SCHEDULE XVII.

OFFICIAL OPINIONS.

(The opinions in this Volume have been considered in conference by the members of this Department and approved.)

SUBJECTS OF OPINIONS.

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OPINIONS INTERPRETING POWERS AND DUTIES OF COMMISSIONERS' COURT.

Op. No. 686, Bk. 54, P. 384.

COUNTY COMMISSIONERS—AUTOMOBILE EXPENSES.

County Commissioners are not authorized to purchase and pay for gasoline or other automobile supplies, and present their claims therefor to the commissioners court for audit and allowance, and claims for such supplies furnished for such purpose are not legitimate charges against the county, whether so purchased and paid for by the Commissioner, or sold direct to the county by the dealer.

AUSTIN, TEXAS, August 5, 1920.

Honorable L. G. King, County Attorney, Nacogdoches, Texas.

DEAR SIR: The Attorney General is just in receipt of your inquiry of the 3rd instant, which is as follows:

"I have been asked by our commissioners court whether or not the law permits the county to pay back to the commissioners the money they pay for gasoline while on the road work in the interest of the county; and I have concluded to submit this inquiry to you.

"In other words, when a commissioner is out on his road doing the work required there, would it be legal for him to file an account against the county to pay the same for gasoline while in the performance of such duty? I would thank you for an early reply to this inquiry."

Article 2239 of the Revised Civil Statutes, 1911, among other things, provides:

"Before entering upon the duties of his office, the county judge and each commissioner shall take the oath of office prescribed by the Constitution, and shall also take an oath that he will not be directly or indirectly interested in any contract with, or claim against, the county in which he resides, except such warrants as may issue to him as fees of office."

Subdivision 6 of Article 2341 of the Revised Civil Statutes of 1911, relating to certain powers and duties of the Commissioners' Court. makes it the duty of that court "to audit and settle all accounts against the County and direct their payment."

The case of Knippa vs. Stewart Iron Works (Civ. App.), 66 S. W., 332, was one in which Knippa had advanced certain money to Affleck for the purpose of enabling Affleck to proceed with the construction of a County Jail under a contract made with the Commissioners' Court for that purpose. For the purpose of reimbursing Knippa for the money so advanced by him, Affleck executed an order directing the County Clerk of that County to deliver to Knippa a County warrant issued or to be issued by the County to Affleck as part payment to him by the County under his contract for the erection of the jail. At the time the contract for the erection of the jail was entered into, and continuously until after the completion of the jail, Knippa was a member of the Commissioners' Court of that county. Payment for the jail was made in full by this county except as to the money advanced by Knippa. The Stewart Iron Works brought suit against the County to recover this sum, and Knippa intervened, claiming the right to

have this money paid to him, by reason (1) of the fact that he had advanced this money for the purpose of buying material and paying for labor necessary in the erection of the jail, and which money was actually applied and used for that purpose, and (2) the order for said money, or for the warrant for same, was executed in his favor upon Affleck. Other facts and issues were involved in the case, but it is not necessary to mention them.

The trial court denied the right of Knippa to recover, and he appealed.

The issue on appeal was whether or not Knippa, under the facts, was entitled to recover, and in disposing of the issue, our court of civil appeals says:

"It is seen from the evidence that appellant, George Knippa, was member of the county commissioners court of Uvalde county from the date of the contract between the county and the Stewart Iron Works, and continued as such officer during the entire period of building the jail and until the acceptance of the same by the county. As such commissioner, he was required to take an oath that he would not be directly or indirectly interested in any contract with or claim against the county, except such warrants as might issue to him as fees of office. Article 1535, Revised Statutes. The duties of the county commissioners court, of which he was a member, were to provide and keep in repair court houses, jails, etc., and to audit and settle all accounts against the county, and direct their payment. Subdivisions 7, 8, Art. 1557, p. 522, Rev. St. The subject matter of this suit is $1,000 due from Uvalde County, the commissioners court of which appellant was a member at the time he claims he was, by contract with Affleck, entitled to receive said sum of money from the county. However honest appellant may have been in his intentions, the contract by virtue of which he claims that he is entitled to the money is in derogation of the statute, and contrary to the spirit, if not the letter, of his official oath. His pecuniary interest would have been directly opposes to the interest of the county, in the event of a rejection of the work contracted for, and his private pecuniary interest might have induced him to act in violation of his duty as county commissioner. Contracts in their nature calculated to influence the action of public officers, and the effect of which is to influence them one way or the other, are against public policy and void. Robinson vs. Patterson, 71 Mich., 149, 39 N. W., 24, and authorities cited; Meguire vs. Corwine, 101 U. S., 108, 25 L. Ed., 899; Rigby vs. State, 27 Tex. App, 55, 10 S. W., 769; Brown vs. Bank, 137 Ind., 655, 37 N. E., 158, 24 L. R. A., 206. Therefore, in view of this well established principle of law, when applied to the undisputed facts, we are of the opinion that the court did not err in peremptorily instructing the jury to return a verdict against appellant. The judgment is affirmed."

The holding in this case could not have been otherwise, on principle, than as here stated if the material and labor in question had been paid for directly by Knippa and his account therefor presented to the Commissioners' Court for audit and payment. There may be a great disparity between the amount of money involved in this case and the amount represented by the transactions referred to in your letter, but it must be readily conceded that this would not alter the principle involved, nor justify a conclusion different from that announced in the Knippa case.

In this connection, your attention is called to Art. 376 of the Penal Code of this State, which makes it a penal offense for any officer of any county in this State to be pecuniarily interested in any bid, pro-

posal, contract, purchase or sale to or with the county. In discussing this statute, our court of criminal appeals, in the case of Rigby vs. State, 27 Cr. App. 55, 10 S. W., 760, among other things, says:

"Our construction of the statute is that it inhibits every officer of a county, city or town from selling to, or purchasing from, such corporation (county, city or town) any property whatever. This construction does not, we think, do violence to the language of the statute and is the only construction which will accord with what we believe to be the intent and purpose of the statute."

It can hardly be conceived how a county commissioner can, from his private funds, purchase material and supplies for the use and benefit of the county, thereby creating an indebtedness owing by the county to him, be the amount much or little, and then be and remain the disinterested and impartial auditor that he ought to be when his claim for reimbursement comes before the commissioners' court for audit and allowance, or rejection, as provided by Art. 2241 of our Revised Civil Statutes hereinbefore referred to; in fact, judged by the history and common knowledge of human nature, such a condition is not within the realm of reason.

Moreover, in the case of Harris vs. Hammond (Civ. App.) 203 S. W., 445, paragraph 6, in passing upon this exact question as it relates to the sheriff's office, our court of civil appeals, says:

"By the sixth assignment of error appellant complains of the judgment of the trial court allowing defendant credit, as necessary expense incurred in the conduct of his office, the sum of $1,158.85 paid for gasoline and repairs for automobiles owned and used by defendant in performing the duties of his office. The evidence shows that these automobiles were used by the defendant to some extent in attending to his private business and social affairs, but the greater portion of their use was in performing the duties of his office. There is no evidence showing what portion of the amount claimed was expended for gasoline for the automobiles when they were used in the performance of the duties of the office. It goes without saying that defendant was not entitled to credit for the expense of operating the automobiles for his private benefit or pleasure. We are further of opinion that, even when he used the automobiles in performing the duties of his office, the expense of their operation should not be regarded as expense necessarily incurred in the conduct of the office. It would hardly be contended that a sheriff could charge his office with food for his horse or the upkeep and repairs of his buggy, though he often uses both in carrying on the business of his office, and there can be no difference in this respect between the food for a horse and care and repairs of a buggy and the expense of operating an automobile. We think this assignment should be sustained."

Other decisions and statutes of this State to the same general purport and effect, especially with reference to other state, county and municipal officers, might be cited and quoted, but this is not regarded as necessary. It is axiomatic that public funds can be lawfully expended only for the purposes, to the extent and in the manner prescribed by law, and in the absence of a statute authorizing a particular expenditure of public funds, such expenditure should be studiously avoided; and that every officer should faithfully eschew every transaction respecting public finance that bears even the semblance of doubtful authority ought to go without saying.

We are of the opinion, therefore, and you are so advised, that it is not proper for a county commissioner to purchase and pay for gasoline or other automobile supplies used by him in the discharge of his official duties and present his account for same to the commissioners' court for audit and payment; also, that such an account is not a legitimate charge against the county whether such supplies be purchased and paid for by the commissioner in the manner stated, or be furnished and charged to the county for that purpose by the dealer direct.

Yours very truly,
W. W. CAVES,
Assistant Attorney General.

Op. No. 2033, Bk. 53, P. 341.

STREETS AND HIGHWAYS—CITIES AND TOWNS—COMMISSIONERS COURT—SCHOOLS AND SCHOOL DISTRICTS—SUFFRAGE AND ELECTION —COUNTY JUDGE—FEES OF OFFICE.

(1) The commissioners court may, with the consent of the city governing body, pave the courthouse square and streets leading therefrom and connecting with the county public roads...... ....
Opinions of Attorney General, 1914-16, p. 728,—Opinions of Attorney general 1916-18-720.—Vernon's Sayles Revised statutes, Article 854, 1049, 224, 6860, 6862.

(2) A qualified voter in a county would be entitled to vote in a general election for school trustees for the county, although he has not resided in the voting precinct in which he offers to vote for six months prior to th election.................. ....
Opinions of Attorney General, 1914-16, p. 212,—Vernon's Sayles' Revised Statutes, 1911, Article 2939, Article 2814, Revised Statutes, 1911.—Article 2959, Revised Statutes, 1911.

(3) The commissioners court cannot contract with the county judge to pay him for services rendered in addition to the fees of office and his ex officio salary—.
Vernon's Sayles Revised Statutes, Article 2239.

AUSTIN, TEXAS, April 11, 1919.

Honorable J. E. Wilfong, County Attorney, Haskell, Texas.

DEAR SIR: We have your letter of April 7th, in which you make the following inquiries:

First—"The town of Haskell is an incorporated town. Can the county commissioners court levy a tax upon all taxable property within the county in order to raise funds to pave the court house square and all streets leading from the court house square connecting with the public roads of the county? And can the funds derived be used to pave said streets without any assistance from the city?"

Second—"How long must a voter reside in a common school district in order that he may be a qualified voter for common school trustee?"

Third—"Can the commissioners court contract with the county judge to take (fill out and prepare all papers necessary) drouth applications under the recent drouth relief act and pay him, out of the drouth relief fund, or out of any fund of the county, the sum of 50 cents for each application taken?"

In reply to your inquiries I call your attention to Article 854, Vernon's Sayles Revised Statutes, which vests exclusive control over "streets, alleys and public grounds and highways of the city" in the city.

By reading Vernon's Sayles Civil Statutes, Articles 2241, 6860 and 6862 you will find that the control and management of public highways is vested in the county commissioners court. It might appear from a reading of these several Articles that there is a conflict of jurisdiction between cities and counties in the control of streets and highways. I will call your attention, however, to the fact that in Article 854 exclusive control of cities relates only to such streets and highways as are in the city.

Wherever this question has arisen the word "streets" as herein used is made to refer to those highways that are within the corporate limits of a city; and the word "roads" is made to refer to those highways that are outside of a city and are rural or suburban in their nature.

This distinction is clearly made in the case of Williams et al. vs. Carroll, 182 S. W., 29, also in the case of State vs. Jones, 18 Texas, 874.

In other States the same distinction between streets and roads has been made. See:

In re Woolsey, 95 New York, 135;
Sebolt vs. Carter, 31 Ind., 355;
Sachs vs. City of Sioux, 80 N. W., 336;
Osborne vs. Meclinberg County Commissioners, 83 N. Carolina, 400;
Carter vs. City of Rahway, 55 N. Jersey Law, 177;
Breace vs. New York Central Ry. Co., 27 New York, 269.

By this use of the two respective words there can be no conflict thus far between the respective jurisdiction of cities and towns and counties.

Article 1049, Vernon's Sayles Civil Statutes, has this provision in it:

"......provided, that with the consent of the board of aldermen, where streets are a continuation of public roads, the commissioners court shall have power to construct bridges and other improvements thereon, which facilitate the practicability of travel on said streets."

Article 8, Section 9 of the Constitution, among other things, provides that:

"......No county, city or town shall levy . . for the erection of public buildings, streets, sewers, waterworks and other permanent improvements, tax to exceed 25 cents on the 100 dollars valuation in any one year,"

clearly indicating where the county has authority to do so, it may improve such streets as the county commissioners may determine.

Article 1049, above cited, gives them authority to make certain improvements within the city limits after having obtained the consent of the governing body of the city. These improvements are of city streets which are the continuation of public roads.

I would therefore advise you that the county commissioners may levy a special tax and pay the entire cost of the pavements of such portions of the Court House square within an incorporated town or

city as are used for highway purposes, and the streets leading therefrom and connecting with the county roads, provided they have first obtained the consent of the governing body of the city to do so.

Replying to your second question I will quote verbatim an opinion given out by this department in answer to a similar question, on May 10, 1915, as found on page 212 of Opinions of Attorney General of Texas, 1914-16:

"Article 2939, R. S. 1911, provides, in part, as follows, to-wit:

" '.....in any election held only in a subdivision of a county for the purpose of determining any local question or proposition affecting only such subdivision of the county, then, in addition to the foregoing qualifications, the voter must have resided in said subdivision of the county for six months next preceding such election.'

"In an opinion, formerly rendered by this Department, this section of the law was construed as follows:

" 'In an election held in any subdivision or designated precinct of a county to determine a local question, a person must have resided within the particular subdivision of the county or precinct for six months before he will be entitled to vote. If, however, the election is general for the county, it is not necessary that he shall have resided within the precinct for six months, but he must have resided in the county for six months preceding the election.'

"We think the latter part of the above paragraph is a direct answer to your inquiry, for the reason that Article 2818, R. S. 1911, provides that 'on the first Saturday in April of each year the qualified voters of each school district, at a school district meeting for that purpose, shall elect three trustees for said district, who shall enter upon the discharge of their duties on the first of May next following. . . . The election above provided for is a school trustees election to be held in each county throughout the State, and the election is, therefore, general for the entire county. Article 2959, R. S. 1911, deals with the question of a voter's change from one voting precinct to another, and provides, in part, as follows:

" 'If a citizen, after receiving his poll tax receipt or certificate of exemption, removes to another county or to another precinct in the same county he may vote at an election in the precinct of his new residence in such other county or precinct by presenting his poll tax receipt or his certificate of exemption or his written affidavit of its loss to the precinct judges of election, and stating in such affidavit where he paid such poll tax or received such certificate of exemption, and by making oath that he is the identical person described in such poll tax receipt or certificate of exemption, and that he then resides in the precinct where he offers to vote and has resided for the last six months in the district or county in which he offers to vote and twelve months in the State . .'

"In the case of Hendricks vs. State, 49 S. W., 705, it was held that a school trustee is a county officer, and we think all legally qualified voters of the county are entitled to vote for all county officers, including school trustees, in the election precinct where they live, regardless of the fact whether they have lived in the particular school district in which they offer to vote six months prior to such election.

"You are therefore advised that a qualified voter in the county would be entitled to vote in a general election for school trustees for the county, even though he may not be a resident of the school district in which he offers to vote for six months prior to the election."

In reply to your third inquiry I will refer you to Article 2239, Vernon's Sayles' Civil Statutes, which reads as follows:

"Before entering upon the duties of his office, the county judge and each commissioner shall take the oath of office prescribed by the Constitution, and shall also take an oath that he will not be directly or indirectly interested in any contract with, or claim against, the county in

which he resides, except such warrants as may issue to him as fees of office, which oath shall be in writing and taken before some officer authorized to administer oaths, and together with the certificate of the officer who administered the same, shall be filed and recorded in the office of the clerk of the county court in a book to be provided for that purpose; and each commissioner shall execute a bond, with two or more good and sufficient sureties, to be approved by the judge of the county court of his county, in the sum of three thousand dollars, payable to the treasurer of his county, conditioned for the faithful performance of the duties of his office."

You will observe that this Article prescribes that the county judge and each commissioner shall not be "directly or indirectly interested in any contract with, or claim against, the county in which he resides." The law fixes the fees of a county judge and in certain contingencies authorizes the county judge to receive a certain ex officio salary. These fees and this ex-officio salary are supposed to pay him for all his duties and he is not authorized, in fact he is specifically forbidden, to make any contract with the county, directly or indirectly, to receive any other fees, salary or emoluments whatever, but is supposed to perform all duties incident to his office, for such fees and for such ex officio salary.

In the case of Jeff Davis County vs. Davis, et al., 192 S. W., 291, a question similar to this was before the Court of Civil Appeals, sitting at El Paso.

In this case the Commissioners' Court of Jeff Davis County had paid to the Sheriff certain moneys for the performance of duties, for which no fees were provided in the fee bill. The sheriff of this county was paid an ex officio salary as provided in the statute, and the Court held, in deciding this case, that this ex officio salary was to pay him for all other services performed, except those for which specific fees were provided in the fee bill, and that the payment of any other moneys to the Sheriff, by the Court, was illegal and void; and further held that the sheriff was liable to refund same to the county.

I therefore advise you that the county commissioners can not contract with the county judge to sell out and prepare the necessary papers in drouth relief applications and pay him therefor, either out of the drouth relief fund or out of any county fund, the sum of fifty cents, or any other amount, for each application taken.

Yours very truly,

JOHN MAXWELL,
Assistant Attorney General.

Op. No. 1949, Bk. 51, P. 380.

COMMISSIONERS COURT—DEBTS.

A commissioners court cannot lawfully enter into a contract creating a debt against the county to be paid in future years without first providing for the levy of a tax sufficient to pay the interest and create a sinking fund to discharge the debt at maturity. Constitution Section 7, Article 11.

AUSTIN, TEXAS, October 14, 1918.

Hon. Giles L. Avriett, County Auditor, Cameron, Texas.

DEAR SIR: You submit for an opinion thereon by this department

a contract entered into by your Commissioners Court with Milam County Abstract Company for the installation of a block map system. The contract provides for the installation of such system on the part of the abstract company for a consideration of nine thousand dollars to be paid as follows:

Three thousand dollars upon the completion of the work, and the balance in two equal installments due in one and two years from the completion of the system, with the interest. The system is to be maintained by the abstract company for a period of ten years for a consideration of fifty dollars per month, said system to be completed within eighteen months of the date of the contract, which is June 16, A. D., 1917. There is no provision made by the Commissioners Court for the levying of the tax to meet the payments demanded by this contract.

You desire an opinion from this department on the legality of such contract.

The Constitution of this State in Section 7, Article 11, reads in part as follows:

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

"Debt" as used in this section has been defined by the courts of this State as follows:

> "Any pecuniary obligation imposed by contract, except such as were, at the date of the contract, within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year, or out of some fund then within the immediate control of the corporation. McNeal v. City of Waco, 89 Tex. 83, 33 S. W. 322."

It appears from the contract that no payments were to be made thereon until after the completion thereof, which was to be within eighteen months. Therefore each payment under the contract was postponed beyond the year in which the same was entered into. To our minds this brings the contract clearly within the above quoted provision of the Constitution and definition of "debt" by the Supreme Court of this State, and therefore such contract is illegal and void.

Brazeale vs. Strength, County Judge, 196 S. W., 247;
Rogers National Bank vs. Marion County, 181 S. W., 884;
Ault vs. Hill County, 116 S. W. 359;
City of Terrell vs Dessaint, 71 Texas 770.

In Brazeale vs. Strength, above cited, an injunction was sought to prohibit the Commissioners Court from carrying out an order made by that court making an appropriation sufficient to build the necessary number of dipping vats to carry on the work of tick eradication. The injunction was sought upon the ground that the expense to be incurred would create a debt against the county for the reason that such expense would exceed the amount of available funds on hand for the current year and would therefore violate Section 7, Article 11,

of the Constitution, a portion of which is quoted above. The court held that if such expense when incurred would create a debt against a county within the meaning of this provision of the Constitution that the contention should be sustained, for it appears that the only provision made for paying such debt was that made for paying ordinary expenses of the county. The court held that although the testimony showed that the current revenues of Harrison County would be insufficient to pay ordinary expenses already incurred, and which was contemplated would be incurred, yet this order was not invalid for the reason that at the time same was entered and at the time the judgment appealed from was rendered the county had on hand sufficient funds to meet the expenses of building the vats and dipping the cattle and all ordinary expenses theretofore incurred by the county, the court saying:

"We have not found and have not been referred to anything in the law which required the commissioners court to give to one contemplated ordinary expense precedence over another where the current funds of the county were not sufficient to pay both."

In other words, the court held that an ordinary expense incurred by the Commissioners Court where there were sufficient funds on hand to meet the same would not be invalid although such expenditure taken together with other expenditures from the ordinary fund would more than exhaust that fund during the current year.

In the case of Rogers National Bank vs. Marion County, above cited, the Commissioners Court purchased certain lands, executing in payment therefor promissory notes due and payable in future years bearing interest from date, making no provision for the levying of a tax to pay the interest and create a sinking fund as is required by the article of the Constitution under discussion.

Appellants in this case sought to surround this constitutional provision by an allegation to the effect that the levy of the legal rate for general purposes was amply sufficient to produce and did produce revenue enough to pay all current debts and expenses and to pay the warrant sued on at maturity. The court said that this allegation showed nothing more than that the warrants were to be paid out of the county general fund for the year 1915 and that the fund was sufficient for the purpose. The court then said:

"That the 'provision' alleged to have been so made was not such as the Constitution required to be made was in effect settled by the Supreme Court in City of Terrell vs. Dessaint, 71 Tex. 770, 9 S. W. 593. In that case Dessaint recovered on a promissory note made by the city of Terrell, payable two years after its date 'out of the tax of one-fourth of one per cent collected annually for general purposes.' The note was for part of the purchase price of material for extending waterworks. Dessaint claimed that the debt it evidenced was current expenses of the city, and, being chargeable against the current expense fund, was not within the purview of the inhibition in the part of Section 7 of the Constitution set out above. In disposing of the contention Judge Gaines said:

"'We think that a debt for current expenses in order to be valid without a compliance with the constitutional and statutory requirements to which we have referred must run concurrently with current resources for such purposes, and that such a debt cannot be created without such compliance, which matures at such a time as would make it a charge

upon the future resources of the city. It may not be easy to define accurately what are the current expenses of a municipality. But we may ask, if a city can create a debt of $1,500 for materials to extend its waterworks and make it payable with interest one and two years after date, why may it not create an indebtedness for a larger sum for any public improvement which it has the power to construct, and make it payable at a longer period? It is clear to us that if this were permitted the provisions of our Constitution and statutes which limit the power and regulate the manner of the creation of municipal indebtedness would be entirely nugatory.'

"We are of the opinion, therefore, it did not appear from the allegations in the petition that provision was made at the time it was created for the payment of the debt evdenced by the warrant, and hence that the petition failed to show appellant to be entitled to recover thereon."

We are therefore of the opinion that such a contract was illegal and could not be enforced.

What is said above disposed of the entire matter without reference to that portion of the contract providing for a continuation of the block map system for ten years for a consideration of fifty dollars per month. However, we believe this provision of the contract is non-enforceable for the reason that the present commissioners court thereby undertakes to bind their successors in dealing with the affairs of the public.

In 23 American and English Encyc. of Law, 371. we find the following:

"It has been held, however, that an officer acting on behalf of a municipal corporation may make a contract which is to run beyond the probable limitation of his official tenure, provided such contract does not attempt to bind the corporation to the exclusion of the right to succeeding officers to deal with the affairs of the public, or to deprive the corporation of the right to take advantage of the varying circumstances and situations of the public good."

The Commissioners Court in office at any time might contract for a continuation of a block map system already in existence, but such contract or agreement on the part of the Commissioners Court could not bind their successors in office to a continuation of same.

Yours very truly,

C. W. TAYLOR.
Assistant Attorney General.

Op. No. 2077, Bk. 53, P. 48.

CONSTITUTIONAL LAW—INVESTMENT OF PERMANENT SCHOOL FUND.

The commissioners court is authorized to invest the proceeds derived from the sale of lands belonging to the school fund of the county in road bonds issued by that county.

Section 6, Art. 7, Tex. Const.

Article 5402, V. S. C. Statutes, 1918 Supplement.

AUSTIN, TEXAS, May 30, 1919.

Hon. Henry G. Russell, County Attorney, Barstow, Texas.

DEAR SIR: I have your letter of May 26, addressed to the Attorney

General, wherein you state that the lands belonging to the county fund of Ward County were sold years ago, recently the purchaser discharged his notes and this fund is on hand. The county of Ward has some unsold road bonds issued by it and you then propound to this Department the following question:

"Can the commissioners court of Ward County invest its permanent school fund in county road bonds?"

