699 which is an Article of similar import as Section 383 of the Rural Aid Law, does not constitute a consolidation in any sense of the word. The statutes of this State are very specific in setting out the method by which certain school districts may be consolidated and these Articles must be strictly followed in order for a consolidation to be valid. We fail to find any statute which authorizes this type of consolidation but feel that to place such a strained construction as called for upon this law would be opening an avenue for evasion of the statutes of this State.

With reference to your question number three, the writer would respectfully call your attention to Section 371 of the Rural Aid Law reading as follows:

"Sec. 371. Tax Levy—No school district shall be eligible to receive aid under the provisions of this Act unless it shall be providing for the annual support of its schools by voting, levying and collecting for the current

year a local maintenance school tax, exclusive of the tax for interest and sinking fund for bonds, of not less than fifty (50) cents on the one hundred dollars (\$100) of property valuation in the entire district, or not less than seventy-five (75) cents, inclusive of the tax for interest and sinking fund for bonds; and providing further that the property valuation shall not be less than said property is valued for State and county purposes. Any school district which shall after October 1, 1935, reduce its existing tax rates, thereby enabling it to participate under this Act, shall not be eligible to receive aid from any of the funds herein provided."

Section 383 is also a pertinent Article in this respect but has been quoted in your letter and referred to therein as Section 18. In view of the expressed terms of these Articles we are of the opinion that transfer of scholastics does not effect the State Aid which has been granted to the school of high rank, if said school of higher rank has a sufficient tax levy as to come within the purview of Section 371, supra. The transfer statutes do not attempt to qualify a school district for rural aid but on the contrary it was clearly the intention of the Legislature that such transfer should not effect the status of the various districts with reference to aid from the Equalization Fund. The transfer statutes above referred to merely authorizes the transfer of scholastics *and the Rural Aid funds which they may otherwise be entitled to* and do not effect the status of the various school districts concerned.

The provisions of Section 383 above quoted do not apply to transfers made by school districts except school districts which are entitled to benefits under the Rural Aid Law. Article 2699, supra, provides as follows:

"Except as herein provided, no part of the school fund apportioned to any district or county shall be transferred to any other district of county provided the districts lying in two or more counties, and situated on the county line, may be consolidated for the support of one or more schools in such consolidated district; and, in such case, the school funds shall be transferred to the county in which the principal school building for such consolidated district is located; *and provided, further, that all the children residing in a school district may be transferred to another district, or to an independent district, upon such terms as may be agreed upon by the trustees of said district interested.*" (Italics ours.)

As it will be noted, this general provision of law carries the same general terms as Section 383, supra. In case of a transfer of the scholastics of any school other than transfers made under the Rural Aid Law, the general Article (Article 2699) is applicable. This Section 383 was enacted presumably to supplement the general law in this respect and to authorize the transfer of scholastics in school districts which were entitled to rural aid. It does not apply to the transfer of scholastics in districts not entitled to the benefit of the Rural Aid Law.

With reference to your question number five, the writer would call your attention to Section 367 of the Rural Aid Law which

has been referred to in your letter as Section 2. Said Section reads as follows:

"Sec. 367. Scholastic Population of District—State aid under the provisions of this Act may be distributed in such a way as to assist all schools of not fewer than twenty (20) scholastics and not more than four hundred (400) scholastics located in districts of not more than five hundred (500) scholastics, and consolidated and/or rural high school districts which have an average of not more than two hundred (200) scholastics of each original district composing the consolidated and/or rural high school districts unit, and all districts composed of entire counties having a scholastic population of less than five thousand (5,000); providing the provisions of this Section shall not apply to any school district containing forty-eight square miles (48) of territory or more, or any district of a length of not less than nine miles, for the purpose of receiving transportation aid. It is expressly understood that the provisions and limitations of this Section shall not apply to industrial aid, vocational aid, and aid for crippled children."