In reply your attention is directed to that part of Section 6, of Article 7 of the Texas Constitution, which reads as follows:

"Said lands and the proceeds thereof, when sold, shall be held by said counties alone as a trust for the benefit of public schools therein; said proceeds to be invested in bonds of the United States, the State of Texas, or counties in said States, or in such other securities, and under such restrictions as may be prescribed by law; and the counties shall be responsible for all investments; the interest thereon and other revenue, except the principal, shall be available fund."

The Legislature, in view of the above constitutional provisions, enacted Article 5402 Vernon's Sayles Civil Statutes, which read as follows:

"Each county may sell or dispose of the lands granted to it for educational purposes in such manner as may be provided by the commissioners court of such county; and the proceeds of any such sale shall be invested in bonds of the State of Texas, or of the United States, and held by such county alone as a trust for the benefit of public free schools therein, only the interest thereon to be used and expended annually."

In 1914, while the above statute was still in effect, the Court of Civil Appeals at Fort Worth, in the case of Comanche County, et al. vs. Burks, et al., reported in 166 S. W., 470, had before it a question relative to the investment of the permanent school funds derived from the sale of school lands belonging to Comanche County. The commissioners court of Comanche County apparently had used about $12,000.00 of the permanent school fund of that county derived from the sale of the county school land for general county purposes and had issued in a formal way what was termed "bonds of Comanche County" at six per cent interest. The Court. speaking through Chief Justice Conner, said:

"While the bonds so issued are doubtless invalid, as such, for want of any authority for their issuance * * * it seems more than probable that, in construing their authority to invest the proceeds 'in bonds of the United States, the State of Texas, or counties in said State,' said court mistakenly concluded that the investment could be made in 'bonds of Comananche County' as well as other counties. Of course, if the bonds so issued could be upheld as authorized under the terms of the Constitution and by many legislative acts, then Comanche County would concededly be responsible, not only for the several sums so invested, but also for the interest at the rate therein specified."

It will be observed that in enacting Article 5402, quoted above, the Legislature did not take full advantage of that provision of the Constitution which we have hereinabove quoted, but limited the invest-

ment of the proceeds derived from the sale of the county's school lands to bonds of the State of Texas, or of the United States. It is doubtful, therefore, if the commissioners court, under the provisions of Article 5402 above quoted, had the authority to invest the permanent school funds of the county in valid bonds of the county. The bonds issued by Comanche County, in which the proceeds of the permanent school funds of that county were invested, were invalid, for the reason that the commissioners court had no authority to issue such bonds.

As stated, the above decision of our Court of Civil Appeals at Fort Worth was handed down in 1914. When the Legislature convened at its next biennial term, said Article 5402 quoted above was amended, (see Chapter 136, Acts of the Thirty-fourth Legislature, passed at its regular session) so as to hereafter read as follows:

"Each county may sell or dispose of the lands granted to it for educational purposes in such manner as may be provided by the commissioners court of such county, and the proceeds of any such sale shall be invested in bonds of the United States, the State of Texas, the bonds of the counties of the State, and the independent or common school districts, road precinct, drainage, irrigation, navigation and levee districts of said State, and the bonds of incorporated cities and towns, and the bonds of road precincts of any county of Texas, and the bonds of drainage, irrigation, navigation and levee districts of any county or counties of Texas; 'And held by such county alone as a trust for the benefit of public free schools therein, only the interest thereon to be used and expended annually.' "

It will be observed from a reading of Article 5402, as amended, that the commissioners court may invest the proceeds derived from the sale of the county's school lands not only in the bonds of the United States and the State of Texas, but also in "the bonds of the counties of the State, and the independent or common school districts, road precinct, drainage, irrigation, navigation and levee districts of said State, and the bonds of incorporated cities and towns, and the bonds of road precincts of any county in Texas, and the bonds of drainage, irrigation, navigation and levee districts of any county or counties of Texas." It will also be observed that the commissioners court, under the provisions of said Article 5402 as amended, may invest the permanent school fund of the county in the bonds "of any county or counties of Texas." This language can only be construed to mean that the commissioners court can invest the permanent school funds of the county in bonds of any county or counties of Texas, including the bonds of their own county. We again direct attention to a part of that provision of the Constitution hereinabove quoted which provides that "said proceeds to be invested in bonds of the United States, the State of Texas, or counties in said State, or in such other securities and under such restrictions as may be prescribed by law." It is, therefore, clearly evident that the commissioners court may invest its permanent school fund in such security as may be prescribed by law, and Article 5402, as amended, states in detail the kind of securities in which the permanent school fund of the county may be invested, including the bonds of any county or counties of Texas.

You are, therefore, respectfully advised that the commissioners court of Ward County may invest the proceeds derived from the sale of the

lands belonging to the school fund of Ward County in road bonds issued by Ward County.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 1961, Bk. 51, P. 438.

"PLAT BOOK SYSTEM"—AUTHORITY OF COMMISSIONERS' COURT TO CONTRACT FOR SUCH A SYSTEM.

1. A commissioners court has no authority to contract to pay draftsmen, as compensation for their services in making a "plat book system" for the county, all delinquent taxes collected within a given time.
2. Claims or debts against a county must be registered in three classes (Art. 1433, R. S.), must be numbered in the order presented (Art. 1436, R. S.), and the claims in each class must be paid in the order registered.
3. Funds received by the county treasurer must be classed and paid out as directed in Article 1438, R. S.
4. To authorize delinquent taxes collected within a certain time to be paid to draftsmen for their services in making a "plat book system" for the county would be equivalent to placing the claims of such persons ahead of other claims, which, under the statute, might have preference.
5. The making of a "plat book system" for a county is a county affair, and must be paid for out of county funds (Art. 7700) and paid in its proper order as directed in Article 1433, Article 1436 and Article 1438, Revised Statutes.
6. Delinquent maintenance or bond tax of a school district when collected becomes the property of the district, and not of the county, and the commissioners court has no authority to apply the same to the payment of a county claim (Art. 7700). A claim for services in preparing a "plat book system" for the county is a county claim, and cannot be paid from the funds of a school district.
7. Under the provisions of Chapter 141, Acts of the Regular Session of the Thirty-fifth Legislature, if a contract involves the expenditure of $2,000 or more, it must be let on competitive bids and notice of the time and place and when and where such contract is to be let must be published in some newspaper published in the county for two weeks prior to the time set for letting the contract.

AUSTIN, TEXAS, January 8, 1919.

Hon. J. H. Rosser, County Superintendent, Crockett, Texas.

DEAR SIR: We have a letter from you which is in part as follows:

"The commissioners court of this county have contracted with draftsmen to get up what they call the 'plat book system' to expedite the collection of delinquent taxes. It seems that the court agreed to pay for the work by giving to the workmen all delinquent taxes that are collected subsequent to the time the work began.

"Now a great deal of this property, in fact nearly all of it, owes considerable sums to the several school districts in which it is situated. The rural districts voted building bonds and maintenance taxes, and depend for their well being upon the disposition made of taxes derived from the property located within their bounds."

You wish to know whether the Commissioners' Court had authority to make such a contract and especially whether taxes due to school districts could be used for such a purpose.

It is difficult to make accurate reply to your letter, because we are not advised what is meant by the "plot book system."

If by this term is meant a delinquent tax record, then, in the opinion of this department, the Commissioners' Court did not have the authority to make such a contract. By the terms of Chapter 147 of the printed General Laws of the Regular Session, Thirty-fourth Legislature, commonly known as house bill number 40, the duty of making the delinquent tax record is imposed upon the tax collector. This duty is made mandatory on his part. Definite compensation is provided to the tax collector in the act for the performance of such duty and the commissioners' court would have no right or authority to employ anyone else to perform the work, and no right or authority to pay for such work any compensation except that provided in the Act.

If by the term "plot book system" is meant a system of indexing, then the commissioners' court would have no right or authority to make such a contract, because the duty of properly indexing county records is placed upon the county clerk by statute. See Tarrant County vs. Rogers, et al., 125 S. W., 592; Tarrant County vs. Butler, et al.. 80 S. W., 656.

Aside from these views, however, we think the commissioners' court would have no right or authority to contract with draftsmen to make a "plot book system" for a consideration of "all delinquent taxes that are collected subsequent to the time the work began." In support of our conclusion on this subject we call your attention to the decision of the Court of Civil Appeals in the case of Stringer vs. Franklin County, 123 S. W., 1172, from which we make an extended quotation, clearly setting forth the views of the Court on a similar subject:

"The compensation allowed by this contract awards to the appellants for their services the right to themselves collect and retain all that portion of the taxes shown on those delinquent lists to belong to the county. Such a proceeding was not only an attempted transfer of the official duty of the tax collector in collecting delinquent taxes, but it was an effort to barter to private individuals the county's sources of revenue. Neither of these could the commissioners court do. . . . .

"The law has not only provided certain methods for collecting the revenues paid in taxes, but has formulated a well-balanced system for their disbursement. All taxes, whether current or delinquent, are first to be paid to the tax collector, and by him, at certain stated periods, paid over to the treasurer, and by the latter paid out upon the proper orders of these designated by law. The system was devised and is adhered to for the purpose of maintaining an orderly and economical administration of the fiscal department of the county government, and to furnish a check against unwise and corrupt practice by those intrusted with the custody and expenditure of the public funds. When collected, the revenues of a county are divided by law into specific funds, which are to be expended in the payment of claims according to their classification with reference to such division. There are what are called the general county fund, the road and bridge fund, where a county has a bonded indebtedness there is also an interest and sinking fund. In settlements between the

collecting and disbursing officers of the county, and in the reports that are to be made to the auditing and inspecting departments, the distinction between these funds is required to be observed. Each claim against the county must be paid out of that fund to whose class it properly belongs. It is true that the commissioners court may, in some instances, transfer money from one fund to another; but the law contemplates that this shall be done before money standing to the credit of one fund shall be applied to the payment of claims forming a charge against another. Claims against a county are required by law to be paid in the order in which they are presented, and for that purpose the treasurer is required to keep a book in which all claims allowed shall be registered as presented. If the county commissioners court can be permitted to dispose of its revenues in advance of their collection in the manner attempted in this instance, they can easily use that method as a subterfuge for giving preference to one claimholder over another. If they may contract to pay for the preparation of a delinquent tax record by such an agreement, they can also contract in the same way to pay for bridges and other public improvements; in fact, may settle any debt by the same method. It requires but little reflection to discover the confusion that would inevitably result from the adoption of such a system. We think the commissioners court of Franklin County were without authority to make the agreement empowering the appellants to collect and retain the delinquent taxes due the county. While possessing the authority to fix the compensation which appellants might receive, to be paid out of taxes after their collection, it could not assign to them, in advance of their collection, the taxes due from any particular class of individuals, or for any particular years."

A contract of this kind is a county matter and according to the provisions of Article 1433, R. S., all claims against a county shall be registered in three classes. According to the provisions of Article 1436 R. S., such claims shall be numbered in the order presented, and according to the provisions of Article 1437, R. S., the treasurer shall pay off the claims in each class in the order in which they are registered. According to the provisions of Article 1438, R. S., the funds received by the county treasurer shall also be classed and shall be paid out in the manner directed therein.

Your Commissioners Court, therefore, had no right to authorize the entire amount of delinquent taxes collected to be paid to the persons preparing the "plot book system," because such action would be equivalent to placing the claims of such persons for compensation ahead of other claims, which, under the statutes, have preference.

The making of such a "platt book system" as referred to by you in your letter is evidently a system for the county, and we think the funds of a school district could not legally be used to pay for such work.

If it is claimed that the "plot book system" is the system authorized by the terms of Article 7700, then we call your attention to the following provisions of said Article:

"Provided, that the cost of making said survey and plats shall be defrayed by the county in which said property is situated, and of which the said commissioners' court ordered the said surveys and plat made; provided, that the cost of any map of a town or city shall be paid by such town or city when ordered by such town or city."

We likewise call your attention to the provisions of Chapter 141, Acts of the Regular Session, Thirty-fifth Legislature. If this con-

tract involves the expenditure or payment of two thousand dollars or more out of the funds of the county, the same should have been submitted "to competitive bids," and notice of the time and place and when and where such contract was to be let should have been "published in some newspaper, published in said county......for two weeks prior to the time for letting said contract."

Yours very truly,

JOHN C. WALL,
Assistant Attorney General.

Op. No. 2050, Bk. 52, P. 422.

COMMISSIONERS' COURTS—PURCHASES—COMPETITIVE BIDS.

In cases of emergency, supplies and material for the use of the county, including stationery, books, blanks, records and other supplies for the county officers to an amount not in excess of $50, may be purchased upon a requisition to be approved by the commissioners' court without advertising for bids.

Articles 1479 and 1480, Revised Civil Statutes.

Chapter 141 Acts of the Thirty-fifth Legislature passed at its Regular Session.

AUSTIN, TEXAS, April 24, 1919.

Honorable Jno. Sutherland, County Auditor, Marlin, Texas.

DEAR SIR: I have your letter of April 17th, addressed to the Attorney General, reading as follows:

"Art. 1479 Tex. Revised Statutes, 1911, directs that all supplies of stationery, etc., must be purchased on competitive bids without any emergency clause being added.

"Art. 1480 directs that supplies of every kind and material must be purchased on competitive bids, but a provision is added that in cases of emergency purchases not in excess of $50.00 may be bought upon requisition without advertising for bids.

"Does this emergency clause of Art. 1480 apply to Art. 1479? Or are the supplies of the kind referred to in Art. 1479 to be purchased in every case from the lowest bidder?"

In construing the provisions of Articles 1479 and 1480, Revised Civil Statutes, it is necessary that the provisions of Chapter 141 Acts of the Thirty-fifth Legislature passed at its Regular Session be taken into consideration. Section 1 of the Act is as follows:

"The commissioners' court of this State shall make no contract calling for or requiring the expenditure or payment of two thousand ($2000) dollars or more out of any fund or funds of any county or subdivision of any county without first submitting such proposed contract to competitive bids; notice of the time and place, when and where such contract will be let, shall be published in some newspaper published in said county or subdivision once a week for two weeks prior to the time set for letting said contract; or if there is no newspaper publisher either in said

county or said subdivision, then notice of the letting of said contract shall be given by causing a notice thereof to be posted at the court house door of such county for fourteen days prior to the time of letting such contract; provided, that in case of public calamity, where it becomes necessary to act at once to appropriate money to relieve the necessity of the citizens or to preserve the property of the county, this provision may be waived; provided that all contracts made by or with said court calling for or requiring the expenditure of any amount of money less than two thousand ($2000) dollars and exceeding five hundred ($500) dollars, shall be let by competitive bids at a regular term of court, except in cases of urgent necessity or present calamity; provided, that the provisions of this Act shall not apply to any work done under direct supervision of the county commissioners and paid for by the day."

In an opinion prepared by Honorable C. W. Taylor, Assistant Attorney General, of date May 18, 1917, after quoting Article 1480 of the Revised Statutes and Section 1 of said Chapter 141, which we have hereinabove quoted, Judge Taylor said:

"A comparison of Section 1, just quoted, with Article 1480, R. S., 1911, quoted above, disclose at once that the two statutes are in pari materia and are substantially the same, wih the exception that the latter act deals with those contracts not in excess, amounting to $2,000.00 or more, with the proviso that contracts amounting to less than $2,000.00 and exceeding $500.00 shall be let by competitive bids, at a regular term of the Court, except in case of urgent necessity or present calamity.

"Not only are these two statutes in pari materia, but by the express provision contained in Section 2 of the Act of the Thirty-fifth Legislature, it is provided that the Act shall not be construed so as to repeal any part of Title 29, Chapter 2, Revised Statutes of 1911, and shall be cumulative of said title and chapter. Chapter 2 of Title 29 contains the County Auditors Law of this State. In our opinion this Act of the Legislature must be construed, as is expressly stipulated in the Act, as cumulative of Article 1480, and when so construed must be held to operate in all counties of the State, irrespective of whether or not such counties are under the County Auditors Law.

"Under Article 1480 it is made the duty of the county auditor to advertise for bids for the supplies of every kind, road and bridge material, or any other material, for the use of said county or any of its officers, departments or institutions, and such supplies must be purchased on competitive bids, the contract to be awarded to the party who, in the judgment of the commissioners court, has submitted the lowest and best bid.

"By the terms of Section 1, Chapter 141, Acts of the Thirty-fifth Legislature, it is made the duty of the commissioners court to advertise for and let contracts upon the competitive bids when the amount thereof exceeds $500.00, and this applies to contracts of every kind or character calling for an expenditure of moneys out of any fund or funds of any county or subdivision of the county. It will be noted from a comparison of these two acts that the language of the Act of the Thirty-fifth Legislature is much broader than that used in Article 1480, that of the latter limiting the scope of the Article to supplies furnished, while the former covers every contract calling for the expenditure of the funds of the county or any district thereof.

"We therefore advise that in the opinion of this Department the two acts will be construed as though they were one and the same and the effect thereof is that in all counties of the State before the commissioners court or county auditor would have authority to let contracts for expenditure of funds of the county or subdivision thereof, where such contracts call for an expenditure in excess of $500.00, competitixe bids must be advertised for and received and the contract made under such notice and bids. That in so far as supplies for counties, its officers and institutions are concerned Article 1480 still controls in those counties where the county auditors law is in operation, and it is only in those matters

not controlled by the county auditors law that the Act of the Thirty-fifth Legislature has application.

"In other words, these two laws are to be construed as though they were one and the same act. That is, that the Act of the Thirty-fifth Legislature has application throughout the State in all counties, whether under the operation of the auditors law or not, the effect being that all contracts made by the commissioners court of any county calling for the expenditure of money in excess of $500.00 shall be let upon competitive bids after advertisement. This leaves in full force and effect Article 1480, being a part of the county auditors law, which deals with particular classes of contracts without respect to the amount thereof, and makes it incumbent upon the county auditor to let contracts for supplies for counties, its officers and institutions upon competitive bids. The further effect of this Act is to broaden the scope in those counties operating under the county auditors law and to add this provision in those counties not under such law."

There is nothing to be added to or taken from what Judge Taylor has said, as the conclusions he reaches are unquestionably correct. However, Article 1479 was enacted at the same time as Article 1480, and as a part of the same bill and the proviso in Article 1480, which provides "that in cases of emergency, purchases not in excess of $50.00 may be made upon requisition to be approved by the commissioners' court without advertising for competitive bids" would in the opinion of this Department permit the commissioners' court to purchase stationery, books, blanks, records and other supplies for the various officers of the county in an amount not exceeding $50.00 without advertising for competitive bids; provided, there was an emergency requiring such supplies.

Yours very truly,

E. F. SMITH,

Assistant Attorney General.

Op. No. 2114, Bk. 53, P. 246.

COMMISSIONERS' COURT—LEASING A PORTION OF COURT HOUSE SQUARE.

The commissioners' court has no authority, except such as is conferred upon it by the Constitution and laws of this State, either in express terms or by implication.

There is no law in this State which authorizes the commissioners' court to lease a portion of the court house square to an individual to be used for private purposes.

ATTORNEY GENERAL'S DEPARTMENT, July 3, 1919.

Hon. C. J. O'Connor, County Attorney, Breckenridge, Texas.

DEAR SIR: I have your letter of June 21st, addressed to the Attorney General, wherein you ask this Department for a ruling as to whether or not the commissioners' court of your county has the authority to lease a portion of the court house square to an individual

for five years, on which is to be erected a building for an oil station and cold drinks. The consideration of the lease to be fifty ($50) dollars per month, together with the additional consideration that the party leasing the ground will build some concrete sidewalks around the court house.

In reply, you are advised that the court house square is public property, and is intended to be used for public purposes, and that it would be inconsistent with these purposes for an individual to erect a building on the court house square to be used by him for private purposes.

In Dillon's admirable work on Municipalities, 5th edition, Section 977, these words are used:

"A city can not, as landlord or lessor, make a lease of real estate owned by it which is held for public purposes when the making of such lease is inconsistent with these purposes."

This general rule has been held to be correct with reference to cities of this State.

Corpus Christi vs. Cantral Wharf Co., 8 T. C. A., 94;

Weeks vs. Galveston, 21 T. C. A., 102.

While the authorities cited above are with reference to cities, the same principle of law would apply to counties. The following proposition is laid down in 15 Corpus Juris, 437:

"It is well settled that a county board possesses and can exercise such powers, and such powers only, as are expressly conferred upon it by the Constitution or the statutes of the State."

This proposition is sustained by the courts of Texas in the following cases:

Bland vs. Orr, 90 T. 492;
Von Rosenberg vs. Lovett, 173 S. W. 508;
Edwards County vs. Jennings, 33 S. W 585.

The laws of Texas do not confer upon the commissioners' court the authority to lease public grounds that are used for public purposes.

15 Corpus Juris, 537, has the following to say with reference to county boards leasing property:

"In accordance with the general rule heretofore stated that county boards or county courts have no powers other than those conferred expressly or by necessary implication, such courts or boards have no power to rent or to lease property on franchise owned by the county in the absence of statutory authority so to do." (See authorities cited under this text.)

This Department, in an opinion prepared by Honorable B. F. Looney, Attorney General, of date April 12, 1915, recorded in the 1914-16 Report and Opinions of the Attorney General, page 584, held that the commissioners' court was without authority to lease or rent office space in the county court house and that the sheriff would have the right to evict any occupant not authorized to occupy same. This opinion is in line with the universal rule that the commissioners' court

has no authority except such as is conferred upon it by the Constitution and laws of this State, either in express terms or by implication, and is also in line with the universal rule that commissioners' courts have no authority to lease or rent public property which is used for public purposes unless authorized to do so by the laws of the State.

It is, therefore, the opinion of this Department, and you are so advised, that the commissioners' court of Stephens County has no authority to lease to an individual a portion of the court house lot or square for a period of five years, on which is to be erected a building for an oil station and cold drinks, or for any other purpose inconsistent with the public purposes.

Yours very truly,

E. F. SMITH,

Assistant Attorney General.

Op. No. 2053, Bk. 52. P. 501.

COMMISSIONERS' COURT—EXPENSES OF QUARANTINE.

Whenever the commissioners' court of any county has determined that they are threatened with the introduction or dissemination of a dangerous, contagious or infectious disease and have directed the county health officer to declare and maintain a quarantine, then it is mandatory upon the commissioners' court to furnish to those detained in quarantine such provisions, medicines and other things that are absolutely essential to their comfort and convalesence.

Article 4568, Revised Civil Statutes.

AUSTIN, TEXAS, April 29, 1919.

Honorable C. W. Goddard, M. D., State Health Officer, Capitol.

DEAR DR. GODDARD: I have your letter of April 28th, reading as follows:

"In order that I may give the information asked for in the attached telegram, will you please give me a ruling on same at as early an hour as is convenient, and oblige."

The telegram attached to your letter is as follows:

"Please advise by wire immediately in cases of smallpox if county is liable for all expenses incident to quarantine, as doctor and drug bills, supplies and attendants."

In reply, I respectfully direct your attention to Article 4568, Revised Civil Statutes, which reads as follows:

"Whenever the commissioners' court of any county has reason to believe that they are threatened at any point or place within or without

the county limits with the introduction or disseminaton of a dangerous, contagious or infectious diseases that can and shall be guarded against by quarantine, they may direct their county health officer to declare and maintain said quarantine against any and all such dangerous diseases; to establish, maintain and supply stations or camps for those held in quarantine; to provide hospitals, tents or pest houses for those sick of contagious and infectious diseases; to furnish provisions, medicine and all valesence of the sick. The county physician shall keep an itemized acother things absolutely essential for the comfort of the patients and the concount of all lawful expenses incurred by local quarantine, and his county shall assume and pay them as other claims against the county are paid. Chartered cities and towns are embraced within the purview of this article, and the mere fact of incorporation does not exclude them from the protection against epidemic diseases given by the commissioners' court to other parts of their respective counties. The medical officers of chartered cities and towns can perform the duties granted or commanded in their several charters, but must be amenable and obedient to rules prescribed by the Texas State Board of Health. This article, however, must not be construed as prohibiting any incorporated town or city from declaring, maintaining and paying for local quarantine."

In the case of King County vs. Mitchell, 71 S. W. Rep., 610, the facts were that one J. H. Mitchell was engaged in killing prairie dogs on the ranch of S. B. Burnett in King County, Texas, having in his employ about fifteen men. None of the men were members of his family, and in no way was he obligated to care for them. Smallpox broke out among the men in his employ, and he and his men were placed under a strict quarantine by the duly authorized and constituted authority of King County, acting through the county commissioners' court by an order duly entered of record in the commissioners court of King County. The commissioners court appointed R. C. Hannah, a practicing physician, its health officer and authorized him to perform such other and further special quarantine regulations as in his judgment he deemed for the best interest of the people of King County, but after the order was passed of quarantining the county, said R. C. Hannah, acting by virtue of his authority, passed a special quarantine in and around Mitchell's camp and men, and such quarantine was continued for a period of more than two months. Mitchell and his men were the only persons in King County at that time or after that time that had the smallpox in King County. Immediately after said quarantine was put into operation, R. C. Hannah resigned his position as quarantine officer, for the reason that the commissioners court refused to allow him a reasonable compensation for his services in attending to said smallpox patients, leaving said quarantine in operation as against Mitchell and the men in his employ.

King County failed and refused to furnish Mitchell, or the men quarantined with him, any medical attention or any health officer to look after their welfare, and failed and refused to furnish any medicines or supplies for their support and maintenance for said period of two months during the time said quarantine was in force and effect. Mitchell paid all the expenses for nursing the men while they were sick with the smallpox, paid for all their medicines, provisions and supplies, furnished them shelter and protection during the entire two months. He kept a careful and accurate account of

the moneys expended and expenses incurred in caring for and supplying everything for the comfort of said men thus quarantined.

As soon as the quarantine was raised, Mitchell presented his account to the commissioners court of King County for their approval and allowance, explained said account fully to said court, giving in detail all items of expenditure contained in said account. The commissioners court refused to consider said account and refused to allow same or any part thereof.

Suit was brought by Mitchell in the District Court of King County against King County for his expenses incurred in taking care of and providing for the men who had been quarantined with him by said King County. Mitchell recovered a judgment in the District Court for the amount of his claim. King County appealed the case to the Court of Civil Appeals at Fort Worth, and that court, after quoting Article 4568, which we have hereinabove quoted, speaking through Judge Spear, said in part:

"We think a proper interpretation of this statute would require that a county whose commissioners' court has determined that they are threatened with the introduction or dissemination of a dangerous, contagious, or infectious disease, that can and should be guarded against by quarantine, and has directed the county physician to declare and maintain such quarantine, should furnish to those thus detained such provisions, medicines, and other things as are absolutely essential to their comfort and convalescence, and is legally liable therefor. We cannot hold that it is optional with a county to assume the duty of supplying these things. Nor can we assent to the contention of appellant that the county would be relieved of this duty because of the fact that there was no county physician to keep the itemized account of the expenses incident to the quarantine after the resignation of Dr. Hannah. The beneficent purpose of the statute was to supply to those detained in quarantine such things as were absolutely essential to their comfort and convalescence, and the duty of the county physician in the particular of keeping an itemized account of expenditures is, at most, only ministerial in its nature, and the liability of the county not made to depend upon his compliance. If such were the case, the county could in the most meritorious cases avoid all liability by refusing to appoint such auditing officer."

From the plain language of the statute and the above decision of the court construing the same, it is clearly evident that a county is liable for the expenses incident to quarantine, but as stated by Judge Spear, the county is only liable for "medicines and other things as are absolutely essential to their comfort and convalescence and is legally liable therefor."

We also call special attention to the following language used by Judge Spear in his opinion: "We cannot hold that it is optional with the county to assume the duty of supplying these things." It, therefore, follows that it is mandatory upon the county to supply medicines and such other things as are absolutely essential to the comfort and convalescence of the smallpox patients.

You are therefore respectfully advised that whenever the commissioners court of any county has determined that they are threaterned with the introduction or dissemination of a dangerous, contagious or infectious disease and has directed the county health officer to declare and maintain a quarantine, then it is mandatory

upon the commissioners court to furnish to those detained in quarantine such provisions, medicines and other things as are absolutely essential to their comfort and convalescence.

Yours very truly,

E. F. SMITH,

Assistant Attorney General.

Op. No. 2021, Bk. 52, P. 297.

COMMISSIONERS COURT—EMPLOYING ROAD ENGINEER.

The law does not require the commissioners' court to let the contract for preparing plans, specifications, etc., for road work on competitive bids. The commissioners' court may, if it chooses to do so, employ the county suveyor to do this work on a percentage basis.

AUSTIN, TEXAS, April 7, 1919.

Honorable J. L. Deal, County Judge, Cuero, Texas.

DEAR SIR: Mr. L. C. Sutton, our Chief Clerk, handed me the following inquiry, saying that he had received the same from you over the telephone:

"Road District No. 4 of DeWitt County has issued bonds in the amount f $40,000; they have also procured $40,000 of Federal aid. They desire to appoint the county surveyor to draw plans and specifications, etc., and compensate him upon a percentage basis. The question is: Can this be lawfully done, or will it be necessary to advertise for competitive bids and employ an engineer in that manner?"

Article 1480 Revised Civil Statutes provides in part that:

"Supplies of every kind, road and bridge material, or any other material, for the use of said county, or any of its officers, departments or institutions, must be purchased on competitive bids, the contract to be awarded to the party who, in the judgment of the commissioners' court, has submitted the lowest and best bid . . . ."

This Article does not require the commissioners court to procure personal services by competitive bids, but has to do with supplies and materials of all kinds that are to be furnished the county. Evidently, the Legislature intended that the commissioners court should exercise their own sound judgment in employing persons to render a personal service to the county. As an illustration,—we will suppose that it is necessary for the county to employ some attorney or firm of attorneys to represent the county in some pending litigation. It would be very poor business for the commissioners court to employ an attorney or firm of attorneys on the competitive bid system; what the commissioners court would want would be the best attorney or firm of attorneys available, and the same applies to a road engineer. It is not a question of getting the work done cheaply. It is a question

of getting the work done properly and, of course, at as little cost as possible.

This Department is, therefore, of the opinion, and you are so advised that the law does not require the commissioners court to let the contract for preparing plans, specifications, etc., for road work on competitive bids. The commissioners court may, if it chooses to do so, employ the county surveyor to make plans and prepare specifications for road work on a percentage basis.

Yours very truly,

E. F. SMITH,

Assistant Attorney General.

Op. No. 2009, Bk. 52, P. 193.

COUNTY SCHOOL LANDS—SCHOOL FUND—COMMISSIONS

(1) County commissioners can not pay a commission on the expenses in the sale of county school land out of the proceeds of such sale, and expenses must be paid from the general fund.

AUSTIN, TEXAS, March 26, 1919

Honorable James A. Alexander, County Judge, Waco, Texas.

MY DEAR SIR: Yours of March 22d, addressed to the Attorney General to hand. Your letter and inquiry reads as follows:

"The McLennan County formerly owned some land in Eastland County. We heretofore thought that all of this land had been sold, but upon a more thorough examination we have reason to the conclusion that it is possible that some of this land has been sold and that there are some over-runs in the surveys that still belong to McLennan County. This land, by reason of the discovery of oil in that county has become very valuable and we now desire to employ an attorney to recover this land.

"In your opinion will this attorney and his expenses have to be paid out of the county's general fund, or could it be paid out of the proceeds from the land recovered."

In considering this inquiry it might be well to consider some portions of the Constitution relative thereto, together with the decisions construing same.

Article 7, Section 6 of the Constitution, with reference to county school lands reads in part as follows:

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

This provision of the Constitution as it now stands was adopted in 1883, but these particular provisions were brought forward from the same Section of the Constitution of 1876. Therefore, the construction of these provisions under the Constitution of 1876 would be applicable to the amendment of 1883 inasmuch as no change was made in this portion of the wording of said Section. This provision of the Constitution is substantially reiterated in Article 5402, Vernon's Sayles Revised Statutes.

Construction of this provision of the Constitution has been frequently before the courts of this State. In the case of Pulliam vs. Runnels County, 15 S. W., 277, the question arose as to whether or not a county might convey a portion of its public school lands in paying for the services of a person for locating same. This was an original location and the contract was entered into under the provisions of the Constitution of 1876 and prior to the adoption of the amendment of 1883. Judge Gaines in construing these provisions, above quoted, of the Constitution, said;

"The use of the words 'may sell or dispose of its lands in whole or in part' are somewhat difficult of construction. They certainly tend to indicate that it was intended to give the counties power to convey the fee in their school lands for a consideration other than money, but the language of the entire section makes it clear that all the lands or their proceeds were to be held by the counties in trust for the support of the public schools and that it was not intended that any part was to be diverted in any manner to any other purpose. Such in substance is the expressed declaration of the last sentence in the section; and we are unable to see how this provision can be given effect if a part of the lands to be thereafter acquired could be conveyed as a compensation for locating and securing patents to the whole."

Then, after discussing the provisions of legislation prior to the adoption of the Constitution of 1876 and the attitude of the Republic of Texas and of the State with reference thereto he refers to the case of Tomlinson vs. Hopkins County, 57 Texas, 572, and with reference thereto he says:

"It was held, in effect, that the commissioners court did not have the power to convey a part of its school lands as a consideration for their location and we are of opinion that it was not intended to confer that power either by the Constitution of 1876 or by the statutes which have since been passed in pursuance thereof."

Then follows a fuller discussion of this theory of the Court. And further on in the opinion the court held such a conveyance void, even as to innocent parties.

In Dallas County vs. Club Land and Cattle Company, et al., 66 S. W., 294, the same question was raised but from a slightly different angle. In this case Dallas County agreed to pay a certain party for the surveying, subdividing, mapping and classifying for the purposes of selling the school lands of the county by conveying to the party a portion of the lands.

Subsequently Dallas County brought suit in trespass to try title to the lands conveyed under this agreement and Judge Gaines, in writing this opinion, refers to his previous opinion in Bulliam vs. Runnels County, reiterates his opinion there and says:

"It would seem, therefore, that the conveyance of the land for any other consideration than that of money would be unauthorized."

Then the Court takes up the argument that by use of the school lands in the cancellation of a debt or obligation of the county it is equivalent to selling the lands for money, and in answer thereto says:

"But we are of opinion that a debt created by a county as an expense incurred in selling school lands cannot be charged either against the lands themselves or the proceeds of their sale."

The Court then proceeds to discussion of the meaning of the word "proceeds." He holds that the word "proceeds" as used in the Constitution and in the statute means the *gross proceeds;* and the final conclusion of the Court is that the commissioners' court of Dallas County did not have power to convey the public school lands of the county in payment for services for subdividing the county school lands for sale.

In Tabor et al. vs. Dallas County, 106 S. W., 332, practically the same question arose as in the next preceding case. The facts in this case were practically the same as the facts in the former case. Judge Brown wrote the opinion in this case for the Court and in his opinion he approves the opinions in the preceding cases cited and says:

"The Constitution and the statute imposed the trust upon the county and imposed the duty of making sale of the land upon the commissioners' court and by imposing that duty it required the commissioners court to preserve the gross proceeds of the land to be held 'alone as a trust for the benefit of public schools' of the county."

In the case of Gallup et al. vs. Liberty County, 122 S. W., 290, the Court of Civil Appeals in considering the question of whether or not a commission of five per cent could be paid out of the funds acquired by the sale of public school lands, said:

"The court's allowing Perryman to retain the five per cent was, in our opinion, simply a diversion of the money from the fund to which it belonged to the general fund of the county. Thereby the county commissioners' court created a claim by the school fund on the general county fund for the amount of money paid Perryman, and therefore the commissioners' court should restore the amount thus diverted from the school fund by taking it from the general fund to which it was diverted."

Writ of error denied by Supreme Court.

See also:

Tomlinson vs. Hopkins County, 57 Texas, 572;

Cassin vs. LaSalle County, 21 S. W., 122;

San Augustine County vs. Madden, 87 S. W., 1057.

By careful study of these authorities and the Constitution itself it becomes clear that all public lands granted the county by the State for school purposes constitute a trust fund; that said lands can not be sold except for money; that a portion thereof can not be conveyed as a fee for the services of any person in locating same or for any

other expense incurred thereby; that the *gross proceeds* from the sale of all such lands becomes a trust fund and only the interest thereon can be expended.

I would therefore advise you that any expense incurred by the county in locating or selling county school lands should be paid out of the general funds of the county and such expense can not be paid out of the proceeds from the sale of such land.

Yours very truly,

JOHN MAXWELL,

Assistant Attorney General.

OPINIONS ON CONSTITUTIONAL LAW AND POWERS OF LEGISLATURE.

Op. No. 1973, Bk. 51, P. 493.

CONSTRUING ARTICLE 4, SECTION 15 OF THE CONSTITUTION OF TEXAS.

All orders, or resolutions, both concurrent and joint, passed by the Legislature, except such as provide for adjournment, and which embrace legislative matter, require action by the Governor; joint resolutions, proposing amendments to the Constitution, do not require action by the Governor.

AUSTIN, TEXAS, February 3, 1919.

Governor W. P. Hobby, Capitol.

DEAR SIR: Your inquiry requests advice as to your duty with reference to the approval or disapproval of concurrent and joint resolutions passed by the Legislature.

To answer your question, we must construe Article 4, Section 15 of the Constitution of Texas, which is as follows:

"Every order, resolution or vote to which the concurrence of both Houses of the Legislature may be necessary, except on questions of adjournment, shall be presented to the Governor, and, before it shall take effect, be approved by him; or, being disapproved, shall be repassed by both Houses, and all the rules, provisions and limitations shall apply thereto as prescribed in the last preceding section in the case of a bill."

Under the above Article, bills, joint resolutions proposing amendments to the Constitution, other joint resolutions and concurrent resolutions are sometimes presented to the Governor for his approval or disapproval. We will answer your inquiry by considering each of the above subjects in their order.

As to bills, it seems to be very plain and unambiguous that "every bill" which shall have passed both branches of the Legislature shall, before it becomes a law, be presented to the Governor for his approval or disapproval. This is true irrespective of the nature or contents of the bill. The only ground of debate lies in the proposition as to whether an "order," resolution or vote (except upon the question of adjournment) must be presented to the Governor for his approval or disapproval.

The terms of the Article of Constitution providing for this course of conduct are very general and appear to be broad enough to permit of a construction which would require the presentation of all of them to the Governor for his approval or rejection, but from time to time, this matter has received legislative and judicial interpretation. From a summary of the decisions and precedents, we deduce the following as the correct rule of procedure, with reference to resolutions:

(a) All joint resolutions proposing amendments to the Constitution of the State of Texas are not required to be presented to the Governor for his approval or disapproval.

On April 3, 1913, this, the Attorney General's Department, in an opinion to Governor O. B. Colquitt, a copy of which is hereto attached, held that the Article of the Constitution providing for its amendment was separate and apart from any other article.

"It affords a complete procedure. It does not refer to, or is it dependent upon any other part of the Constitution. It does not deal with matters of general legislation, but is confined exclusively to the one subject of amending the Constitution."

This position is fortified by many decisions, among which I mention the Case of Commonwealth ex rel Elkins vs. Girst, 50 L. R. A., 507. This case construed a provision of the Pennsylvania Constitution which is couched in almost the identical language of the provision of our Constitution on the same subject. Also, the Case of Hollingsworth vs. Virginia, 3 Dall, 378 1st L. Ed., 644.

Article 7040, Hinds' Precedents of the House of Representatives, Volume 5, provides:

"IT HAS BEEN CONCLUSIVELY SETTLED THAT A JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION SHOULD NOT BE PRESENTED TO THE PRESIDENT FOR HIS APPROVAL."

Passing upon a point of order raised as to the failure of the presiding officer to have presented to the President for his approval of a joint resolution providing for an amendment to the Constitution of the United States, the Speaker of the House made the following ruling:

"The gentleman having stated the point of order, the Chair will decide it. It has been raised once before and decided by the Chair. He will repeat the substantial points of that decision, which he thinks will satisfy the gentleman that his point is not well taken, although based by him upon the Constitution of the United States. The question was raised distinctly in 1803 in the Senate of the United States, on a motion that the then proposed amendment to the Constitution should be submitted to the President:

" 'On motion that the Committee on Enrolled Bills be directed to present to the President of the United States for his approbation the resolution which has been passed by both Houses of Congress, proposing to the consideration of the State legislatures an amendment to the Constitution of the United States respecting the mode of electing President and Vice-President thereof, it was decided in the negative, yeas 7, nays 23.'

"On a distinct vote of 23 to 7 the Senate voted that the Committee on Enrolled Bills should not present the proposed amendment. This is a decision made by one of the early Congresses. But the Chair is not satisfied with having it rest on that; he is disposed to present higher authority in overruling the point of order.

"In 1798 a case arose in the Supreme Court of the United States depending upon the amendment to the Constitution proposed in 1794, and the counsel, in argument before the court, insisted that the amendment was not valid, not having been approved by the President of the United States. The Attorney General, Mr. Lee, in reply to this argument, said:

" 'Has not the same course been pursued relative to all other amendments that have been adopted? And the case of amendments is evidently a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of investing the President with a qualified negative on the acts and resolutions of Congress.'

"That was the remark of the Attorney General. But the Chair does not rest his decision upon that. He sustains it by the decision of the Supreme Court of the United States. The court, speaking through Chase, justice, in reply to the Attorney General, observed:

" 'There can surely be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition or adoption of amendments to the Constitution.'

"As the Supreme Court of the United States has settled this question by a decision, the Chair does not need to read further authorities. But this question came before the Senate of the United States recently, since the recent exciting questions have been before the country, and the chairman of the Judiciary Committee of the Senate (Mr. Lyman Trumbull, of Illinois) offered the following resolution:

" 'Resolved, That the article of amendment proposed by Congress to be added to the Constitution of the United States respecting the extinction of slavery therein having been inadvertently presented to the President for his approval, it is hereby declared that such approval was unnecessary to give effect to the action of Congress in proposing said amendment, inconsistent with former practice in reference to all amendments to the Constitution heretofore adopted, and being inadvertently done, should not constitute a precedent for the future; and the Secretary is hereby instructed not to communicate the notice of the approval of said proposed amendment by the President to the House of Representatives.'

"Upon that resolution the Senator from Maryland, Mr. Reverdy Johnson, who had been formerly Attorney General of the United States, made a speech which the Chair will not quote, corroborating, however, the opinion of the Chair, and the Senate adopted the resolution of Mr. Trumbull without a division and without the yeas and nays.

"The Chair therefore thinks that the question is settled, not only by the practice of Congress but by a decision of the Supreme Court of the United States, and therefore overrules the point of order."

On January 27, 1897, Mr. David B. Hill of New York submitted a report to the Senate on behalf of the judiciary committee, which report involved the construction of the provision of the United States Constitution, Section 7, Article 1, a part of which report is as follows:

"The committee found that in the first twelve Congresses there were one or two instances of simple resolutions being approved by the President; and that, with one or two exceptions, all joint resolutions were approved. These exceptions were in the cases where Congress made requests or recommendations not involving any legislative act. In the first fifty years of the Government the whole number of joint resolutions did not exceed 200, but they gradually increased thereafter, until in the Forty-first Congress alone the number exceeded 500. The joint resolutions have been largely used since. But not to the extent reached in that Congress. Except in the few instance in the early Congresses, all joint resolutions have been presented to the President and have been acted on by him.

"The committee found that the passage of concurrent resolutions began immediately upon the organization of the Government, but their use has been, not for the purpose of enacting legislation, but to express the sense of Congress upon a given subject, to adjourn longer than three days, to make, amend, or suspend joint rules, and to accomplish similar purposes, in which both Houses have a common interest, but with which the President has no concern." Hinds' Precedents, Vol. 4, P. 331.

It should be noted here that the precedents and decisions, construing the provisions of the Constitution of the United States, are particularly applicable to a construction of the provisions of our Constitution on the same subject, because the provisions of the Texas Constitution

are in the identical language of the Constitution of the United States on the same subject. So nearly so, that it is perfectly apparent that our provisions of the Constitution were copied from the provisions of the United States.

From the report of the judiciary committee, referred to above, we call especial attention to the following paragraph:

"It has been the uniform practice of Congress (except in the few instances, hereinbefore mentioned, occurring in very early Congresses) to present all joint resolutions to the President for his approval, and for the President to act upon the same. Such resolutions have usually embraced only matters of a conceded legislative character."

But as to concurrent resolutions, the rule is different. The same report contains the following paragraph, with reference to concurrent resolutions:

"For over a hundred years, however, they have never been presented. They have uniformly been regarded by all the Departments of the Government as matters peculiarly within the province of Congress alone. They have never embraced legislative provisions proper, and hence have never been deemed to require executive approval.

"This practical construction of the Constitution, thus acquiesced in for a century, must be deemed the true construction, with which no court will interfere (Stuart vs. Laird, 1 Cranch, 299.)"

Field vs. Clark, 143 U. S. R. 649;

14 Diamond Rings vs. United States, 183 U. S. 176.

The judiciary committee concluded their report as to concurrent resolutions as follows:

"We conclude this branch of the subject by deciding the general question submitted to us, to-wit, 'whether concurrent resolutions are required to be submitted to the President of the United States,' must depend, not upon their mere form, but upon the fact whether they contain matter which is properly to be regarded as legislative in its character and effect. If they do, they must be presented for his approval; otherwise, they need not be. In other words, we hold that the clause in the Constitution which declares that every order, resolution, or vote must be presented to the President, to 'which the concurrence of the Senate and House of Representatives may be necessary,' refers to the necessity occasioned by the requirement of the other provisions of the Constitution, whereby every exercise of 'legislative powers' involves the concurrence of the two Houses; and every resolution not so requiring such concurrent action, to-wit, not involving the exercise of legislative powers, need not be presented to the President. In brief, the nature or substance of the resolution, and not its form, controls the question of its disposition."

We, therefore, conclude that the controlling fact in determining whether or not a resolution, or order, or vote of the House requires the approval, or disapproval, of the Governor is whether or not said order, vote, or resolution is legislative in its character. Looking beyond the form of the resolution, order or vote, to its substance, and from its substance, we then determine whether or not it is a matter which is properly to be regarded as legislative in its character.

If such resolution, order, or vote of the House contains legislative matter, such resolution, order or vote must be presented to the Governor for his approval or rejection and that without regard to the form of the resolution, order, or vote; otherwise they should not be

so presented. It is the subject matter of the resolution, and not its form, which determines whether or not it is legislative.

Yours very truly,

W. A. KEELING,

First Assistant Attorney General.

Op. No. 2113, Bk. 53, P. 236.

LEGISLATIVE DISTRICTS, CONSTITUTIONAL LAW, APPORTIONMENT.

The Legislature, having once apportioned the State following a Federal Census, cannot again apportion the State into Legislative Districts until after the next Federal Census.

Constitution, Art. 3, Secs. 2-26-28.

AUSTIN, TEXAS, July 1, 1919.

Honorable D. J. Neil, Honorable J. T. Hamilton, Members of the House of Representatives, Capitol.

GENTLEMEN: We have your oral inquiry of June 30, in which you ask whether or not the Legislature of Texas may create a new representative district after having already apportioned the State following the last Federal census. This inquiry involves the question as to whether or not the State can twice be re-apportioned within one ten-year period following the last preceding Federal census. Before going into a discussion of the authorities on this question, I will quote for you several provisions of the State Constitution relative to this question. Section 2 of Article 3 of the Constitution reads as follows:

"The Senate shall consist of thirty-one members, and shall never be increased above this number. The House of Representatives shall consist of ninety-three members until the first apportionment after the adoption of this Constitution, when or at any apportionment thereafter, the number of Representatives may be increased by the Legislature, upon the ratio of not more than one Representative for every fifteen thousand inhabitants; provided, the number of Representatives shall never exceed one hundred and fifty."

Section 26 of Article 3 of the Constitution reads as follows:

"The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed . . ."

And Section 28 of Article 3 reads in part as follows:

"The Legislature shall, at its first session after the publication of each United States decennial census, apportion the State into Senatorial and Representative districts, agreeably to the provisions of Sections 25 and 26 of this Article. . . ."

Thus we see that the basis for re-apportionment of the State into representative districts is the last preceding Federal census. The question then reduces itself to whether the provisions of Section 28, above quoted, limit the Legislature to one re-apportionment, or whether after having acted succeeding a Federal census, the Legislature can again, prior to the next Federal census, re-apportion or create new districts. In answer to this question, it is immaterial whether one new district is created or whether the entire State is being redistricted. This question, so far as I can discover, has not been passed upon by the courts of Texas, but many other states have had the question up for review, and we are dependent upon the findings in these states for the rule to be followed.