In view of our answers to the above inquiries, we feel it un-
effect that the action of the trustees in transferring an entire
district of scholastics does not constitute a consolidation, we are
of the opinion that the clause "a consolidated and/or Rural High
School Districts which have an average of not more than two
hundred (200) scholastics of each original district composing the
consolidated and/or rural high school districts unit" would not
entitle the school of higher rank to rural aid assistance.

In view of our answers to the above inquiries, we feel it un-
necessary to answer your question number six.

Respectfully submitted,

JOE J. ALSUP,
Assistant Attorney General.

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

WILLIAM MCCRAW,
Attorney General of Texas.

No. 2990

ALIENS—REPORT OF OWNERSHIP OF LAND IN TEXAS.

1. Under the terms of Article 176 of the Revised Civil Statutes, 1925, all aliens owning lands in this State, without distinction as to whether such lands are subject to escheat under the terms of Article 166 et seq., are required to file written report of such ownership, as prescribed by Article 176.

Construing Article 176, Revised Civil Statutes, 1925.

OFFICES OF THE ATTORNEY GENERAL,
Austin, Texas, July 6, 1936.

Hon. Roy D. Jackson, District Attorney, El Paso, Texas.

DEAR SIR: This Department acknowledges receipt of your letter of June 30th, in which you ask certain questions with ref-

erence to Title 5, Revised Civil Statutes, 1925, pertaining to the ownership of land by aliens.

In answer to your first question as to whether certain alleged aliens may legally own and hold real estate in Texas under any condition, you are advised that the answer to this question will depend upon a determination of facts under Articles 166 and 167. Since you do not give us all the facts pertaining to the matter, we are unable to say whether the persons named by you are aliens who are excepted under the provisions of Article 167.

In your second question, you ask to be advised whether aliens who may legally own and hold real estate in Texas are required to file a report and record of ownership as required by Article 176.

This identical question has heretofore been passed upon by this Department in two opinions, copies of which are enclosed herewith. The first opinion is Departmental Opinion No. 2466, dated December 2, 1922, by Honorable Bruce W. Bryant, Assistant Attorney General, and printed at page 513 of the Biennial Report of the Attorney General's Department for 1922-1924, in which it was held that the provisions of the statutes now carried forward as Article 176 do not apply to those aliens whose lands are not subject to escheat under the law.

The next opinion is Departmental Opinion No. 2667, dated February 19, 1927, by Honorable C. W. Trueheart, Assistant Attorney General, and printed at page 402 of the Biennial Report of the Attorney General's Department for 1926-1928, in which it was held that under the terms of Article 176 of the Revised Civil Statutes, 1925, all aliens owning land in this State, without distinction as to whether such lands are subject to escheat under the terms of Article 166 et seq., are required to file a written report of such ownership as prescribed by Article 176. The opinion of 1922 was considered and overruled.

After carefully considering the above conflicting opinions, we have reached the conclusion that the last opinion correctly construes Article 176. In addition to the reasoning set out by Mr. Trueheart in his opinion, we might also call attention to the fact that even construing Articles 167 and 176 as both being a part of the same Act, we find that Article 167 provides that *this title* shall not apply to any *land* now owned in this State by aliens. This Article is clearly an exception or exemption which pertains only to *land*. Article 176 is a statute directed to *all aliens* and is intended as a penalty for those aliens who do not comply with the provisions of same. In short, we see that Article 167 is an *exception or exemption* applying to the *land* owned by aliens, while Article 176 applies to *persons* only, to wit, *all aliens owning lands* in Texas.

In view of the above, you are advised that it is our opinion that Article 176, Revised Civil Statutes, 1925, applies to all aliens owning land in Texas, without distinction as to whether such lands are subject to escheat under the terms of Article 166 et

seq., and all such aliens are required to file a written report of such ownership as prescribed by Article 176.

Yours very truly,

H. GRADY CHANDLER,
Assistant Attorney General.

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

WILLIAM MCCRAW,
Attorney General of Texas.