It is universally held, as the authorities hereafter quoted show, that while such a law involves political matters, yet the courts will take the jurisdiction of them in order to determine their constitutionality. I will first refer you to the rule laid down in Thirty-six Cyc., page 845. In discussing the very question involved in this investigation, Honorable Jos. R. Long, Professor of Law, Washington & Lee University, in his writing in the 36 Cyc., page 845, says:

"The State Constitution generally provides for the apportionment of the state into districts for election of members of the Legislature and requires the Legislatures to provide for the enumeration of the inhabitants of the State at stated intervals as a basis for the apportionment........ and such a provision prescribing the time of making an apportionment impliedly prohibits an apportionment at any other time and where a former apportionment has been made, no new apportionment can be made before the expiration of the prescribed period."

On page 847, the same writer says:

"Except as restrained by the State Constitution, the Legislature has power to change the boundaries of election districts, but the Constitution commonly prohibits the Legislature, after having made a valid apportionment, from making a new apportionment during the apportionment period. The apportionment once made is required to remain unaltered until another enumeration and this prohibition may be implied as well as expressed."

Under the Constitution of Texas, there is no provision made for the State to enumerate its inhabitants for the purposes of legislative apportionments, but the Constitution adopts each decennial Federal census and makes that the basis of apportionment. Under a constitution similar to ours, this question was raised in the State of Illinois in the case of Ex. Rel. Mooney vs. Hutchingson, 172 Ill., 486, 40 L. R. A., 770. In that state an effort was made by the Legislature to reapportion a part of the State of Illinois after the Legislature had already passed an apportionment act in the same enumeration period. The argument by Mr. Cartwright, Justice of the Supreme Court, is very elaborate, and I will quote from him at some length. The Constitution as set out in the argument of the court is similar to that of Texas, in that it makes each decennial Federal census the basis of the apportionment for the State of Illinois. In this case the court used the following words:

"The Constitution divides the powers of the government into three distinct departments, and for the exercise of legislative power creates a legislative department, to be elected by the people in senatorial districts. The provision authorizing the apportionment of the state into such senatorial districts is Section 6 of Article 4, which provides as follows: 'The general assembly shall apportion the state every ten years, beginning with the year 1871, by dividing the population of the State, as ascertained by the Federal census, by the number 51, and the quotient shall be the ratio of representation in the Senate. The State shall be divided into fifty-one senatorial districts,' etc. Acting under the provisions of said Section, the Legislature, by the act of June 15, 1893, divided the State, according to the last Federal census, into fifty-one senatorial districts, and by that act the county of Will was made the twenty-fifth district. The act of January 11, 1898, was in form an amendment, which remodeled and changed forty-three of these senatorial districts, and in the case of the twenty-fifth district added to Will County the county of Dupage. Section 1 of the same article of the Constitution is as follows: 'The legislative power shall be vested in a general assembly which shall consist of a senate and a house of representatives, both to be elected by the people,' and there are further provisions of the Constitution that three representatives and one senator shall be elected in each district, and they constitute the two houses.

"The passage of an apportionment act is the exercise of a legislative power (State, Morris vs. Wrightson, 56 N. J. L., 126, 22 L. R. A., 548; State Atty. Gen. vs. Cunningham, 81 Wis., 440, 15 L. R. A., 561), and, if there were no other provisions relating to apportionment than the general legislative authority conferred by Section 1, the Legislature might apportion the State at its pleasure, at any time. There is no express denial in the Constitution of the right to exercise this power whenever the Legislature may see fit, and it is therefore argued for the defendant that it may be exercised at any time, and that the Legislature may make an apportionment whenever they choose. This does not follow, however, and it is not essential, in order that the Constitution may operate as a prohibition, that it shall contain a specific provision that apportionments shall not be made otherwise than according to its provisions. The general principles governing the construction of Constitutions are the same as those that apply to statutes. Potter's Dwarr, Stat. 654; 6 Am. & Eng. Enc. Law, 2d ed., 921. The use of negative words would be conclusive of an intent to impose a limitation, and they are used in some instances in the Constitution, but their absence is not conclusive of the opposite. Where there are provisions inserted by the people as to the time when a power shall be exercised, there is at least a strong presumption that they design it should be exercised at that time, and in the designated mode only; and such provisions must be regarded as limitations upon the power. Cooley, Const. Lim., 6th ed., p. 94. If legislative power is given in general terms, and is not regulated, it may be exercised in any manner chosen by the Legislature; but where the Constitution fixes the time and mode of exercising a particular power it contains a necessary implication against anything contrary to it, and by setting a particular time for its exercise it also sets a boundary to the legislative power. If a power is given, and the mode of its exercise is prescribed, all other modes are excluded. Sedgw. Stat. & Const. Law 51. The Legislature must keep within the legislative powers granted to it, and observe the directions of the Constitution. Sutherland Stat. Constr. Sec. 26. This doctrine was applied in State, Morris vs. Wrighteon, 56 N. J. L., 126, 22 L. R. A., 548, where an apportionment of assembly districts in New Jersey was in question, and it was said: 'In the construction of statutes it is a cardinal rule, which applies as well to constitutional provisions, that when the law is in the affirmative that a thing shall be done by certain persons or in a certain manner, this affirmative matter contains a negative that it shall not be done by other persons or in another manner, upon the maxim, Expressio unius est exclusio alterius.'

"In Page vs. Allen, 58 Pa., 338, 98 Am. Dec., 272, which involved the constitutionality of the registry law of that State, it was held that the inhibitions of the Constitution as to legislation are to be regarded as well

when they arise by implication as by expression, and that the expression of one thing in the Constitution is the exclusion of things not expressed. It is here admitted, as it necessarily must be, that the provisions for apportionment are all exclusive except the particular one as to time. It is not denied that the basis for apportionment must be the population of the State as ascertained by the last Federal census, that the population can only be divided by the number 51, and that the quotient must be the ratio of representation in the Senate. The only claim is that the provision as to time is not exclusive, and we cannot see any substantial ground for establishing a different rule respecting the time than the mode of doing the act. In Wisconsin the Constitution provided for an apportionment and organization of assembly districts once in five years, but contained no express prohibitions against their alteration between the periods fixed for apportionment, and in Slauson vs. Racine, 13 Wis., 398, it was said that, whatever limitation existed upon the power of the Legislature in that respect was to be derived from the general scope and object of the provisions of the Constitution concerning the apportionment of Senators and Representatives, but that it might well be said that this furnished such limitation, and it was held that the provision implied that apportionments should not be made at any other time than that fixed by the Constitution. The Constitution of Indiana fixes the time once in six years when an enumeration of the voters of the state shall be taken, and an apportionment shall be made by law. In Denny vs. State, Basler, 144 Ind., 503, 31 L. R. A., 726, an apportionment act passed in 1895 was in question, and the main dispute was whether, under the Constitution, any apportionment act could be passed at that time. It was insisted, in support of the act, that the Constitution committed to the legislative department, by a general grant of legislative power, the authority to make apportionments, and that the provision requiring the enactment of an apportionment law at the beginning of each period of six years was not intended as a prohibition upon the Legislature from making other apportionments whenever that body might think best. This question was determined against the claim made, and it was held that if there were no particular provisions in regard to the subject of legislative apportionment, the Legislature might, under the full and unrestricted vesting of legislative power, enact apportionment laws at their pleasure, but that the fixing by the Constitution of a time and mode for the doing of such act was, by necessary implication, a forbidding of any other time or mode, and a prohibition of the exercise of the power in any other way."

The argument of the court in this case is so full that it is not neces sary for me to elaborate on same. This same question arose in California in the case of Wheeler vs. Herbert, et al, 92 Pac. Reported 353. I will quote only two excerpts from the opinion of the Supreme Court of California, one of which includes the provision of the Constitution of California relating to this subject. Section 6 of Article 4 of the Constitution of California providing for the apportionment of California into legislative districts, says among other things as follows:

"The census taken under the direction of the Congress of the United States, in the year 1880, and every ten years thereafter, shall be the basis of fixing and adjusting the legislative districts; and the Legislature shall, at its first meeting after each census, adjust such districts and reapportion the representation so as to preserve them as nearly equal in population as may be."

You will observe that this provision of the California Constitution as to the basis of legislative apportionment is identical with ours. Pursuant to this provision of their Constitution, the Legislature of California in 1901 divided the State into legislative districts subsequent thereto and prior to 1911, the end of the ten-year period, the legislature endeavored to reapportion a part of the State for legislative pur-

poses and in passing upon the right to do so, the Supreme Court of California, among others, used these words:

"The power to adjust the legislative districts and the power to form new counties and change county lines are all vested in the Legislature by the general grant of legislative power. Article 4, Section 1. The special provisions relating to these powers, found in other parts of the Constitution, must therefore be considered as limitations upon the general grant. The amendment of 1894, aforesaid, relating to the formation of new counties, though couched in the language of a grant, is in fact a limitation, for, prior to its adoption, the Legislature had full power over the subject and could act by special law. The provisions of Section 6, Art. 4, being construed as limitations, and being mandatory and prohibitory, it follows from their terms, and from the application of the maxim, 'Expressio unius est exclusio alterius,' that the legislative power to form legislative districts can be exercised but once during the period between one United States census and the succeeding one, and that, having been thus exercised in 1901, the districts cannot be again adjusted until the session of 1911."

This question also arose before the Supreme Court of West Virginia, where the same rule was laid down in Harmison vs. Ballot Commission of Jefferson County, as found in 42 L. R. A. 591. However, the Constitution of West Virginia is slightly different from that of Texas, in that it provides that such apportionment once made shall continue in force unchanged until such districts shall be altered and delegates apportioned under the preceding census. Nevertheless, the argument of the court on the general principles in this case follows that of the other authorities on the question.

In the case of Denney vs. State of Indiana, 31 L. R. A. 726, already quoted above by the Illinois Supreme Court, the Supreme Court of Indiana, after a very elaborate argument too long to quote in this opinion, also found the rule unequivocal; that such a provision as the one contained in the Constitution of the State of Texas is a specific limitation on the Legislature, that it not only limits the basis upon which the State may be apportioned into legislative districts, but this provision as to time is mandatory and that an apportionment once having been made a subsequent apportionment cannot be made until the next succeeding period of enumeration. True, in Indiana the enumeration was made by the State itself on six year periods, while in Texas the last preceding decennial Federal census is the basis, yet the rules governing the legislature would be the same irrespective of the constitutional basis of the apportionment.

I cite you also to the case of Slauson vs. Racine, 13 Wis., 398, quoted at length by the Illinois Court above, and also quoted by the Indiana Supreme Court. In Wisconsin a similar constitutional provision to ours on this question exists and the Supreme Court of Wisconsin held that no two apportionments could be made until the expiration of each decennial census period.

In addition to the authorities quoted on this specific question, I refer you to the general rule on matters of this kind laid down by Judge Cooley in the seventh edition of his work on Constitutional Limitations found on page 114 thereof, which is as follows:

"But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules by which all departments of the government must at all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such instrument when we infer that such directions are given to any other end. Especially when, as has been already said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication."

As said above, this question has not been specifically passed upon in this State, but similar constitutional questions have been passed upon. That is whether a provision authorizing one method of procedure by the constitution of the State prohibits the Legislature from proceeding in any other manner or at any other time. In the case of Keller vs. State of Texas, —— Tex. App. ——, 1 L. R. A., (N. S.) 490, the question was presented to the Court of Criminal Appeals of this State, as to whether the local option provision in the State Constitution of Texas was a limitation on the powers of the Legislature or whether it was merely directory. Following a great line of decisions as set out in the opinion, both of Texas and other states, the court in passing on that question said:

"The provision of the Constitution in regard to local option only authorizes the people of a county, a justice precinct, city, or town, etc., to prohibit the sale of intoxicants 'within the prescribed limits'; that is, the limits of the territory in which the law has been voted into operation. They could vote on no other proposition, except the prohibition of the sale of the intoxicants 'within the prescribed limits' or given territory, because this is the extent of the constitutional authority. The inclusion of this matter is the exclusion of all others. This would prohibit the Legislature or the people voting on local option prohibiting the sale outside the 'prescribed limits.'"

I have searched both text books and authorities in this and other states, and I find nothing holding a contrary rule to the one set out in the authorities and text books here quoted. It is not necessary for me to elaborate at length on these opinions, as in each instance they are full and explicit and buttressed by long lines of authorities showing the construction of courts in many jurisdictions to be identical to those here quoted. Therefore in line with these opinions, I advise you that

the Legislature of Texas has no authority to make a second apportionment of the State into legislative districts, having already apportioned the State following the last decennial Federal census, until the next period of enumeration shall have arrived, to-wit: the next decennial Federal census.

Yours very truly,

JOHN MAXWELL,
Assistant Attorney General.

CONSTITUTIONAL LAW.

Op. No. 2069, Bk. 53, P. 6.

State Constitution, Article 17.
State Constitution, Article 3, Section 5.

A special or called session of the Legislature has no constitutional authority to change the date specified for an election on a constitutional amendment submitted by a regular session of the Legislature.

AUSTIN, TEXAS, May 17, 1919.

Miss Annie Webb Blanton, State Superintendent of Education, Capitol.

DEAR MISS BLANTON:—Your letter of this date, requesting the opinion of the Attorney General, reads as follows:

"At the regular session of the Thirty-sixth Legislature a resolution was duly carried, authorizing the submission of the constitutional amendment to remove the present fifty cent limit, for school tax for all purposes. The day set for this election is the regular election in November, 1920. Now the question arises. It is very desirable that this amendment be submitted in November, 1919. In view of the constitutional provision that resolutions proposing an amendment to the Constitution must be passed at any biennial session of the Legislature, would it be possible at a called session of the Legislature to change the date from November, 1920, to November, 1919, on which this election shall be held? It is very desirable that this date should be changed, but we want to know if such a change would be in keeping with the provisions of the Constitution of this State."

In reply to your inquiry, I beg to advise you that a Special Session of the Legislature is without Constitutional authority to change the date for the election on the Constitutional amendment to which you refer. The reasons for this conclusion will now be briefly stated. The authority of the Legislature to submit a Constitutional amendment is found in Article 17 of the Constitution, which reads:

"The Legislature, at any biennial session, by a vote of two-thirds of all the members elected to each House, to be entered by yeas and nays on the journals, may propose amendments to the Constitution, to be voted upon

by the qualified electors for members of the Legislature, which proposed amendments shall be duly published once a week for four weeks, commencing at least three months before an election, the time of which shall be specified by the Legislature, in one weekly newspaper of each county, in which such a newspaper may be published; and it shall be the duty of the several returning officers of said election to open a poll for, and make returns to the Secretary of State, of the number of legal votes cast at said election for and against said amendments; and if more than one be proposed, then the number of votes cast for and against each of them; and if it shall appear from said return, that a majority of the votes cast, have been cast in favor of any amendment, the said amendment so receiving a majority of the votes cast shall become a part of this Constitution, and proclamation shall be made by the Governor thereof."

You will observe that this Constitutional provision grants authority to the Legislature, at its biennial session, to propose amendments to the Constitution to be subsequently voted upon. What is meant by the words "biennial session" as used in this article of the Constitution is made clear by Section 5 of Article 3 of the Constitution, which requires the Legislature to meet every two years at such time as may be provided by law. The Article 17 of the Constitution then means that the Legislature, at its Regular Session every two years, may propose amendments to the Constitution. It is elementary that the provisions of a Constitution regulating its own amendment are not merely directory but are mandatory, and a strict observance of every requirement is essential to the validity of the proposed amendment. These provisions are binding upon the people as upon the Legislature. 12 Corpus Juris, Page 688 and many authorities cited in note 43. The provision of the Constitution to the effect that amendments may only be submitted at certain times, as in this instance, by a Regular Session of the Legislature are mandatory and must be complied with. 12 Corpus Juris, Page 689.

It is plain from the authorities which we have cited and referred to that a Constitutional amendment can only be submitted to the people by a Regular Session of the Legislature.

We will next examine Article 17 to see what the Legislature must do in submitting a Constitutional amendment. We have already quoted Article 17, and by referring to it you will observe that "the time of which shall be specified by the Legislature" refers to the time when the qualified voters are to vote upon proposed amendments to the Constitution. It is, therefore, to be observed that the Legislature not only has conferred an exclusive authority upon the Regular Session of the Legislature to submit Constitutional amendments to a vote of the people but has required it in so doing to specify the time when these amendments are to be voted upon.

In the case of Cartledge vs. Wortham, 153 S. W., page 297, the Supreme Court of this State expressly says:

"In empowering the Legislature to propose amendments for adoption by the people the Constitution requires that it shall specify the time for the election at which the proposed amendment shall be voted upon."

Discussing the question further, the Court says:

"It is an established principle that a time is of the essence of an elec-

tion, and if it be held in a time not authorized by law a valid election does not follow."

The same authority says:

"The purpose of the Constitutional requirement that the Legislature shall specify the time for holding the election is obvious. It is to facilitate the submission of the proposed amendment and insure the election at the time determined by the Legislature and by it be made known to the people. Its language is equally plain and can only mean the designation of a certain time for the election."

Continuing further, the Court says:

"The proposal of a constitutional amendment by the Legislature becomes a mere pastime unless effective provision be made for its submission to the popular vote. When duly proposed, it is the right of the Legislature to have the amendment submitted and the people have the paramount right to vote upon it. The one is enforced and the other exercised by means of the election provided by the Constitution for that purpose. But the Constitution does not warrant a conditional provision for the election or provision for a conditional election. The right to the election is absolute, and cannot be defeated. To more strongly secure its exercise and surround it with greater certainty, the Legislature, in proposing the amendment, is not merely directed, but required to specify the time when it shall be held, so as to make it known of all men, and insure its being held at a time certain—fixed and determined by law. Such is the controlling purpose of the constitutional requirement, as is apparent both from its general tenor and the discriminate use of the terms employed." (153 S. W., 298.)

From these authorities, it is apparent that only a Regular Session of the Legislature may propose amendments to the Constitution, and that in proposing such amendments the Regular Session itself must "specify" the time when such amendments are to be voted upon. We have already seen that these provisions of the Constitution are mandatory and that since the Constitution provides that Constitutional amendments may only be submitted at a Regular Session of the Legislature, that such amendments cannot be submitted at a Special or Called Session. The authority having been conferred upon the Regular Session to submit Constitutional amendments carries with it full and complete authority to make such submissions, and a Special or Called Session of the Legislature has no authority with reference thereto. A Called Session of the Legislature is without power to change the time fixed by the Regular Session at which Constitutional amendments are to be voted upon, because the time when amendments are to be voted upon is one of the declared functions and paramount duties of the Regular Session and is, therefore, denied to the Special Session of the Legislature.

It is a rule for the construction of constitutions constantly applied, that where a power is expressly given and the means by which or the manner in which it is to be exercised is prescribed, such means or manner is exclusive of all others. In other words, where the grant of power in the Constitution is to a particular depository, the right to exercise this particular grant of power is denied any other depository.

Gilliam vs. Hull, 58 Texas, 298;

Robertson vs. Breedlove, 61 Texas, 373;

Day Land, etc. Co.vs. State, 68 Texas, 526;
State vs. Moore, 57 Texas, 307.

You are advised, therefore, that a Called Session of the Legislature is without Constitutional authority to change the date of the election at which the proposed Constitutional amendment, referred to in your letter, is to be voted upon from November, 1920, to November, 1919.

Respectfully submitted,
C. M. CURETON,
Attorney General.

Op. No. 1985, Bk. 52, P. 50.

CONSTITUTIONAL LAW—STOCK LAWS.

The Legislature may enact a stock law which shall not apply to certain counties as a whole, but shall apply only to such subdivision thereof as may be designated.

AUSTIN, TEXAS, February 25, 1919.

Hon. H. B. Hill, Member of Thirty-sixth Legislature,
Capitol.

DEAR SIR: I have your letter of February 24, addressed to the Attorney General, reading, in part, as follows:

"Please give me your opinion on the following: Has the Legislature authority to enact a stock law which 'Shall not apply to .... County as a whole, but shall apply only to such subdivision thereof as may be designated,' as is provided for Wharton and Jefferson Counties in the Acts of the Fourth Called Session of the Thirty-fifth Legislature, Chapter 13, page 21?"

Section 23 of Article 16 of our State Constitution reads as follows:

"The Legislature may pass laws for the regulation of live stock and the protection of stock raisers in the stock raising portion of the State, and exempt from the operation of such laws other portions, sections, or counties; and shall have power to pass general and special laws for the inspection of cattle, stock and hides and for the regulation of brands; provided, that any local law thus passed shall be submitted to the freeholders of the section to be affected thereby, and approved by them, before it shall go into effect."

Our Supreme Court in Armstrong vs. Traylor and Elmore, 87 Texas, 598, had this question under consideration. They appear to hold that Section 23 of Article 16 is that under which the Legislature passed the stock law, and they use this language in regard thereto:

"* * * 'We hold that the Legislature, being authorized by the Constitution to submit the law to the voters of any subdivision of the county, had the power to adopt the method of ascertaining the subdivision to be affected that seemed most advisable, and could authorize the voters to

designate the boundaries of the subdivision in which they desired that the law should be applied. The policy of such course was a matter for the consideration of the Legislature and not of the courts. We further hold that Section 23 of Article 16 of the Constitution authorizes the Legislature to pass a law regulating live stock, making it applicable to the entire State, or it might have exempted any county or counties from the operation of such law. The Legislature might also have enacted a law regulating live stock in any county or in any subdivision of such county, or it might, as it did in this instance, pass a law not to be enforced in any county or part of a county until adopted' * * *"

Evidently, this language was intended to apply to the first portion of Section 23, and to convey the idea that the mere fact that the Legislature was given the power to pass general laws did not inhibit it from passing a law which might be adopted by localities and by a vote of the freeholders of such localities; furthermore, that there was nothing in the latter portion of the section that restricted the power of the Legislature to delegate authority to communities to adopt a stock law.

You are, therefore, respectfully advised that, in the opinion of this Department, the Legislature may enact such a law as is indicated in your letter.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2071, Bk. 53, P. 32.)

LAWS—TIME OF TAKING EFFECT.

An Act of the Legislature passed without the emergency clause and the necessary two-thirds vote does not go into effect until ninety full days after the adjournment of the session, exclusive of the day of adjournment and the day of taking effect. In other words, ninety full days must elapse between the day of adjournment and the day upon which the Act takes effect.

Section 39, Article 3, of the Constitution.

AUSTIN, TEXAS, May 23, 1919.

Hon. Ben H. Powell, Judge Twelfth Judicial District, Huntsville, Texas.

DEAR SIR: The Attorney General has your letter of May 21st, asking an opinion from this Department defining the date upon which the Acts of the Regular Session of the Thirty-sixth Legislature passed without emergency clauses and the necessary vote take effect. You state that there is a difference of opinion among your officials, some holding that these acts take effect on June 16th, and others on June 17th. In our opinion, acts of this character take effect and go into force on the first moment of time of June 18th.

The Constitution, Section 39, Article 3, provides in part:

"No law passed by the Legislature, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency * * *"

In the case of Halbert, et al., vs. San Saba Springs Land and Live Stock Association, 34 S. W., 639, the court enters into a lengthy discussion of the meaning of the Constitutional provision above quoted. In that case, there was involved the question of the validity of the Live Stock Association chartered on June 29th, 1885, under an article of the statute which had been repealed by an act of the next preceding Legislature. The question arose on whether or not the repealing act had gone into effect on the day upon which the charter was granted. The Regular Session of the Nineteenth Legislature adjourned March 31st, 1885. In the above case, the court held an act of that Legislature passed without an emergency clause did not go into effect until the 30th day of June of that year. Therefore, the law went into effect with the beginning of the ninety-first day after the adjournment of the Legislature, thereby excluding the day of adjournment and the day upon which the law took effect. We quote from the above case the discussion and citation of authority upon which this holding is based:

"The object of the constitutional convention in prescribing a prediod of time within which no law enacted by the Legislature should be operative was to give notice to the people of its passage, that they might obey it when it should become effective, and also to enable them to adjust their affairs to the change made, if any. Price vs. Hopkin, 13 Mich., 325. The law which requires citation to be served five days before the return day thereof is analogous to the constitutional provision, in that each is intended to fix a time for giving notice of an event which is to occur, or a thing that is to be done, the first to an individual, the latter to all persons; and we might well apply the rule that the entire period of time mentioned is to expire between the two dates named, as, for instance, that the day of service and the day of return in service of citation must both be excluded in the computation of the time. Applying that rule in this case, the day of adjournment of the Legislature and the day that the law shall take effect would be likewise excluded in the computation of time prescribe by the Constitution: that is, 90 full days must expire between the adjournment of the Legislature and the taking effect of the law. O'Conner vs. Towns, 1 Tex., 107.

"Article 3, Section 39, of the Constitution of 1876, reads as follows: 'No law passed by the Legislature, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency, which emergency must be expressed in a preamble or in the body of the Act,' etc. At the time this constitutional provision was adopted, the Act of December 1, 1849 (Pasch. Dig., Art. 4576), was in force, which is in this language: 'Every law hereafter made shall commence and be in force with the commencement of the sixtieth day after the adjournment of the session of the Legislature at which such law may be passed, unless in the law itself another time for the commencement thereof is particularly mentioned.' The construction of the Constitution urged by appellants' counsel would require that we change the language so as to read 'until the ninetieth day,' which would accord with the law as it then existed. But the convention did not use that language. From the change of the language, it must be presumed that there was an intention to change the rule fixed by the law upon the subject. Hotel Co. vs. Griffiths (Tex. Sup.), 33 S. W., 661. The changes plainly made are that the period of time is enlarged from sixty to ninety days: the Legislature is prohibited from putting any law into effect in less time than that named, save in the excepted classes mentioned; and, instead of saying that the law shall take effect at the commencement of the ninetieth day, it is said 'until ninety days,' etc. If the convention had intended that a law to the thereafter passed should take effect on the ninetieth day after adjournment of the

Legislature, it would have been easy and natural to have used the language of the law then in force. It cannot be claimed that it was intended that the law should go into effect at an earlier date than the ninetieth day, and the only change that could result from the language used is that it should take effect at a later date than that which would be expressed by language similar to that of the then-existing law.

"The language 'until ninety days' is incomplete and meaningless if we construe it alone by the words used, and therefore it becomes necessary, in order to arrive at the intention of the framers of the Constitution, to supply those words which have evidently been omitted. Mr. Sutherland says: 'When one word has been erroneously used for another, or a word omitted, and the context affords a means of correction, the proper word will be deemed substituted or supplied.' Suth. Stat. Const., Sec. 260. Ninety days is the period of time intended to be prescribed by the Constitution which must elapse after the Legislature adjourns before a law enacted by that body can become operative, but this is not expressed by the words used, neither can it be said that eighty-nine days or any less number must elapse if we regard only the words used. In fact, nothing definite and certain can be determined from these words; but, by supplying the words evidently omitted, we can read the provision as if it had been written thus, 'until the expiration of ninety days after the adjournment of the Legislature': or, 'until a period of ninety days shall have elapsed after the adjournment of the Legislature.' The words supplied are consistent with the context and in harmony with the purposes of the convention in framing the section quoted. It is also in harmony with the previous decisions of this court in construing statutes upon the subject of notice, and we conclude that this provision of the Constitution should be construed as if the language had been used that is above supplied. Section 43 of Article 12 of the Constitution of 1869 provided: 'The statutes of limitation of civil suits were suspended by the so-called "Act of Secession," 28th of January, 1861, and shall be considered as suspended within this State until the acceptance of this Constitution by the United States Congress.' The Constitution was accepted on the 30th day of March, 1870. In the case of Dowell vs. Vinton, this provision of the Constitution of 1869 was construed by the Court of Appeals, the question being whether or not limitation commenced to run on the day the Constitution was accepted by Congress, or on the succeeding day. It was held by the Court of Appeals that the law of limitation was not revived until the 31st day of March, 1870, the day next succeeding the day on which the Constitution was accepted. We think that this case is in point, and correctly decided. It is in harmony with the decisions before cited herein, and with the general rules laid down for construction under like circumstances. See 1 White & W. Civ. Cas. Ct. App., Sec. 327. We therefore answer that Article 566 of the Revised Statutes was in force on June 29, 1885, and that the Act of March 27, 1885, did not go into effect until the 30th day of June of that year."

To like effect is the holding of the court in the case of Beale's Heirs et al. vs. Johnson et al, 99 S. W., 1045 (1047). In determining the day upon which the act took effect, this case makes the calculation as follows:

"The Legislature adjourned April **30**, 1895, General Laws 1895, page 230. The ninety days ended July 29th and the Act took effect July 30, 1895."

In the copy of the Southwestern Reporter before the writer, the date upon which the Legislature adjourned is written April 31st. This, of course, is an error. April has only thirty days, and the certificate of the Secretary of State appended to the acts of the Legislature of 1895 states that the session adjourned on April 30th.

We, therefore, advise you that ninety full days must elapse between the date upon which the Legislature adjourned and the date of the taking effect of the act. That is to say, in computing this time the date of adjournment of the Legislature and the date upon which the act takes effect must both be excluded, and that beginning the computation with the day after the adjournment of the Legislature, the act takes effect upon the first moment of time on the ninety-first day.

The Regular Session of the Thirty-sixth Legislature adjourned, as is shown by the certificate of the Secretary of State, on the 19th day of March, A. D., 1919. Ninety days must elapse after this last named date before an act of that Legislature passed without an emergency can become effective. Under the above rules as laid down by the courts, a computation of this ninety days begins on the 25th day of March, and counting the full ninety days beginning with this date, the ninetieth day falls on June 17th. Therefore, acts of this Legislature, taking effect ninety days after adjournment, go into effect on June 18th, and the act affecting the time of holding court in your District becomes effective on the first moment of time June 18th, 1919.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OPINIONS ON CORPORATION: FOREIGN, BANK, INSURANCE.

Op. No. 1959, Bk. 51, P. 424.

INSURANCE—FRATERNAL BENEFIT INSURANCE.

Acts, Thirty-fifth Legislature, Chapter 192,
Austin's Insurance Digest, Sections 463 and 458;
Acts, Thirty-third Legislature, Chapter 113.

(1) A fraternal benefit society has no authority to issue membership certificates to persons who have not been elected and initiated into the order by its ritualistic ceremonies.

(2) Juvenile insurance policies cannot be issued under the Fraternal Beneficiary Act to dependents of a person who has not been elected and initiated into the order as a member.

(3) A fraternal benefit society may have social or general members who do not carry insurance, but in every instance, without any exception, social or general members must be elected and initiated into the order with its ritualistic ceremonies, the same as are beneficial members.

AUSTIN, TEXAS, December 20, 1918.

Hon. Chas. O. Austin, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: The question propounded in your letter of December 18 is whether or not a fraternal beneficiary society authorized to do business under the laws of this State has the right to issue juvenile insurance certificates to children whose parents, or other support, are not members of the order and who have not been initiated into all of its degrees and who are not entitled to all of the protection granted by the order to all of its members of every kind and character and who are not permitted to attend the lodge meetings of the order and participate in all the proceedings thereof in the same and like manner with all other members of the order of every nature. So much of your letter as is necessary to a description of the business referred to is as follows:

"Section 1, Chapter 192, Acts of the Thirty-fifth Legislature, provides for juvenile insurance by fraternal benefit associations authorized to do business in this State. The condition under which such insurance may be issued upon the lives of children between 2 and 18 years of age is that they must be dependent for support and maintenance upon a member of the society, the exact language of the law being: 'for whose support and maintenance a member of the society is responsible.' Frequent complaints have been filed with this Department in recent months that the Woodmen of the World, head office at Omaha, Nebraska, has been writing insurance upon children not dependent upon members of the society; in other words, that the organization has been writing insurance upon children and offering to do so, irrespective of whether or not their parents or other persons upon whom they were dependent for support and maintenance were members of the order of Woodmen of the World.

"Upon investigation, the Department finds that these charges are well founded and that the agents of this order are engaged in an active campaign to write insurance upon the lives of any and all children, irrespective of whether or not such are dependent upon members of the order for

support and maintenance. However, in order to give color of legality to the business. I find that the Woodmen of the World are issuing to the parents of children insured by them a membership certificate in what is known as the 'Security Degree' of the order. The consideration for the issue of the membership certificate is the payment for premium on the juvenile certificate. The certificate specially exempts the person in whose name it is issued from all financial liability upon the part of the Sovereign Camp, and, furthermore, it is provided in the certificate that it shall become null and void upon termination of the juvenile certificates, for the purpose of attempting to legalize which this membership certificate is evidently issued.

"There is no initiation whatever required of the parties to whom these certificates are issued, and the Security Degree is a mythical degree established by the order for the purpose of giving it an excuse to issue juvenile insurance upon children whose parents are not members of the order, according to my information."

Accompanying this letter is a copy of the certificate issued in the Security Degree. So much of this certificate as it is necessary to consider reads as follows:

"Security Degree."

"For and in consideration of the payment of the premium on Juvenile Certificate Number ....., Mr. and Mrs. .... is hereby constituted a member of the Security Degree of the Woodmen of the World and as such is entitled to participate in all the fraternal benefits of said degree without financial liability on the part of the Sovereign Camp.

"This certificate shall become null and void in the event of the termination of the juvenile certificates, the numbers of which are herein specified."

On the back of the certificate is found the following printed statement:

"(1) On behalf of nearly one million members of the different degrees of the Woodmen of the World we welcome you to the fold of Woodcraft as a member of the Security Degree.

"(2) You have now taken your first step in this great fraternity. Why not continue your journey in the realm of Woodcraft until you reach its culminating height as exemplified by the Protection Degree?

"(3) For more than twenty-eight years the Woodmen of the World has served humanity, during which time we have paid out over *one hundred million dollars* to the dependents of our members.

"(4) Over seventy thousand monuments have been erected to the memory of deceased Sovereigns. This in itself is a practical exemplification of the watchful care with which Woodcraft guards its membership.

"(5) The certificates of insurance issued by this Society are protected by assets in excess of forty million dollars."

We accept your finding that members of the Security Degree are not initiated into the order at all, and, as is observed by the reading of the membership certificate, the only consideration required for membership in the Security Degree is the payment of the premium on the juvenile certificates.

It is elementary that fraternal beneficiary associations can exercise only the powers given them by statute and that where the statute provides the method of the exercise of those powers, its provisions are exclusive and must be followed. Bacon on Life and Accident Insurance, Volume 1, Section 53.

As a corollary from this it follows that the State, in regulating insurance companies, may prescribe the character of contract which a fraternal benefit association may issue. Bacon on Life and Accident Insurance, Volume 1, Section 53; Hysinger vs. Supreme Lodge, etc., 42 Missouri Appeals, 627.

Consistent with this law, a fraternal benefit society in this State exercises its right to issue contracts on the lives of children by virtue of Chapter 192, General Laws of the Thirty-fifth Legislature. Section 1 of this Act in part follows:

"Any fraternal benefit society authorized to do business in this State and operating on the lodge plan, may provide in its constitution and by-laws, in addition to other benefits provided for therein, for the payment of death or annuity benefits upon the lives of children between the ages of two and eighteen years at next birthday, for whose support and maintenace *a member of such society is responsible.*" Chapter 192, Acts of the Regular Session of the Thirty-fifth Legislature, page 430.

It will be noted from a reading of the above statute that before a policy may be issued on the life of a child "a member of such society" must be responsible for the support and maintenance of the child.

Section 463 of Austin's Digest, or Insurance Laws of Texas, is the statute with reference to qualifications for membership in fraternal benefit associations of this State. This section reads as follows:

"Qualifications for Membership.

"463. Any society may admit to beneficial membership any person not less than sixteen and not more than sixty years of age, who has been examined by a legally qualified physician, and whose examination has been supervised and approved in accordance with the laws of the society; provided, that any beneficiary member of such society who shall apply for a certificate providing for disability benefits need not be required to pass an additional examination therefor. Nothing herein contained shall prevent such society from accepting general or social members. (Id., Sec. 7)." Insurance Laws of Texas, Austin's Digest, Section 463, page 162.

It will be noted that this section makes it clear that the laws of this State do not prevent a fraternal benefit society from having general or social members as distinguished from beneficiary members; in other words, the statutes of this State permit fraternal benefit societies to have members of the society who are not compelled to carry insurance. The constitution and by-laws of the Woodmen of the World, in effect October 1, 1917, in conformity with this permission of the statute, has a class of members called "fraternal members." See Section 85 of the Constitution and By-laws of the Woodmen of the World, in effect October 1, 1917.

The Security Degree certificates are evidently an attempt on the part of the society to create some character of social membership upon which might be predicated the authority to issue juvenile certificates in favor of the parents who do not care to join the society. The question is: Can a benefit society in this State have social members without the necessity of initiating such members into the so-

ciety the same as it does other members? We answer that it cannot. A benefit society is not compelled to require that all its members shall be beneficiary members. It might have social members of another society, but they must be members of the society in every other respect.

The reasons for this conclusion are now to be stated.

A fraternal benefit society, under the laws of this State, must be carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit. It must have a lodge system with ritualistic form of work and representative form of government, and make provisions for the payment of benefits. Austin's Insurance Digest, Section 457; Acts of the Thirty-third Legislature, Chapter 113, Section 1.

Our statutes define what is meant by a lodge system in the following language:

"Lodge System Defined.

"458. Any society having a supreme governing or legislative body and subordinate lodges or branches by whatever name known, into which members shall be elected, initiated and admitted in accordance with the constitution, laws, rules, regulations and prescribed ritualistic ceremonies, which subordinate lodges or branches shall be required by the laws of such society to hold regular or stated meetings at least once in each month, shall be deemed to be operating and (on) the lodge system. (Id., Sec. 2.)" Austin's Digest, Section 458, Acts of the Thirty-third Legislature, Chapter 113, Section 2.

It is to be noted from the last provision, just quoted, that in a fraternal benefit society "members shall be elected, initiated and admitted in accordance with the constitution, laws, regulations and prescribed ritualistic ceremonies, etc." This provision as to the method by which persons may become members of a fraternal benefit society is binding on every society transacting business in this State, and no one may become a member of any kind or character without the membership is attained through the prescribed statutory process, that is to say, the member must be elected and he must be initiated in accordance with the laws of the order "and prescribed ritualistic ceremonies." The truth of the matter is that the entire lodge system is based upon initiation, and there can be no membership without it. Bacon on Life and Accident Insurance, Volume 1, Section 83; Matkin vs. Supreme Lodge, etc., 82 Texas, 301; Hiatt vs. Fraternal Home, 72 S. W., 463; Porter vs. Loyal Americans, etc., 167 S. W., 578; McWilliams vs. Modern Woodmen of America, 142 S. W., 641.

Mr. Bacon, in his late work which we have cited (Fourth Edition), says:

"Where a ceremony of initiation is required by the laws of a society, a person, though duly elected, is not entitled to benefits unless regularly initiated, and it is immaterial that the ceremony is secret, such secrecy not being considered against public policy. In the case last cited the Court says: 'The objects of this order, as stated in the constitution, are not merely to establish a fund for purposes of insurance of members 'who have complied with all lawful requirements,' as stated in the constitution,

but, as also declared in the same article and section, 'to unite fraternally all ecceptable white men of every profession, business and occupation,' and 'to give all possible moral and material aid in its power, to its members, and those depending on its members, by holding moral, instructive and scientific lectures, by encouraging each other in business, and by assisting each other in obtaining employment.' With these and other beneficial objects in view, it is not difficult to see why there should not be a regular initiation into the order, and why members only can participate in its benefits. That the ceremony of initiation is secret does not affect it; it is doubtless intended to bind the members to a performance of their duties in respect to the objects to be accomplished. We could not say that it is a useless and unreasonable requirement. The affiliation is close and confidential for good purposes so far as can be seen from the testimony. Were the ceremonies open, they could not be said to be unreasonable; because they are secret does not make them so. The entire system, its existence and objects, are based upon initiation. We think there can be no membership without it, and no benefit, pecuniary or otherwise, without it. Matkin specially contracted in his application for membership, with reference to the initiation, that the payment of the 'proposition fee' should not entitle him to any benefit, or constitute him a member, unless he was duly 'initiated according to the ritual and laws of the order' * * * The stipulation in Matkin's contract making initiation necessary to membership, and the enjoyment of benefits attaching thereto, is not against law, or public policy, unreasonable, nor opposed to the good government and objects of the society. On the contrary, it is reasonable and calculated to promote the objects and welfare of the order.' Where the statute requires fraternal beneficiary associations to have a lodge system, it intends that no one can become a member without being initiated into one of the lodges, and until one has been initiated the association cannot rightfully issue a benefit certificate to him. The Missouri Court of Appeals has said: 'Section 7109, Revised Statutes 1909, which was then in force, governed this case, and provided that such an association is carried on for the 'sole benefit of its members.' The only source of revenue is the assessments paid by members. The payment of benefits must be to those sustaining certain relations to members. It is imperative that each association doing business under this law have a lodge system with ritualistic form of work and representative form of government. The whole scheme of such an association contemplates a course of dealing in regard to levying assessments and paying benefits only among members. Regular initiation is the birth of a member. Until such event occurs, the association is dealing with an outsider, a non-member, and an assessment paid by such a person or a benefit paid to him is a course of dealing beyond the power given by law to such associations. It is a condition precedent that is necessary to give life to the beneficiary certificate." Bacon on Life and Accident Insurance (4th Ed.), Vol. 1, pages 131-132.

In the excerpt from Mr. Bacon's work is found a quotation from the Matkin case, decided by the Supreme Court of this State, and it is unnecessary for us to further discuss or quote from that case. It is sufficient to say that our courts adhere to the proposition which we have enunciated in this opinion. Nor is it necessary for us to quote from or discuss the other authorities which we have cited. Our conclusion is in accord with the conclusion of the courts throughout the country, that is to say, in order to become a member of a fraternal beneficiary society, it is necessary for such person to be initiated into the order. Our statutes do not exempt social or general members from being initiated into the order. On the contrary, our statute, Section 458, Austin's Digest, declares that initiation according to the ritual is one of the necessary elements of a lodge system of government and, therefore, a necessary constituent of the

constitution, by-laws and practice of a fraternal benefit society operating under our laws.

In the case of Porter vs. Loyal Americans, 167 S. W., page 579, the Court of Appeals of Missouri announced its adherence to the doctrine we have stated, in the following language:

"There can be no recovery in this action; the reason being that the applicant, Fred C. Porter, never became a *member* of the defendant association. He was never initiated into the local lodge, or received the secret or ritual work that is contemplated before one can have the benefits of a certificate.

"(1) Section 7109, R. S. 1909, which was then in force, governed this case, and provided that such an association is carried on for the 'sole benefit of its members.' The only source of revenue is the assessments paid by *members*. The payment of benefits must be to those sustaining certain relations to members. It is imperative that each association doing business under this law have a lodge system with ritualistic form of work and representative form of government. The whole scheme of such an association contemplates a course of dealing in regard to levying assessments and paying benefits only among *members*. Regular initiation is the birth of a member. Until such event occurs, the association is dealing with an outsider, a non-member, and an assessment paid by such a person or a benefit paid to him is a course of dealing beyond the power given by law to such associations. It is a condition precedent that is necessary to give life to the beneficiary certificate. The following cases hold that there must be an initiation to create liability: Shartle vs. Modern Brotherhood, 139 Mo. App, 433, 122 S. W., 1139; Sloan vs. Loyal Fraternal Home Ass'n, 139 Mo. App., 443, 123 S. W., 57; Hiatt vs. Fraternal Home, 99 Mo. App., 105, 72 S. W., 463; Loyd vs. Modern Woodmen, 113 Mo. App., 19, 87 S. W., 530; Matkin vs. Supreme Lodge Knights of Honor, 82 Tex., 301, 18 S. W. 306, 27 Am. St. Rep., 886; 1 Bacon on Benefit Societies and Life Insurance, Sec. 63a, p. 122, Section 137, p. 255, Section 252, p. 540, Section 273a, p. 666; Taylor vs. A. O. U., 75 Hun, 612, 29 N. Y. Sup., 773; McLendon vs. W. O. W., 106 Tenn., 695, 64 S. W., 36, 52 L. R. A., 444." Potter vs. Loyal Americans of the Republic, 167 S W., 579.

It could not reasonably be contended that the statutes of this State permitting fraternal benefit societies to have social members override or change that section of the same Act of the Legislature which declares that members of a fraternal benefit society must be elected and be initiated according to the prescribed ritualistic ceremonies. On the contrary, inasmuch as there is no express exemption of social members from election and initiatory ceremonies, then, in order for a fraternal benefit society to have such members, these members must be elected and initiated the same as other members, the only difference being that social members are not compelled to take and pay for insurance.

Having arrived at this conclusion, then, it is entirely clear that the alleged members of the Security Degree,—who are not elected and who are not initiated like other members of the order, but whose claim to membership is based solely and alone upon the payment of a consideration,—are in truth and in fact not members of the order in any sense of the term. From this it follows that children dependent upon such persons who are not members of the order cannot have valid and legal policies or certificates of insurance issued to them.

You are advised, therefore, that a fraternal benefit society has no authority to issue membership certificates to persons who have not been elected and initiated into the order by its ritualistic ceremonies, and that juvenile insurance cannot be issued to the dependents of such persons who have not been elected and initiated into the order as members. We do not mean to say that every person who becomes a member of the order must take out insurance, because that is not required by the statute. The order may have social or general members who do not carry insurance, but in every instance, without any exception, both beneficiary and social members must be elected and initiated into the order with its ritualistic ceremonies.

Respectfully,
C. M. CURETON,
First Assistant Attorney General.

Op. 2213, Bk. 54, P. 175.

INSURANCE—LOCAL MUTUAL AID ASSOCIATIONS

Associations operating wholly within one county are not limited in the number of members.

Associations operating in two or more counties in territory of a radius of fifty miles from the home office are limited to 2,000 members.

Article 4859, Revised Statutes, amended by Chapter 50, Regular Session Thirty-sixth Legislature.

AUSTIN, TEXAS, April 23rd, 1920.

Hon. J. C. Chidsey, Commissioner of Insurance and Banking, Capitol.

For Attention of Hon. Chas. V Johnson, Deputy.

DEAR SIR: The Attorney General is in receipt of your letter as follows:

"Chapter 50 of the Acts of the Regular Session of the Thirty-sixth Legislature re-enacted and amended Section 31 of Chapter 113, Acts of the Thirty-third Legislature referring to the operation of local mutual aid associations in this State.

"The amendments to the original law provide that such associations may operate in a territory in two or more adjacent counties within a radius of not more than fifty miles from the city or town in which its principal office is located, whereas the original law limited this territory to twenty-five miles from the said home office.

"The amendments also limit the number of members which any such association might have to two thousand, whereas the original law did not have any limitation whatever as to the membership. In all other respects the amended and original laws are practically the same.

"Two of these local mutual aid associations have made reports to this office showing that each of them has a membership of more than two thousand and these reports, therefore, show that they are operating in conflict with the amended law which prohibits a membership exceeding two thousand. We understand also that the membership of these two associations probably exceeded two thousand at the time the amended law was enacted and in one case at least, although the membership of the association amounts to six thousand, the territory in which it operates does not extend beyond the county in which its home office is situated.

"We are unable to find in the law any method by which the excessive membership under such circumstances could be reduced with fairness to the association and to its members. In view of these facts we desire your opinion upon the following questions:

"First. Would it be lawful for these associations to continue to operate and accept contributions from and pay benefits to the members of the association, notwithstanding the fact that they amount to more than two thousand?

"Second. If the above question is answered in the negative, this department desires to know just how we could require the membership to be reduced under the circumstances so as to compel the association to operate with a membership not exceeding the limited two thousand."

The writer hereof has heretofore verbally advised your Mr. Johnson to the effect that the provision of the amended Act limiting membership to not exceeding two thousand does not apply to a local mutual aid association operating wholly within a county, and we now beg to confirm the advice so given.

Article 4859, R. S. 1911, as amended by Chapter 50, Acts of the Regular Session of the Thirty-sixth Legislature, reads, in so far as pertinent to this inquiry, as follows:

"Article 4859. The provisions of this chapter shall not apply to incorporated or unincorporated mutual relief or benefit or burial associations, operating upon the assessment plan, whose business is confined to not more than one county in the State of Texas, or to a territory in two or more adjacent counties included within a radius of not more than 50 miles surrounding the city or town in which its principal office is to be located, which is designated in its charter and which at no time shall have a membership exceeding 2,000 members which are hereby denominated local mutual aid associations. * * *"

Article 4859, covering this provision, originally read as follows:

"The provisions of this chapter shall not apply to incorporated or unincorporated mutual relief, or benefit, or burial associations, operating upon the assessment plan, whose business is confined to not more than one county in the State, or to a territory in two or more adjacent counties included within a radius of not more than twenty-five miles surrounding the city or town in which its principal office is to be located, which is designated in its charter, which are hereby denominated local mutual aid associations * * *"

It will be observed that the amendment of the Thirty-sixth Legislature extended the territory in two or more adjacent counties to a radius of fifty miles surrounding the city or town in which is located the principal office, and in addition thereto placed the limitation upon membership to not exceeding two thousand members. In other words, in extending the territory in which the company might operate, the Legislature saw fit to limit the number of members the association might have. This article contemplates two characters of associations: one operating wholly within one county, and the other operating in territory composed of two or more adjacent counties and included within a radius of not more than fifty miles. It is to the latter character of associations that the clause limiting membership to not exceeding two thousand applies.

We therefore advise you that those local mutual aid associations

operating wholly within one county are not limited in their number of members, and that it is only those associations operating in two or more counties within a radius of fifty miles from the home office that are so limited.

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

CONSTITUTIONAL LAW—POLICE POWER—BUILDING AND LOAN ASSOCIATIONS.

Op. No. 2099, Bk. 53, P. 161.

1. The State under its police power has the Constitutional authority to reasonably regulate, control and supervise the affairs of building and loan associations, since such associations are in their nature public associations doing business with the public as bankers, insurance companies, and other trust companies, and are subject to regulation on the same theory that these other trust companies are subject to lawful regulations.
2. The fact that a statute imposes certain requirements on the right of persons or corporations to conduct the building and loan business as to make it impossible for some person, persons or associations to engage in it does not render the statute unconstitutional as creating a monopoly in those who are able to comply with the conditions.
3. The police power of the State is defined to be that "power vested in the Legislature to make, retain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same." Black's Law Dictionary.
4. Corpus Juris, Vol. 9, pp. 923-924.
   Brady vs. Mattern, 125 Iowa, 158, 100 N. W., 358.
   Mechanics Building & Loan Assn. vs. Coffman, 162 S. W., 1091.
   State ex rel Hickman, Supervisor of Bldg. & Loan Assn., vs. Preferred Tontine Mercantile Co., et al., 82 S. W., 1075.
   Union Savings Investment Company vs. District Court of Salt Lake County, 140 Pac., 21.
   State vs. Merrill, 144 Pac., 925.
   State Savings & C. Bank vs. Anderson, 165 Cal., 437.
5. All persons, firms, corporations or association of persons or joint stock companies which are doing a building and loan association business are controlled and regulated by the provisions of Chapter 5, Laws of the First Called Session, Thirty-fourth Legislature, 1915. Section 27 of the Act referred to provides that no person, firm, corporation, or association of persons or joint stock companies shall hereafter engage in this State in the business provided for in this Act, except in compliance with this Act * * * This provision is mandatory and covers all persons, firms or corporations engaged in this character of business.

AUSTIN, TEXAS, June 24, 1919.

Honorable George Waverly Briggs, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: We beg leave to advise that we have had under investigation the law applicable to the affairs of the United Home Builders of America of Dallas Texas, the subject matter having been submitted by you to the Attorney General for his investigation and advice.

The United Home Builders of America, which has its general office in Dallas, Texas, and is engaged in the business of a building and loan association, is, in our opinion, controlled by and should come under the provisions of Chapter 5, laws of the First Called Session of the Thirty-fourth Legislature, 1915.

The company is not a corporation, but is a common law association organized under articles of agreement and declaration of trust. W. M. Webb and A. A. Coke, resident citizens of Dallas, Texas, are the trustees of said Association. The parties hold their office of trustees for said Association during their natural life. The trustees agree to hold in trust all moneys collected from the contract members of said Association and to loan the same to the members upon the terms and conditions set out in said Association's 3% Loan and Home Purchasing Contract and agree to do all other things authorized and required of them by said contract and said articles of agreement. We have had submitted to us and have examined carefully the 3% Loan and Home Purchasing Contract issued by the Company. Upon its investigation we find that the Association is doing the ordinary business of a building and loan association, as well as co-operative savings and contract loan businesses. We have been furnished with a very able brief prepared by Messrs. Cocke & Cocke, Attorneys of Dallas, Texas, on behalf of said Association, in which they contend that the State of Texas by the provisions of Chapter 5, Acts of the First Called Session, Thirty-fourth Legislature, 1915, aforesaid, did not invoke the provisions of said Act against common law associations under articles of agreement and declaration of trust as their association is conducted. However, after a thorough investigation of the question, we are unable to agree with the gentlemen in their contention, and we are convinced that the act of the Legislature referred to regulating the business of co-operative savings and contract loan companies extends to and includes all building and loan companies, whether incorporated or not.

In the discussion of the principle of law involved in this case, the attorneys representing the Association contend that the STATE OF TEXAS MAY NOT REQUIRE THIS ASSOCIATION TO CONFORM TO THE PROVISIONS OF THE STATUTE REGULATING SAVINGS AND CONTRACT LOAN COMPANIES.

In our opinion, the State, by virtue of its "police power," has the power to regulate the operation of building and loan associations in this State. The police power of a state is defined to be that "power vested in the Legislature to make, retain and establish the manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same." Black's Law Dictionary. The police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as those designed to promote the public health, the public morals or the public safety. Chicago B. & Q. Ry. Co. vs. People of the State of Illinois, 200 U. S., 561. The police power is the power to impose those re-

straints upon private rights which are necessary for the general welfare. It is a power inherent in all requirements, needing neither grant nor recognition by the Constitution. State of N. C. vs. U. S. 199 U. S., 437. Therefore, the question recurs as to whether or not the State by the exercise of its police power may regulate building and loan associations generally. In our opinion, the state has such authority.

"By virtue of its police power, the State may regulate building and loan associations, even to the extent of limiting the carrying on of their business to incorporated associations or to the extent of making the State auditor a general supervising officer over this class of corporations. In the exercise of this power, various statutes have been passed relating among other things to the incorporation of such associations, to their powers, to the withdrawal of stockholders, and to the imposition, amount and collection of dues, fines, premiums and interest." Corpus Juris, Vol. 9, pp. 923-924.
Brady vs. Mattern, 125 Iowa, 158, 100 N. W., 358.

The case above cited decided by the Supreme Court of Iowa involved the question as to whether or not the State under its police power had the authority to limit the right to conduct the building and loan business to incorporated associations only. The act of the Legislature of the State of Iowa in controversy attempted to regulate the operation of building and loan associations by requiring articles of incorporation for such purposes. The provisions of the act were made applicable to all unincorporated organizations, associations, societies, partnerships or individuals conducting and carrying on a business corresponding as described to the business authorzed to be carried on by incorporated building and loan associations. The act, however, imposed a variety of conditions and restrictions on the transacting of such business by unincorporated organizations, associations, partnerships, etc., which are not imposed upon incorporated associations, among which are the conditions and requirements that the unincorporated organizations, associations, partnerships, etc., shall before transacting any business, submit to the executive council of the state a sworn statement of resources and liabilities, and deposit with the auditor of the state at least Fifty Thousand ($50,000.00) Dollars of negotiable notes and such further securities as the auditor of the State may require; the deposit to be for the protection of members of such organizations to be held in trust for the purpose of carrying out their contracts with members and persons making periodical payments thereto. It is further provided that on approval of executive council of the method and plan of business of such unincorporated organization, association, etc., the auditor of the state shall issue a certificate authorizing it to transact business upon the deposit with him of the securities required; that the auditor may at any time make an examination of the association and may revoke its certificate of authority, if it shall be found not to have complied with, or to have violated any of the conditions imposed.

The appellee in the case contended that the statute in controversy was unconstitutional, and among other grounds urged the following:

that the effect of the law is to prohibit individuals and unincorporated bodies from engaging in the building and loan business which it permitted to corporations; that the effect of the law is to confer monopoly of the building and loan associations upon corporations, thereby depriving individuals of the common law right to make contracts contrary to the State Constitution of Iowa; that the law delegates legislative functions to the auditor of the sate and to the executive council in violation of the Iowa State Constitution, and that the law impairs the obligation of existing contracts in violation of the Federal and State constitutions. The court in deciding the case, in defining the powers and duties of corporations and their liabilities, in part used the following language:

"Corporations derive their existence from the State, and hold their franchises subject to legislative control. They are subject to the visitorial power of the commonwealth, and they may be, and are in fact, required to lay open before the several departments of State government and before the public the character and extent of their business, the profits realized, the dividends declared, and the investments made * * * Private individuals are not subject to the same visitorial power. They cannot ordinarily be compelled to disclose their business, their financial conditions, or the character of their investments. They cannot be restricted in the use of either their capital or their profits, as corporations may be. Those who deal with them must trust more to their personal integrity than the common experience shows to be safe. The State may compel a fair measure of fidelity in the management of these vast sums, and provide for the safety of the insured when, and only when, the business is in the hands of corporations."

"This language is peculiarly applicable to building and loan associations. If the association is incorporated, the member, as a stockholder, can ask protection in the courts as against a perversion of funds, the safe management of which is essential to enable the association to carry out, in good faith, its obligations; but what protection does the individual investor have, as against a partnership or person to whom he pays money under such a contract, save the individual responsibility of the other party to the contract? If the statute which we are now considering is not valid, then such investor has practically no remedy, except an action at law for breach of contract, if the funds to which he has contributed may have been squandered or put beyond his reach. It is hardly necessary to now enter into any discussion of the right and duty of the Legislature to regulate the various businesses conducted by banking, insurance, and building and loan associations. Such right and duty have been recognized by legislation in practically all of the States in the Union, and conceding as we must that such legislation is valid—that is, that these various forms of business may properly be regulated by the Legislature in the exercise of the police power—we reach the conclusion that it is within the power of a Legislature, if, in the exercise of its discretion, it sees fit to so enact, to limit such business to incorporated associatons."

In deciding the merits of this case, the court held as follows:

(1) That the Legislature has power to limit the right to conduct the building and loan business to incorporated associations;

(2) A statute which requires unincorporated associations, partnerships and individuals conducting the building and loan business to deposit securities representing Fifty Thousand ($50,000.00) Dollars to the auditor of the State as a condition precedent to the right to do business, which authorizes the auditor to require such additional securities as he may deem necessary and which gives the executive council authority to approve the plan or method of doing business,

such conditions being imposed upon incorporated associations, does not make an unreasonable classification;

(3) The fact that a statute imposes such conditions on the right to conduct the building and loan business as to make it impossible for some person, persons or associations to engage in it, does not render the statute unconstitutional as creating a monopoly in those who are able to comply with the conditions, and

(4) A statute which authorizes the State Auditor to require unincorporated building and loan associations to make such additional deposits of securities as he may deem necessary, and which authorizes the executive council to pass upon the plans and methods of the association is not unconstitutional as delegating legislative authority.

The doctrine that the State under its police power has the authority to regulate the operation of building and loan associations was approved by the Supreme Court of Arkansas in the case of Mechanics Building & Loan Association vs. Coffman, State Auditor, 162 S. W., 1091. The Acts of the State of Arkansas, Laws 1913, p. 904, referring to building and loan associations and other investment companies, provided that said associations and companies should be examined by the insurance commissioner and licensed only in case their assets are more than their liabilities, and their manner of conducting business is fair and promises a reasonable return, and such companies are required to enter into a bond with the State of Arkansas in the sum of Twenty Thousand ($20,000.00) Dollars for the faithful performance of its contracts or undertakings. In this case the Mercantile Building & Loan Association made application to such State Auditor to be examined and to be authorized to engage in business as a building and loan association. The State Auditor examined the assets and liabilities of said company and was prepared to and did agree to license the company contingent upon their executing a Twenty Thousand ($20,000.00) Dollar bond, as aforesaid, payable to the State of Arkansas for the faithful performance of its contracts. The company refused to execute the bond, whereupon the State Auditor refused it a license to do business in Arkansas. The Supreme Court of that state sustained the law and the case of the Auditor in his refusal to issue a permit to the association. The opinion of the courts cites with approval the decision of the court in the case of Brady vs. Mattern, 125 Iowa, 158, 100 N. W., 358, and held that "the business of building and loan associations is subject to regulation under the police power of the State as well as the business of banking and of insurance."

Another case decided by the Supreme Court of Missiouri approving the doctrine that the state under its police power has the right to regulate the operations of building and loan associations and other concerns selling tontine maturing contracts—State ex rel. Hickman, Supervisor Building & Loan Association, vs. Preferred Tontine Mercantile Company, et al., 82 S. W. 1075. Acts of 1903, p. 110 of State Legislature sought to regulate the operations of persons and concerns engaged in making or issuing contracts to be redeemed or fulfilled in the order of their issue by the accumulation of funds arising from the contributions made by the holders of such contracts, requiring

those engaged therein to make a specified deposit to the State Treasurer as security for the holders of such contracts, and to obtain a license from the supervisor of building and loan associations, who is made ex-officio supervisor of such business with visitorial powers, etc., is a regulation which may be prescribed by the State under its police power. The court in this instance held that the provisions of such act are within the police power of the State, that the same had for its single purpose the promotion of honesty, fair dealing and the safety of its investments, and that the act was not contrary to any of the provisions of the State Constitution of that state or of the United States.

The Supreme Court of Utah in the case of Union Savings & Investment Company vs. District Court of Salt Lake County, 140 Pac. Rep., 221, sustains the same doctrine, that is, that the state under its police power has the authority to regulate and control the operations of building and loan associations. In discussing the purposes for which such associations are formed, the court said:

"The general scheme and purpose of such associations, therefore, is to permit persons without either ready or large means to obtain sufficient money to build homes and to pay for them in small payments at stated intervals of time. A building and loan association honestly, efficiently, and safely conducted may therefore be of great benefit to any community, and more particularly to one where there are a large number of wage-earners. *The State, under its police power*, may thus assert the right to exercise some rights of inspection and supervision over building and loan associations, as well as over banks, which it may not deem necessary with respect to corporations organized for profit generally. In view, therefore, that as a general thing there are a considerable number of persons who are without means, or, at least, without ready means, who become members of such associations, and that they do so for the purpose of building moderate and inexpensive homes, the State may well, for their benefit and protection, throw some safeguards around such associations, and require one or more State officers to perform some special duty or duties with regard to them. In this, like in a number of other States, therefore, there are statutes requiring such associations to file with a certain State officer and publish periodical statements showing their financial condition; that certain officers may at any time examine into their financial affairs, and, if found in an unsatisfactory or unsafe condition, may require such associations to remedy any defects and to comply with the statutes, and upon failure to do so a particular officer named shall go into court and wind up their affairs and collect the assets for the use and benefit of those who may perhaps be financially or otherwise unable to protect their own interests, which individually may not be great."

The case of State vs. Merrill decided by the Supreme Court of Washington reported in 144 Pac. Rep., 925, is directly in point. The laws of the State of Washington, Laws of 1913, p. 326, conferred upon the State Auditor power to regulate savings and loan associations with visitorial powers, and is upheld by the Supreme Court of that State as constitutional. In discussing the power of the State Legislature to enact such a law, the Supreme Court of this State said in part: "We think it sufficient to say that these building and loan or savings and loan associations, as provided for in this act, are within the control of the Legislature of the State. They are in their nature public associations doing business with the public as bankers, insurance

companies and other trust companies, and are subject to regulation on the same theory that these other trust companies are subject to lawful regulation," citing with approval the case of State Savings & C. Bank vs. Anderson, 165 Cal., 437, 132 Pac., 755. The court said that "the accounts of these savings and loan associations are, therefore, in their nature public." "We think," says the court, "it is not overstating the Constitution to say that the Legislature has the power under this provision to authorize the State Auditor to examine and audit accounts of such trust companies and in connection therewith to perform such duties as are necessary to a full and fair control of the business of such associations."

In our own State we have laws enacted by the Legislature under its police power regulating the conducting of the business of insurance and banking, making certain restrictions and requirements which are very much akin to the acts of the Legislature under discussion, seeking to regulate and control the operation of building and loan associations. These laws have been construed by our courts and held to be valid. The business of a building and loan association is very much akin to that of banking and insurance, and the same reasons for public control and regulation in the one instance are good in the other. Under its police power, the State unquestionably has the right to regulate and control the affairs of building and loan associations, such as is being conducted by the Union Home Builders of America. In view of the decisions of the courts above quoted and the numerous authorities hereinabove cited, we think it is not an open question, but that the State has the authority through its legislature and by virtue of its police power to control the operation of building and loan associations, whether incorporated or not.

Chapter 5 of the Laws of the First Called Session of the Thirty-fourth Legislature, 1915, is an act regulating the business of co-operative savings and contract loan companies, such as building and loan associations under discussion. The act is a comprehensive one, containing about thirty sections. Among its material provisions are:

(1) Co-operative savings and contract loan institutions organized under the General Laws of this State in the manner therein provided, and all such institutions as may be organized hereafter are required to file certified copy of their charters issued to such companies by the Secretary of State with the Commissioners of Insurance and Banking;

(2) All such corporations are under the supervision and control of the Commissioner of Insurance and Banking;

(3) The capital stock of all such institutions is required to be not less than Twenty-five Thousand ($25,000.00) Dollars;

(4) Such concerns are required to invest not less than thirty-three and one-third (33⅓%) per cent of their capital stock in securities of the kinds in which by law it is provided to invest or loan its funds, and shall deposit the same with the Commissioner of Insurance and Banking for the common benefit of all the holders of all the contracts issued by it. This is denominated as its legal reserve;

(5) All contracts issued by such concerns shall have on their face a certificate substantially in the following words: "This contract is registered, and approved securities equal in value to the legal reserve

thereon are held in trust by the Commissioner of Insurance and Banking of the State of Texas," which certificate shall be signed by the Commissioner and sealed with the seal of his office;

(6) The Commissioner of Insurance and Banking is required to keep an itemized statement of all contracts issued by said company and to value the same;

(7) The by-laws, all forms of contract, and all literature in circular or permanent form, which undertakes to state the benefits and advantages of the contract to the investor or holder thereof, shall be first submitted to the Commissioner of Insurance and Banking for his examination and approval before such advertisements are promulgated and before such contracts are issued;

(8) No foreign or domestic company shall transact business under this act, unless it shall first procure from the Commissioner of Insurance and Banking the certificate of authority stating that the requirements of the laws of this State have been fully complied with by it and authorizing it to do business in this State;

(9) The law regulates the manner in which dividends may be paid by the company;

(10) The provisions of the act provide that the companies shall invest their funds in certain approved securities, including the securities in which life insurance companies are permitted to invest or loan their assets;

(11) The act provides for the manner in which the loans may be made and real estate purchased;

(12) The act further provides for the manner of taxation;

(13) Section 24 of the act provides that all agents representing the companies soliciting business shall be duly licensed by the Commissioner of Insurance and Banking before they are authorized to act as agents in soliciting business for the companies.

Without the enumeration of the many other provisions of the act, its scope seems to be a complete supervision and control of all domestic and foreign corporations, persons, firms or associations of persons, or joint stock companies engaged in the business of conducting a building and loan association. Under its police power, the state had the authority to enact this law.

Section 27 of the Act referred to reads as follows:

"No person, firm, corporation, or association of persons or joint stock company shall hereafter engage in this State in the business provided for in this Act, except in compliance with this Act, and any corporation which does so engage shall have its charter forfeited by suit of the Attorney General and shall be liable to a penalty of not less than one hundred dollars a day nor greater than five hundred dollars a day for each day that it does so engage; all such suits to be brought as other penalty suits which the Attorney General is authorized to bring; any person who does so engage in violation of the provisions hereof shall be guilty of a misdemeanor for each and every day such person is so engaged and shall be punished by fine not less than one hundred nor more than five hundred dollars for each offense; provided each day shall be a separate offense; provided, however, that existing corporations, individuals, associations and joint stock companies engaged in the business defined in this Act at the time this measure goes into effect shall have twelve months thereafter to adjust their business affairs and bring their business under the terms of this Act; provided, however, that they must within sixty days after this

Act goes into effect submit a statement of their business to the Commissioner of Insurance and Banking, together with the certificate of their intention to accept the provisions of this Act, and comply therewith."

Undoubtedly, the act of the Legislature and an investigation by the provisions of Section 27 above quoted intended to include all persons, firms, corporations, associations of persons, or joint stock companies engaged in this character of business. The Legislature so stated its intentions and to correctly construe the act as including all associations doing this character of business in the State, including that of the United Home Builders of America. There are no exceptions in the bill exempting any associations or joint stock companies from its provisions. On the contrary, there is an express provision in the act to include all persons, firms, corporations, associations of persons or joint stock companies. Under Section 3 of the Act, all institutions doing this character of business are required to have a capital of Twenty-five Thousand ($25,000.00) Dollars. Under Section 9, referring to capital stock of such concerns, it is provided that if such capital stock shall become impaired to the extent of thirty-three and one-third (33 1/3%) per cent thereof, computing its liabilities according to the terms of this act, that the same shall make good such impairment within sixty days by reduction of its capital stock or otherwise, provided its capital stock may never be reduced below the minimum required by the act, and failure to make good such impairment within such time shall forfeit its right to write new business in this State until such impairment shall have been made good, and the Section of the Act further provides for the appointment of receiver by the Commissioner of Insurance and Banking to wind up the affairs of such company when its capital stock shall become impaired to the extent of fifty (50%) per cent. Only companies with an authorized capital stock of Twenty-five Thousand ($25,000.00) Dollars are authorized to engage in this character of business. We believe that this provision of the act of the Legislature is mandatory, and that a company or association of a less capital stock is not authorized under the law to do this character of business, and the fact that the Home Builders of America may not have this amount of capital stock at this time is immaterial for the purpose of this discussion, for the reason unless they are subject to qualify and to set apart this amount of capital stock, they certainly would not be authorized to continue to do business as a building and loan association. If it means that the association can set aside a capital stock of any amount less than Twenty-five Thousand ($25,000.00) Dollars, it means to render the act of the Legislature nugatory so far as unincorporated companies are concerned. The provisions of Section 27 of said Act to the effect that "no person, firm, corporation or association of persons or joint stock company shall hereafter engage in this State in the business provided for in this Act, except in compliance with this Act," means what it says, and prohibits all companies, whether incorporated or not, from engaging in the business of building and loan associations, except under the provisions of the act of the Legislature hereinbefore referred to.

Therefore, we conclude, in our opinion, that the United Home Builders of America, home office Dallas, Texas, is controlled by the

provision of the act of the Legislature above referred to, and that they should comply with the provisions of said law. We have not discussed the policy which actuated the Legislature in passing this law. In our opinion, they had the authority to enact the same, and as to the policy of including all companies incorporated as well as those unincorporated under its provisions. This is a question for the Legislature alone to determine. So far as we are able to determine from the evidence before us, we are of the opinion that the association known as the United Home Builders of America are attempting to do a legitimate business, and doubtless are doing a great deal to assist its members to procure homes; still, in our opinion, the law above quoted controls the operation of their business, and that necessarily the association will have to comply with these provisions.

Yours very truly,

W. J. TOWNSEND,
Assistant Attorney General.

Op. 1956, Bk. 59, P. 403.

CORPORATIONS—OIL COMPANIES—RIGHTS OF—WORDS AND PHRASES.

Revised Statutes, Article 1131.

(1) There is no independent corporate authority in this State to organize corporations whose main purpose is to buy and sell oil royalties.
(2) There is no statute in this State authorizing the formation of corporations whose business it is to sell stock in oil companies
(3) Oil companies chartered under Revised Statutes, Article 1121, have the right to acquire royalties in oil wells or oil properties and, necessarily, have the incidental right to sell these royalties, but these powers are incidental to its main purpose to conduct an oil company.
(4) An oil company, of course, has the right to acquire oil, and the grant of royalties arising from the production of oil on a tract of land is a grant of the oil in the land.

AUSTIN, TEXAS, December 3, 1918.

Hon. George F. Howard, Secretary of State, Capitol.

DEAR SIR: We are in receipt of a communication presenting two questions for our determination, and, in view of the general importance of this matter, we have decided to answer them in the form of an opinion addressed to you, so that the public may have the benefit of the views of this Department.

The questions referred to were presented by the writer of the inquiry as follows:

"1. Can a corporation organized under Article 1121, Section 16, Sayles' Revised Statutes, and as amended by the Thirty-fourth Legislature, page 225, buy and sell royalties in oil wells and leases?
"2. If not, is there any article under which a corporation can be organized with the power to buy and sell oil royalty and stock in oil companies?"

Replying to these questions, I beg to advise you that there is no provision in the corporation laws of this State for chartering a cor-

poration with power to buy and sell oil royalties and stock in oil companies. However, oil companies organized under Subdivision 16 of Article 1121 would have the right to buy and sell royalties where such purchase and sale were incident to their general business of conducting an oil company. Sheehan vs. Sheehan-Hackley & Co., 196 S. W., p. 667.

An oil company, of course, has the right to acquire oil. The grant of royalties, rents and income arising from the production of oil on a tract of land is the grant of the oil in the land. Thornton on The Law of Oil and Gas, Volume 1, p. 41.

We are clear, therefore, that all companies chartered under the statute referred to above have the right to acquire royalties in oil wells or oil properties, and necessarily they have incidental right to sell these royalties. However, there is no independent corporate authority to organize corporations whose main purpose is to buy and sell oil royalties; nor is there any statute by which corporations may be organized whose business it is to sell stock in oil companies.

Respectfully,

C. M. CURETON,
First Assistant Attorney General.

CORPORATIONS—FOREIGN CORPORATIONS.

Op. No. 1957, Bk. 51, P. 409.

R. S. ARTICLE 1314

1. A foreign corporation which sells machinery in interstate commerce, but which in the same contract agrees to install same within this State, is engaged also in intrastate commerce, and, in order to carry out its contract of installation, must have a permit to transact business in this State, under the statutes.

2. This is true, even though the actual work of installation is done by another corporation than the original contracting one, for the reason that the other corporation is merely an agency through which the original intrastate contract is carried out.

AUSTIN, TEXAS, December 14, 1918.

Hon. George F. Howard, Secretary of State, Capitol.

DEAR SIR: We have received an inquiry from the United Equipment Company of Knoxville, Tennessee, the substance of which presents the question as to whether or not this company is transacting interstate business or whether its business is of such a character as to require it to take out a permit in order to transact the same in the State of Texas.

The question appears to be one which will likely recur in administering the duties of your office; and we have decided, therefore, to write an opinion on the question for the information of your Department, as well as for the information of this particular company in the transaction of its business. The business of the company is very well stated in its letter to the Attorney General, as follows:

"By way of explanation, will state that we are organized for the purpose of financing the installation of automatic sprinkler systems. As an illustration: We have solicitors on the road who contract with a concern for the installation of an automatic sprinkler system in their plant, factory or store, as the case may be, and the contract is executed in Knoxville, Tennessee, by us; that is, the solicitor secures the contract and the signature of the purchaser and then forwards it to this office for our acceptance or rejection. If we accept it, we so acknowledge on the contract, and it becomes binding.

"Next, we go to the companies organized for the purpose of constructing and installing the automatic sprinkler systems and make a contract with them to install the system for us; in other words, if we enter your State to do business, the extent of our operation is simply the securing of the contract, and then the actual construction and installation is done by another company."

Accompanying the letter of inquiry, are two forms of contracts. The first is that entered into by the United Equipment Company with its customers, and the second is that entered into by the United Equipment Company with the company which does the actual installing of goods constructed to be sold by the United Equipment Company.

In this particular case, the installing company is a corporation known as the General Fire Extinguisher Company. The inquiry is predicated upon a proposition that the company which does the actual installation has a permit to transact business in this State. By the terms of the contract, first referred to, the United Equipment Company agrees with its Texas customer to install automatic sprinkler systems in premises located in the State of Texas. The Texas property, under this contract, is to be equipped with a system of automatic sprinklers. During the period of installation, its local customer gives possession to the Tennessee Company of the premises to be equipped for their control as far as necessary for the installation of the sprinkler equipment.

The title to the sprinkler equipment remains in the Tennessee corporation until it is paid for. The local customer is regarded as the lessee of the equipment. In other words, the contract with the Tennessee Company and its Texas customer is a contract for the sale and installation of automotic sprinklers within the State of Texas. In this particular case, the contract is solicited by agents of the Tennessee Company sent into the State for the purpose; but the final acceptance and approval of the contract takes place in Tennessee.

The insistence is made that this is purely an interstate contract; and that for its execution, the Tennessee Company is not required to have a permit to transact business in the State of Texas. After the Tennessee Company has entered into the contract with its Texas customer, it then makes a contract with an installing company which has a permit to transact business in this State.

In the form of contract before us, the installing company is known as the General Fire Extinguisher Company. A reading of the contract between the Tennessee Company and the Extinguisher Company discloses that the Extinguisher Company furnishes and installs all of the equipment, except the earth, carpentry and mason work, which are to be furnished by the Tennessee Company. The Texas customer

is not a party to the contract between the Tennessee Company and the installing company. The question is whether or not the Tennessee Company must have a permit to transact business in the State, as required of foreign corporations.

It is the opinion of this Department that it must have such a permit. The reasons for this conclusion will now be stated. The substance of the contract between the Tennessee Company and its customer, as has previously been stated, is that the Tennessee Company not only makes a sale to its Texas customer of certain pipe and machinery, which we will designate as the sprinkler systems, but that it contracts and agrees to install the same.

We first direct your attention to so much of the statutes of this State relating to the admission of foreign corporations as may be necessary for your consideration in the instant matter. Revised Statutes, Article 1514, in part, read:

"Hereafter, any corporation for pecuniary profit, except, as hereinafter provided, organized or created under the laws of any other State, or of any territory of the United States, or of any municipality of such State or territory, or of any foreign government, sovereignty or municipality, desiring to transact business in this State, or establish a general or special office in this State, shall be, and the same is hereby, required to file with the Secretary of State a duly certified copy of its articles of incorporation; and, thereupon, the Secretary of State shall issue to such corporation a permit to transact business in this State." (Acts 1897, p. 167.)

The courts of this State have construed this Article in various cases, and among others, in the case of Smythe Company vs. Fort Worth Glass and Sand Company, et al. (105 Texas, p. 8.) In this case, a contract made in Pennsylvania by a corporation of that state to erect in Texas a gas producing machinery for a glass factory involving in its performance the furnishing, shipment and setting up of machinery and materials from outside of the State and, also, the employment in the State of labor and the purchase of materials here and being done under the direction of an agent of the contractor on the ground, was held to be transaction of business in the State of Texas within the meaning of the above article and not a mere sale, shipment and installation of machinery from another state, such as would constitute interstate commerce; and the Pennsylvania Company was denied the right to maintain suit in Texas courts for balance due it.

It is unnecessary for us to further state facts as they are available in the Texas Reports, cited, and may likewise be found reported in 142 S. W., p. 1157.

In making its holding that the contract, involved in this case, constituted acts in intrastate commerce, requiring a permit on the part of the foreign corporation, our Supreme Court, in part, said:

"The contention that this case comes within the meaning of Interstate Commerce is, we think, clearly met by the terms of the contract declared on, and what was done by plaintiff in its performance. The transaction has no mark of barter and sale. There was no agreement that defendant would purchase any part of the machinery to be used in the construction of the gas producers, and the price agreed upon was for the complete erection or building of the gas producers, including all material and labor. It is immatrial where the agreement was made, whether in Texas or in

Pennsylvania. Its performance was to be had in Texas; the work provided for was in line with the business of plaintiff; it was for pecuniary profit; the material was that of plaintiff, a portion of which was purchased and paid for by plaintiff in this State; hands were employed by plaintiff and worked for and under the supervision of plaintiff's agent in Texas. In view of all these facts, it may be asked in what particular was this transaction interstate commerce? The performance of the contract on the part of plaintiff was that of constructing three gas producers with downtakes in this State for pecuniary profit. The price agreed upon was not for machinery or any part of machinery, but was for the construction of such gas producers, including all material and labor. The agreement was a builder's contract entered into by plaintiff, a foreign corporation, to be performed in this State, and in the line of its business. It contemplated from six to eight weeks for its performance, and was the transaction of the business of erecting or building of gas producers and was in competition with citizens of this State transacting similar business. The agreed price was a gross sum for the labor and material. To perform this contract it necessarily required transactions of business in this State.

"To sustain the contention of plaintiff, it must be upon some other ground than that of interference with Interstate Commerce. The authorities cited by plaintiff and relied upon as sustaining its contention have been carefully examined and we have been unable to apply these cases to the facts of this case. In all the authorities to which we have been pointed by plaintiff, the dominant feature of the transaction is the purchase and sale of machinery upon an agreed price for each separate article, with promise of delivery, and in some cases the installation and adjustment of the machinery so purchased. The installation of the machinery, as provided for in the cases relied upon by plaintiff, is subordinate to the sale of the machinery and hence such contracts in other jurisdictions than ours and under other regulatory statutes than ours, although similar to ours in some instances, have been held to constitute Interstate Commerce and therefore not reached by our statutes. It is not necessary in this case to determine whether such contracts, in so far as they may provide for the installation of machinery in this State, come within the article of the statute under consideration, and no decision of that question is here made.

"It is contended that what plaintiff did in building the three gas producers for Woolverton was an isolated transaction and did not indicate a desire or intention to transact business in this State, and hence does not come within the purview of the law. We think it immaterial how many such transactions were had, whether one or a hundred; if the contract and acts of plaintiff in the one instance constituted the transaction of business in this State, the law required it to first procure from the Secretary of State a permit for such purpose. If, on the other hand, the execution of the contract herein set out was nothing more than a purchase and sale of machinery to be shipped from another State to this, then the plaintiff could maintain its suit. However, we think the plaintiff transacted business in this State in violation of the statute."

Smythe Co. vs. Ft. Worth Glass & Sand Co. et al., 105 Texas, 14-15.

Considering the matter further, the Supreme Court said:

"That the contract declared on by plaintiff and the things done in compliance with that contract constituted the transaction of business in this State we have no doubt. If any doubt existed as to the legal effect of that contract and its performance in this State to constitute it the transaction of business, we would be able to solve the question without doubt as upon precedent. In the case of State Bank of Chicago vs. Holland, 103 Texas, 266, 126 S. W., 564, the Court of Civil Appeals of the Sixth District certified to this court the question whether or not the State Bank of Chicago as a bona fide holder of a note transferred to it for value and before maturity, could sue on said note in this State, where such note had been given the assignor, a foreign corporation, for building a canning factory in this State, without first securing a permit to transact business

in this State. The facts showed that the foreign corporation entered into a contract with citizens in Upshur County, Texas, to furnish all material and labor and build for the gross sum of five thousand nine hundred and sixty dollars a canning factory. The canning factory was built, and this transaction was held by the Court of Civil Appeals to constitute the transaction of business in this State in contemplation of Articles 745 and 746, Revised Statutes. The Supreme Court, in assuming jurisdiction to answer the question certified, necessarily passed upon and approved the holding of the Court of Civil Appeals to the effect that the one or isolated transaction of performing in this State a contract to furnish material and labor and construct a canning factory for a gross consideration constituted the transacting of business in violation of the statutes here under construction."

The opinion quoted refers to the case of State Bank of Chicago vs. Holland, 103 Texas, 266; and it is unnecessary for us to discuss that case further than to make reference to it.

In the case of Buhler vs. Burrows Company, 171 S. W., 791, the same character of holding was made on a similar state of facts relating to a different business. In this case, one McDaniels was the agent of Burrows Company, a foreign corporation, which did not have a permit to transact business in the State; but who took an order from Buhler for the purchase and installment of certain screens to be fitted to windows and doors of some establishment. The screens were sent and installed by McDaniels. The question was whether or not the Burrows Company, a foreign corporation, was required to have a permit to transact business in this State. The Court of Civil Appeals held it was so required and that it could not maintain a suit for the reason that at the time the contract was entered into, it did not have such a permit. The Court of Civil Appeals in the case of York Manufacturing Company vs. Colley, 172 S. W., p. 206, made a holding similar to those we have just described.

In this case the action was brought on a contract to install an ice manufacturing plant. It was defended on the ground that the plaintiff, a foreign corporation, had not obtained a permit to transact business in the State. The evidence showed, in substance, that the York Manufacturing Company, a foreign corporation, was engaged in selling and installing machinery of the character involved, an engineer being furnished to supervise the installation, who did not turn over the plant until acceptance and payment of purchase money. The court held that this evidence was sufficient to show that a foreign corporation of this character could not transact business within this State and was within the meaning of our Foreign Corporation Act; and since it did not have a permit to transact business, it could not maintain its cause of action in our courts. Considering the matter the Court of Civil Appeals, among other things, said:

"Appellant contends that it did not agree to install and did not in fact install the machinery, but merely furnished an engineer to superintend the installation by appellees of the machinery. But we think it is evident from a reading of the contract that appellant retained the possession of the property until it should be installed, and virtually bound itself to deliver a finished plant, with the exception that appellee should furnish the labor necessary to carry out the engineer's instruction. The contract was one to install machinery, provided appellees furnish labor to assist

appellant's engineer, and the fact that all the work was not done by appellant's engineer does not alter the fact that the contract was for the delivery of a completed plant to be installed in this State. Appellant furnishel the services of an engineer to be performed in this State, contracting in a manner making it compulsory upon appellees to accept and pay for such services. The evidence discloses the construction placed upon the contract by appellant's engineer, and there is no testimony to the effect that he in any way violated the instructions or exceeded the authority given him by Pilsbury * * * Such facts, we think, show clearly that appellant contracted to engage in and did engage in the strictly local business of installing an ice manufacturing plant; but, were it conceded that it merely contracted to engage in and did engage in the business of supervising and superintending the erection of an ice plant, such business was a strictly local business. In either event, the contract calls for the transaction of business in this State without having obtained a permit. Appellant bound itself to connect or superintend the connection of the machinery with property in this State which had not been the subject of interstate commerce. Does the State have to permit such local business to be conducted without a permit because the material to be erected into a finished plant and then delivered to the buyer was ordered from the foreign corporation and shipped from its domicile in another State? The court, in the Browning case above quoted from, declined to express an opinion concerning 'how far interstate commerce might be held to continue to apply to an article shipped from one State to another, after delivery and up to and including the time when the article was put together or made operative in the place of destination in a case where, because of some intrinsic and peculiar quality or inherent complexity of the article ,the making of such agreement was essentian to the accompishment of the interstate transaction.' This language suggests that the court may recognize exceptions in cases in which the facts show agreements to supervise the erection or to erect machinery of such a complexity of the article, the making of such agreement was essential to agreement is made. But is such exceptions are recognized by that high court, and must therefore be permitted by the State courts, the facts creating same ought to be alleged and proven. When a foreign corporation is not content with the privilege of having its agents come into this State and take orders for their goods, ship same to our citizens, and collect therefor in our courts, but contends that it has the further right to transact the business of installing machinery sold by it, so as to connect it with, and make it a part of, the property in this State which was not the subject of interstate commerce, the burden certainly rests upon it of showing that, if it be prohibited from transacting such local business, such prohibition will, on account of the complex character of its machinery, affect the sale thereof to such an extent as to be a restriction or regulation of its right to sell such machinery. In this case appellant has not pleaded or proved that the contract to install or to furnish an engineer was necessary to enable it to make the sale to appellees. A contract relating solely to interstate commerce can be sued upon in our State courts; but, as this one related partially to a strictly local business not shown to be essential to the conducting of the interstate business, the rule announced in the case of Railway vs. Davis, supra, does not apply, and appellant has no right to maintain this suit in our courts."

York Mfg. Co. vs. Colley, 172 S. W., 208-9.

In the case of Browning vs. Waycross, 235 U. S., p. 16, the Supreme Court of the United States had before it the case in which the plaintiff in error had been convicted of violating a municipal ordinance of a town in the State of Georgia which ordinance levied an occupation tax upon lightning rod agents or dealers engaged in putting up or erecting lightning rods within the corporate limits of a city.

The defendant in the case admitted that he carried on the business

as charged; but pleaded not guilty on the ground that he had done so as an agent of a St. Louis corporation on whose behalf he had solicited orders for lightning rods; that he received, when shipped as such orders from St. Louis, and erected them for the corporation, including duty to erect them without further charge. This, it is asserted, constituted the carrying on of interstate commerce, which neither the city nor the State of Georgia had the right to tax. He was convicted and finally reached the Supreme Court of the United States. The Supreme Court of the United States substantiating the ordinance, in part, said:

"We are of the opinion that the court below was right in holding that the business of erecting lightning rods under the circumstances disclosed was within the regulating power of the State and not subject of interstate commerce for the following reasons: (a) Because the affixing of lightning rods to houses, was the carrying on of a business of a strictly local character, peculiarly within the exclusive control of State authority; (b) Because, besides, such business was wholly separate from interstate commerce, involved no question of delivery of property shipped in interstate commerce or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated." (253 U. S., 22.)

These authorities establish beyond question that the contract made by the Texas customer and the Tennessee Corporation involves acts in intrastate commerce and, therefore, requiring a permit on the part of the foreign corporation, in order to carry same into effect. The only question which remains to be discussed is whether or not the contract between the Tennessee Corporation and the Extinguisher Company has any effect sufficient to exempt the Tennessee Corporation from the necessity of securing a Texas permit.

We think that it does not. It is true that the Extinguisher Company is employed by the Tennessee Corporation to furnish and install the equipment sold by the Tennessee Corporation to its Texas customer; but the contract is not one between the Extinguisher Company and the Texas customer.

Therefore, it follows that the Extinguisher Company, whether regarded as a servant or agent of the Tennessee Company, is, nevertheless, the mere agency by which the Tennessee Company actually complies with the contract of its Texas customer by furnishing and installing the sprinkler system. Moreover, under the contract of the Extinguisher Company, the Tennessee Company is still required to do all earth, carpentry and mason work. However the matter may be viewed, it is quite plain that the Extinguisher Company is the agency, or arm, of the Tennessee Company in carrying out its contract with its Texas customer. The mere fact that the Tennessee Company employed a corporation to carry out its contract does not make its status any different from what it would be had they employed private individuals to carry it out.

A corporation, of course, can act only through agents and it was, therefore, necessary for the Tennessee corporation to employ someone, either corporate or individual, to erect a sprinkling system for its Texas customer. So the matter, stripped of superfluous words, is that the Tennessee corporation contracts to sell and install a sprinkler

system for its Texas customer and does do so. The entire work of installation takes place within the State of Texas and to that extent, at least, it transacts business wihin the State of Texas. In order to do this, it is required to have a permit under the Foreign Corporation Act of this State.

Respectfully,

C. M. CURETON,
First Assistant Attorney General.

Op. 2146, Bk. 53. P. 408.

MARRIED WOMEN—CORPORATIONS.

A married woman may be an incorporator, stockholder, officer, or director of an incorporated State bank, or State bank and trust company, or any other incorporated concern.

Article 370, Vernon's Sayles Texas Civil Statutes, 1914.

Chapter 132, Acts of the General Laws of the State of Texas, Thirty-sixth Legislature.

AUSTIN, TEXAS, November 22, 1919.

Hon. George Waverly Briggs, Commissioner of Insurance and Banking, State of Texas, Capitol.

DEAR SIR: The Attorney General is in receipt of your communication of a recent date asking for his construction of the law as to whether or not a married woman may be one of the original incorporators of a state bank.

Replying thereto, we beg leave to advise that, in our opinion, a married woman now may become one of the original stockholders signing an application to incorporate a state bank, or state bank and trust company.

Article 370, Revised Civil Statutes of Texas, authorizing certain persons to associate themselves together by articles of agreement in writing to incorporate a state bank, reads as follows:

"Five or more persons, a majority of whom shall be residents of this State, who shall have associated themselves by articles of agreement, in writing, as provided by the general corporation law, for the purpose of establishing a bank of deposit or discount, or both of deposit and discount, may be incorporated under any name or title designating such business.

The substance of the provisions of this article is that the persons who desire to become a body corporate must associate themselves together by articles in writing. It follows, therefore, that any person who becomes an incorporator must be capable of entering into an agreement with the other several incorporators, as well as with the state, when the charter has been approved and signed by the Commissioner of Insurance and Banking of this State.

Previous to the adoption of Chapter 132, Acts of the General Laws of the State of Texas, Thirty-sixth Legislature, 1919, there was no

law authorizing and permitting a married woman to be one of the original incorporators of a state bank, or a state bank and trust company. However, the general incorporation law authorizing certain persons to execute articles of incorporation were enlarged by permitting married women to become incorporators, stockholders, officers, and directors of corporations incorporated under the laws of this State.

Article 1123 of the Revised Civil Statutes of the State of Texas, as amended by said Chapter 132, General Laws of the State of Texas, Thirty-sixth Legislature, reads as follows:

"The charter of an intended corporation must be subscribed by three or more persons, two of whom at least must be citizens of this State, and must be acknowledged by them before an officer duly authorized to take acknowledgments of deeds; provided, 'that all charters may be subscribed by married women who may also be stockholders, officers and directors thereof; and their acts, contracts and deeds as such stockholders, officers and directors shall be as binding and effective for all the purposes of said corporation as if they were males; and the joinder and consent of their husbands and privy examinations separate and apart from them shall not be required."

Therefore, by a general law enacted by the Legislature all charters (including charters for state banks, or state banks and trust companies) may be subscribed by married women who may also be stockholders, officers, and directors of said corporation, and their acts and deeds as such stockholders, officers and directors are as binding and effective for all purposes for said corporation as if they were males; and the joinder and censent of their husbands and privy examinations separate and apart from their husbands is not required.

Very truly yours,
(Signed) W. J. TOWNSEND,
Assistant Attorney General.

Op. No. 2089, Bk. 53, P. 134.

BANKS—CORPORATIONS—STOCKHOLDERS—ALIENS.

An alien, resident of the State of Texas, a subject of the Republic of Mexico, may be a stockholder and director in a State bank, incorporated under the laws of this State.

Art. 370, R. C. S.;
Art. 1123, R. C. S.;
Art. 15, R. C. S.;
Sec. 1977, Fed. Statutes, Ann. Vol. 4, p. 126;
Art. 8, Treaty between the United States and Mexico;
Cook on Corporations, Vol. 2, Sixth Edition, Sec. 23, p. 1752;
Commonwealth vs. Hemmingway, 131 Pa. St., 614;
Commonwealth vs. Detwiller, 131 Pa. St. Rep., 633-636.

AUSTIN, TEXAS, June 9, 1919.

Honorable George Waverly Briggs, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter of

recent date, advising that an application to organize a State bank had been filed with you, wherein some of the incorporators are aliens, and you desire to have his opinion as to whether or not an alien can become the incorporator of a State bank or act as a director thereof.

I am informed that the aliens referred to reside at San Antonio and are subjects of the Republic of Mexico.

Replying thereto, we beg leave to advise that, in our opinion, an alien can become an incorporator of a State bank and act as a director thereof. The following are the provisions of the United States and Texas statutes, relating to the subject matter.

Article 370 of the Revised Civil Statutes of Texas, relating to incorporations of State banks, reads as follows:

"Five or more persons, a majority of whom shall be residents of this State, who shall have associated themselves by articles of agreement in writing, as provided by the general corporation law, for the purpose of establishing a bank of deposit or discount, or both of deposit and discourt, may be incorporated under any name or title designating such business."

Under the provisions of Article 1123 of the Revised Civil Statutes of the State, it is provided in substance that:

"The charter of an intended corporation must be subscribed by three or more persons, two of whom, at least, must be citizens of this State, and must be acknowledged by them before an officer duly authorized to take acknowledgments of deeds * * *"

Article 15 of the Revised Civil Statutes of the State of Texas reads as follows:

"No alien or person who is not a citizen of the United States shall acquire title to or own any lands in the State of Texas, except as hereinafter provided; but he shall have and enjoy in the State of Texas such rights as to personal property as are or shall be accorded to citizens of the United States by the laws of the nation to which such alien shall belong, or by the treaties of such nation with the United States, except as the same may be affected by the provisions of this title and the general laws of the State."

Section 1977, Federal Statutes, Annotated, Volume 2, Page 126, reads as follows:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalities, taxes, licenses, and exactions of every kind, and to no other."

Under the provisions of the latter clause of Article 8 of the Treaty between the United States and Mexico, known as the Treaty of Guadalupe Hidalgo, of date February 2, 1848, contains the following proviso:

"The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract (meaning the acquisition of property by Mexicans in the United States) shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States."

In our opinion, the provisions of Article 370 of the Revised Civil Statutes of the State, naming the persons who may incorporate for the purpose of establishing a State bank, in providing that five or more persons, a majority of whom shall be residents of this State, may organize a State bank, supersedes and repeals the provisions of Article 1123, Revised Civil Statutes of the general incorporation act, which provides, in substance, that an intended corporation must be subscribed by three or more persons, two of whom, at least, must be citizens of this State. In other words, the provisions of Article 370 of the Revised Civil Statutes control as to the manner and the persons by whom a State bank may be incorporated.

This provision of the statute (Article 370) provides that five or more persons, a majority of whom shall be residents of this State, may incorporate a State bank. A resident is defined by Webster's Revised Unabridged Dictionary to be: "One who resides or dwells in a place for some time." Such person is not necessarily a citizen of that country where he may reside. An alien may be a resident of the State of Texas, residing therein, although he, at the same time, is not a citizen thereof. Under the provisions of the statutes, Federal and State, above quoted, and of the treaty between the United States and the Republic of Mexico, an alien, residing in Texas who may be a subject of the Republic of Mexico, may make and enforce contracts, sue, be parties, give evidence and entitled the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens of this State. Therefore, in our opinion, a resident alien may be a stockholder and director in a State bank incorporated under the laws of this State. However, a majority of the incorporators of said bank are required to be residents of this State.

"An alien may be a stockholder and director in a corporation, if the statutes do not prohibit it."

Cook on Corporations, Vol. 2, Sixth Edition, Sec. 23, p. 1752;
Commonwealth vs. Hemmingway, 131 Pa. St., 614;
Commonwealth vs. Detwiller, 131 Pa. St. Rep., 633-636.

In the case last cited, Commonwealth vs. Detwiller, 131 Pa. St. Report, 633-636, the Supreme Court of Pennsylvania was passing upon an incorporation act similar to ours, which act declared that:

"The charter of an intended corporation must be subscribed by five or more persons, three of whom, at least, must be citizens of the Commonwealth."

One of the legal questions raised by the facts in this case was whether or not a resident alien of Pennsylvania could be and become a stockholder and director in a Pennsylvania corporation,

chartered by virtue of the provisions of the Pennsylvania statute, above quoted. The Supreme Court of Pennsylvania held that such an alien could become a stockholder and director in a Pennsylvania corporation by virtue of the above statute quoted. In passing upon the question, the court used the following language:

"The stock being personal property, he may acquire it by gift or purchase. An alien could at common law buy personal goods and sell them, and, except in the case of an alien enemy, there was no restriction upon trade with aliens. If he can acquire the stock, he can acquire with it the rights and privileges which its ownership confers, among which is the right to have a voice in the control of the enterprise and the selection of those who are to conduct its affairs. He may, therefore, vote in the same manner, and with the same effect as any other stockholder may do. Why may he not become a director? The office is not a political one. If it was, he would, of course, be ineligible to it and disqualified for voting for anyone else to fill it because of his want of citizenship."

We have a statute in this State prohibiting the ownership of lands by aliens. However, there is no statute of the State prohibiting alien ownership of personal property. Therefore, in conformity with the provisions of the Federal and Texas statutes, as well as the treaty obligation of the United States with Mexico, we are of the opinion that an alien, who may be a citizen of the Republic of Mexico, and who resides in the State of Texas, can lawfully become an incorporator of a State bank, chartered under the laws of Texas, and may be a director thereof.

Very truly yours,
W. J. TOWNSEND,
Assistant Attorney General.

Op. No. 1998, Bk. 52, P. 129.

STATE BANKS—LIMITATION AS TO THE AMOUNT OF MONEY TO BE BORROWED BY STATE BANKS.

A State bank, affiliated with the Federal Reserve System under the rules and regulations of the Federal Reserve Act governing such matters, is permitted to borrow from a Federal Reserve bank without limitation as to amount, which may be in excess of its unimpaired capital stock, so long as the loans are secured by United States Government bonds or certificates.

Article 570a, Vernon's Texas Civil and Criminal Statutes, 1918 Supplement.

AUSTIN, TEXAS, March 15, 1919.

Honorable George Waverly Briggs, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter of recent date, which reads as follows:

"A State bank, on becoming a member of the Federal Reserve System, is authorized by the statutes of Texas to discount to a Federal Reserve

bank, notes, drafts and bills of exchange arising out of actual commercial transactions and to do anything else necessary under the Federal Reserve Act, or rules and regulations thereto pertaining, in order to obtain all the benefits and privileges of membership in the Federal Reserve System.

"The Texas law further provides that in computing the legal maximum of a State bank's borrowing privileges, the liabilities incurred under the provisions of the Federal Reserve Act are not to be considered. Under a ruling of the Federal Board, which I assume is such a regulation as the Texas statute approves, national banks and State banks affiliated with the Federal reserve system are permitted to borrow from a Federal reserve bank without limit, so long as the loans are secured by United States Government bonds or certificates.

"In the course of the business of this Department, the question has arisen as to whether or not, under our statutes, a State bank affiliated with the Federal reserve system, would be authorized to borrow in excess of its capital stock any amount of money for which it would be able to give Government bonds or treasury certificates as collateral security."

Replying thereto, we beg leave to advise Article 570-a, Vernon's Texas Civil and Criminal Statutes, 1918 Supplement, providing for limitation of indebtedness which may be incurred by State banks, reads as follows:

"No banking corporation incorporated under the laws of this State shall at any time be indebted or in any way liable to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"(a) Moneys deposited with or collected by it.

"(b) Bills of exchange or drafts drawn against money actually on deposit to the credit of the corporation or due thereto.

"(c) Liabilities to the stockholders of the association for dividends and reserve profits.

"(d) Liabilities incurred under the provisions of the Federal Reserve Act.

"(e) This section shall not apply to any guaranty executed by any trust company whose demand deposits are not in excess of its interest-bearing deposits, provided such trust company is not a mmber of a Federal Reserve Bank.

"(f) Provided further that upon a permit obtained in writing from the Commissioner of Banking any bank may borrow a sum not in excess of its unimpaired surplus in addition to its capital stock."

Under the provisions of said Article 570-a, State banks incorporated under the laws of this State are prohibited from at any time being indebted or in any way liable to an amount exceeding its capital stock actually paid in and remaining undiminished by losses or otherwise, except on account of the exceptions as above enumerated.

One of these exceptions, being denominated (d), provides that such limitation shall not apply to "liabilities incurred under the provisions of the Federal Reserve Act."

Therefore, the limitation, as to the amount of money which a State bank affiliated with the Federal Reserve System could borrow, not to exceed its unimpaired capital stock, does not apply in the matter of loans extended to said banks by the Federal Reserve banks. And in our opinion, a ruling of the Federal Reserve Board, which permits National and State banks affiliated with the Federal Reserve System to borrow money by said banks from a Federal

Reserve bank without limit so long as the loans are secured by United States Government bonds or certificates, would be applicable to State banks of Texas which are affiliated with the Federal Reserve System; and that such limitation of the amount of moneys borrowed by State banks, not to exceed its unimpaired capital stock, would not apply in such instances.

Yours very truly,

W. J. TOWNSEND,
Assistant Attorney General.

Op. No. 2059, Bk. 52, P. 558.

BANKS—SURPLUS FUNDS.

The surplus funds of banks may be used for the following purposes only: to increase its capital stock; to pay off and satisfy bad loans and obligations due by it and to loan to its customers as other moneys of the bank are loaned, and to invest the same in securities in the manner provided for by law.

Bank of Commerce vs. Tennessee, 161 U. S., 134;
Fullen vs. Corporation Commission, 15 N. C., 548, 68 S. E., 158;
Bryan vs. Sturgis National Bank, 90 S. W., 704.

AUSTIN, TEXAS, May 8, 1919.

Honorable George Waverly Briggs, Commissioner Insurance and Banking, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter of recent date, which reads as follows:

"Under Section 95, banking laws of Texas, Cureton and Harris, the Board of Directors of any bank or trust company, when it shall declare a dividend, is required, first, to credit its surplus fund with 10 per cent. of the bank's net profits for the period covered by the dividend, and must continue this accumulation of a surplus until the amount becomes equivalent to 50 per cent. of its capital stock. This surplus shall not be diminished, except for the payment of losses.

"In fixing the limitation upon a bank's liability, the 1917 amendments to the banking laws, passed by the Thirty-fifth Legislature at its regular session, in Section 7, provide for a 'a permanent surplus, the setting apart of which shall have been certified to the Commissioner of Insurance and Banking, and which cannot be diverted without due notice to and consent of said officer.'

'The practice of this Department has been to permit a State bank to increase its capital stock by use of its surplus, and it has justified the policy by the inferential modification of Secton 95, Cureton and Harris, by the 1917 amendments, from which, in the foregoing paragraph, I have quoted. It has, moreover, been deemed to be warranted by the increased liability of stockholders, which necessarily results from an increase in capital.

"A doubt arises in my mind as to the soundness of this construction. Accordingly, I beg to ask that you be good enough to advise me on the following points:

"1. Is it legally permissible for a State bank to employ its certified surplus or any part of it for the purpose of increasing its capital stock?

"2. Is it legally permissible for a State bank to employ its certified

surplus for any purpose which the Commissioner of Insurance and Banking may approve?

"Your consideration of this request will be cordially appreciated."

Replying thereto, we beg to advise that under the provisions of Article 550, Revised Civil Statutes, 1911, relating to the creation of a surplus fund by State banks and trust companies, it is provided that:

"The board of directors of any bank or trust company in this State organized under this title, when it shall declare a dividend, shall set apart to the surplus fund ten per cent. of the net profits of the bank for the period covered by the dividend until the same shall amount to fifty per cent. of its capital stock; and said surplus shall not be diminished, except for the payment of any losses which may occur; provided, if there are undivided profits these shall first be used in payment of such losses."

The "surplus" fund of a bank is not the same as its capital stock, but is that portion of the property over and above the capital stock, which is the property of the bank until it is divided among the stockholders. Bank of Commerce vs. Tennessee, 161 U. S., 134.

The primary purpose of the bank's surplus funds is the accumulation of a sum of money against which bank debts may be charged, so that at all times the capital stock may be kept unimpaired. Pullen vs. Corporation Commission, 15 N. C., 548; 68 S. E., 158.

The accumulating earnings and "surplus" funds of a bank constitute a part of its assets and belong to the corporation, and not to the stockholders until they have been declared and set apart as dividends. Bryan vs. Sturgis National Bank, 90 S. W., 704.

Under the provisions of Section 7, Chapter 205, General Laws of the Thirty-fifth Legislature, 1917, it is provided in part that the permanent surplus funds of a bank, the setting apart of which have been certified by the bank to the Commissioner of Insurance and Banking, and which can not be diverted without due notice to and consent of said officer, may be taken and considered as a part of the capital stock of said bank for the purpose of extending loans.

We are advised that there is a rule in force by the national banks in effect permitting the use of surplus funds of said banks in making up the increase of the capital stock of said banks when such increased capital stock is authorized by the board of directors.

In our opinion the surplus funds of a bank may be used by said bank for the following purposes only; to increase its capital stock; to pay off and satisfy bad loans and obligations due by the bank and to loan to its customers, as other moneys of the bank are loaned, besides the bank may invest the same in securities in the manner provided for by law.

These are all the purposes for which the bank, in our opinion, may make of said surplus funds. All surplus funds earned and held by a bank in excess of its capital stock could be, in our opinion, transferred to the board of directors, to the undivided profits account of a bank and afterwards paid as dividends to the stockholders by and

with the approval and consent of the Commissioner of Insurance and Banking.

Yours very truly,
W. J. TOWNSEND,
Assistant Attorney General.

Op. No. 2182, Bk. 53, P. —.

BANKS—DEPOSITS—TIME DEPOSITS.

1. In order for any State bank or banking and trust company incorporated under the laws of this State to establish a "Savings" department the board of directors must comply with the law with reference thereto and establish by resolution such department calling into effect all the provisions of the law relating thereto. Revised Statutes, Article 431.

2. A State bank or banking and trust company receiving deposits upon which interest is paid at stipulated times are not conducting a "Savings" department unless they so establish it as such in the manner provided by law and are accepting time deposits only. Such practice is regular and in compliance with the law.

February 13, 1920.

Honorable Waverly Briggs, Commissioner Insurance and Banking, Capitol.

DEAR SIR: The Attorney General is in receipt of your communication of recent date with reference to the conduct of certain State banks and trust companies in accepting time deposits which, in fact, are seemingly savings accounts, desiring to have the opinion of the Attorney General as to whether or not the practice of such banks and trust companies is lawful.

Replying thereto, we beg leave to advise that in our opinion the practice of the Central Trust Company in accepting what it terms "Time Deposits" and paying interest thereon and intermingling such funds with the other funds of the bank, in our opinion, is lawful.

Under the provisions of the law, Revised Statutes, Article 4431, it is provided in substance, that any state bank or banking and trust company incorporated under the laws of this State desiring to maintain a savings department or to use or continue to use the words "Savings" as part of its name, shall establish and maintain a savings department in compliance with the provisions of this chapter. Such savings department may be established by the board of directors adopting a resolution providing therefor, at a regular meeting, which shall contain a copy of said article; and a certified copy of which shall be filed in the office of the Commissioner of Insurance and Banking and also be recorded in the office of the county clerk of the county in which such bank or banking and trust company is located.

It is further provided that all banks or banking and trust companies establishing or maintaining a savings department shall keep the business of each department entirely separate and distinct from the general business of such bank or banking and trust company, and shall keep all moneys received as such savings deposits and the funds and se-

curities in which the same may be invested at all times segregated from and unmingled with the other moneys and funds of the bank or banking and trust company. Revised Statutes, Article 431. In other words, this alone is the procedure whereby state banks or banking and trust companies incorporated under the laws of this State desiring to maintain a savings department can and may establish the same. If the bank under its board of directors does not adopt this procedure then in law and in fact it would not have a savings department in contemplation of law.

In Banking Law, the term "deposit" means the act "of placing or lodging money in the custody of a bank or banker, for safety or convenience, to be withdrawn at the will of the depositor or under rules and regulations agreed on, also the money so deposited." Black's Law Dictionary. Generally speaking, a time deposit is a sum of money lodged in the custody of a bank by its customer to be kept for a period of time by said bank and for its use and for which a rate of interest agreed upon by the parties is paid by the bank to the customer for the use of the money.

In our opinion a savings department of a State bank or state bank and trust company has been defined by statute and in order to establish a savings department the provisions of the statute herein before quoted must be complied with, otherwise the account is not a savings account. From the facts stated by you we are of the opinion that the accounts referred to as time deposits by the Central Trust Company of San Antonio and other state banks similarly situated are in fact "Time Deposits" and are not savings accounts in contemplation of law, and that the practice indulged in by said banks as outlined by you is lawful and regular.

Yours truly,
(Signed) W. J. TOWNSEND,
Assistant Attorney General.

Op. No. 2168, Bk. 53, P. 592.

WAREHOUSE AND MARKETING CORPORATIONS

Corporations chartered under the provisions of Chapter 41, Acts of the First Called Session of the Thirty-fifth Legislature, and generally known as the Permanent Warehouse and Marketing Law, have authority to buy and sell cotton seed and other agricultural products, but can not buy and sell merchandise, such as agricultural implements, groceries, etc.

Chapter 41, Acts First Called Session of the Thirty-fifth Legislature; Sections 28 and 67 of Article 1121 of the Revised Civil Statutes.

AUSTIN, TEXAS, December 30th, 1919.

Hon. F. C. Weinert, Commissioner Markets and Warehouses, State Office Building, City.

DEAR SIR:—Your letter of December 9th addressed to the Attorney General has been received. It reads as follows:

"The following question has been propounded to me by C. B. Morrel, Post City, Texas. Will you kindly answer this question, and oblige?

"The question I desire answered is as follows:

" 'Can a warehouse and marketing association, formed under the provisions of H. B. 97, Acts of the First Called Session of the Thirty-fifth Legislature, buy and sell cotton seed and other agricultural products, and handle other merchandise, agricultural implements, groceries, etc;' "

A reply to this letter calls for a construction of Chapter 41 of the First Called Session of the Thirty-fifth Legislature, and especially Sections 21, 24 and 25 of said Chapter. These Sections state the purposes and powers of corporations chartered under this Chapter, which is known as the Permanent Warehouse law.

A portion of Section 21 reads as follows:

"Corporations chartered hereunder shall have the right to erect, purchase or lease, and to operate warehouses, buildings, elevators, gins, storage tanks, silos, and such other places of storage and security as may be necessary for the storage, grading, weighing and classification of cotton, and of farm products, and for the purpose of preparing such products for the market."

The first paragraph of Section 24 reads:

"Corporations chartered hereunder shall have the right to act and do, and perform, generally, all things which may be done and performed by warehousemen."

For the purpose of this opinion, it is unnecessary to quote further from the provisions of this bill. Nowhere in the bill is authority directly given to corporations chartered under the provisions of the bill to buy agricultural products, merchandise, or any other articles for the purpose of re-sale.

If such authority is conferred upon corporations chartered hereunder, it must be by virtue of the first paragraph of Section 24, as quoted above. In order to determine just what is meant by this provision of the bill, we must look to the statutes to ascertain just what warehousemen may do. Of course, a private warehouseman, as an individual and not as a corporation, can not only engage in the general warehouse business but may buy and sell agricultural products, engage in the mercantile, and do most any other kind of a general business. It is evident the Legislature intended by the expression quoted above that corporations chartered hereunder should have the authority to do generally what a corporation could do when chartered for warehouse purposes. We must, therefore, look to the general corporation statutes to ascertain what those powers and authorities are.

Article 1121 of the Revised Civil Statutes enumerates the purposes for which corporations may be created. Section 28 of that Article reads as follows:

"The construction or purchase and maintenance of mills, gins, cotton compresses, grain elevators, wharves, and public warehouses for the storage of products and commodities, and the purchase, sale and storage of products and commodities by grain elevator and public warehouse companies, and the loan of money by such elevator or public warehouse companies."

Section 67 of said Article reads:

"To construct, purchase, maintain and operate warehouses at one or more places in the State for the storage of products of the soil with authority to issue negotiable receipts therefor. Any corporation organized under this subdivision shall, by provision of its charter, or by amendment thereof, limit the amount of its capital stock that may be owned or controlled directly or indirectly by one stockholder, and the number of votes that may be cast at any stockholders' meeting by one stockholder to not exceed $1,000 of its capital stock."

Here we have two sections of this Article under which warehouse corporations could be organized prior to the enactment of Chapter 41 of the First Called Session of the Thirty-fifth Legislature, which we have under discussion. Under the provisions of Section 28, quoted above, which is the broader of the two sections quoted, and by virtue of which not only warehouse companies could be incorporated, but those companies were expressly given the authority to purchase, sell and store products. There is no such authority conferred upon corporations chartered under the provisions of Section 67 of said Article 1121.

We must presume that the Legislature in enacting the Permanent Markets and Warehouse Law had in mind the existence of Section 28 of Article 1121, and that when they used the term "corporations chartered hereunder shall have the right to act and do and perform, generally, all things which may be done and performed by warehousemen," that they intended to confer upon such corporation such authority as such warehouse corporations had under the provisions of Section 28, Article 1121, as quoted above.

The question then arises,—If public warehouses are authorized to purchase, sell and store products and commodities, what products and commodities did the Legislature intend that such companies could purchase, sell and store? It is clear to our minds that the Legislature only intended public warehouse companies to have the authority to buy, sell and store such products and commodities as are usually handled by grain elevator and public warehouse companies. It is evident that the only products and commodities that are handled by grain elevators are the various kinds of grains, agricultural products, but what is meant by products and commodities that may be purchased, sold and stored by public warehouse companies under the provisions of Section 28 is not so easily determined. We must, therefore, look for enlightenment along this line to the provisions of the Permanent Warehouse and Marketing law. The first section of this law gives us the light. It reads as follows:

"The purpose of this Act is to develop a systematic plan for marketing farm and ranch products. To effect this purpose, the State will encourage the organization of marketing warehouse corporations with policies intended to aid producers of such farm and ranch products in securing the highest market price for their products."

The section quoted above states fully and explicitly the sole purpose for which the Permanent Warehouse and Marketing law was enacted. It deals only with farm and ranch products and its purposes are stated to secure for these products the highest market prices. It is, therefore, made plain that the Legislature had in mind the creation of a system

of markets and warehouses whereby these ends could be obtained. It never intended that a corporation created under its provisions should have the authority to engage in the general mercantile business, or buy and sell commodities or any other products, except such products as come from the farm and ranch.

It is the opinion of this Department, and you are so advised, that corporations created under the provisions of the Permanent Warehouse and Marketing law have the authority to buy and sell cotton seed and other agricultural and ranch products, but cannot buy and sell merchandise, such as agricultural implements, groceries, etc.

Yours very truly,

BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 2148, Bk. 53, P. 411.

PUBLIC MARKETS AND WAREHOUSE LAW—INSURANCE—LIABILITY OF WAREHOUSES—LOSS BY FIRE.

The liability of a warehouse company for loss by fire is that of a public warehouseman. Warehouse companies, incorporated under the Permanent Warehouse Law, are not required to carry insurance on products stored with them, but are required to carry insurance on all warehouse property.

It is optional with a customer of a warehouse, chartered under the provisions of the Permanent Warehouse Law, as to whether he carries insurance on his products stored in said warehouse.

Warehouses chartered under the provisions of the Permanent Warehouse Law may carry blanket insurance covering all products stored with them, charge the owner for same and have a lien on said products for the amount of premium due thereon, provided the owner authorizes the same.

Owners of agricultural products stored with a warehouse company chartered under the provisions of the Public Warehouse Law may have same insured by the warehouse company or may have same insured by someone else, or may not have same insured at all at their option.

(Chapter 41, First Called Session, Thirty-fifth Legislature.)

ATTORNEY GENERAL'S DEPARTMENT, November 25, 1919.

Hon. F. C. Weinert, Commissioner, Markets and Warehouse Dept., Austin, Texas.

DEAR SIR:—Your letter of the 17th instant, addressed to the Attorney General, has been received. It reads as follows:

"We desire your opinion on that part of Section 22 of the Markets and Warehouse Law which reads as follows:

" 'The Commissioner shall require fire insurance by blanket policies or individual policies, in some solvent insurance company chartered under the laws of the State of Texas, or having a permit to do business in the State, to be carried by all public warehouses and all warehouse corporations operating under this Act, and to require such other means and methods of protection from fire and weather, or depreciation of warehouse property, as the Commissioner may deem necessary in each case.'

"First, will a construction of this language permit the customer to carry his own insurance?

"If your answer is in the affirmative, then is it optional with the customer as to whether he carries insurance or not?

"In case it is optional and the customer prefers not to insure his produce, can the warehouseman limit his liability by writing across face of receipt 'At owner's risk' or words of like import?"

In reply to the same beg to advise that it is the opinion of this Department that under the provisions of Section 22 of the Permanent Markets and Warehouse Law companies chartered thereunder are not required to carry insurance on products stored with them. A careful reading of that part of Section 22, which refers to insurance, and is quoted in your letter, convinces us that it was the intention of the Legislature for the Commissioner of Markets and Warehouses to require all companies chartered under the provisions of this Act to carry insurance only on warehouse property. We are led to this conclusion by the last paragraph of that part of Section 22, quoted in your letter, which is as follows:

"* * * and to require such other means and methods of protection from fire and weather, or depreciation of warehouse property, as the commissioner may deem necessary in each case."

This entire paragraph with reference to insurance when read in the light of the concluding clause, quoted above, makes it plain that it is only the property of the warehouse company that is made mandatory to be protected under the orders of the commissioner from loss or damage by fire.

You then desire to know if a customer may carry his own insurance and if he may, is it optional with him whether he carry any insurance at all or not?

Section 33 of this law reads as follows:

"The liability of a corporation chartered and operating under this Act, for warehouse purposes, shall be that of a public warehouseman, and it shall have the same rights as a public warehouseman, including a lien for storage, insurance, and other warehouse charges, as well as for charges for any service performed by it; and the corporation shall also have a lien for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, coopering, and other charges and expenses in relation to such goods; and also, all reasonable charges and expenses for notice and advertisement of sale of goods, where sale has been made in satisfaction of the warehouseman's lien."

Section (J) of the Uniform Warehouse Receipts Act, Chapter 126, Acts of the Thirty-sixth Legislature, reads as follows:

"When a negotiable receipt is issued under the terms of this Act for cotton or other agricultural products stored in any warehouse operating under the terms of this Act, it shall, in addition to the other conditions mentioned herein, state the weight, grade, and condition of the same *and shall state plainly whether such agricultural products are insured or not.*"

You are, therefore, advised that warehouse companies chartered under the provisions of this Act are authorized to carry insurance on all products stored with them, and may insure the products of any customer upon his request to be insured, but that it is entirely optional with the customer whether he has the warehouse company to insure him under any blanket policy that it may carry or he may have

the same insured by someone else or he may not have his products insured at all but carry the same at his own risks.

The question then arises under your inquiry as to whether or not the warehouseman may limit his liability by writing across the face of the negotiable receipt he issues to his customer such words as "At owner's risk," or words of like import.

Under the provisions of Section 33, quoted above, the liability of a corporation chartered and operating under the provisions of this Act, for warehouse purposes, is that of a public warehouseman. It has been held in this State:

"A warehouseman is not an insurer of property stored with him, but is only bound to use ordinary diligence or that care which prudent persons usually take of their own property."

"A warehouseman is liable only for failure to exercise ordinary care in preserving goods."

"Whether warehousemen are liable for losses by fire depends upon the question of prudence, diligence and good faith."

"A warehouseman is not liable for goods destroyed by fire unless it be proved that the loss was occasioned by his negligence or neglect of his agents, employes or servants."

(Texas, etc., A. R. Co. vs. Wever, 3 App. Civ. Cases, Sec. 60; App. Civ. Cases, Sec. 118; 31 Tex., 771.)

We do not believe, and you are so advised, that warehouse companies chartered under the provisions of this Act would be authorized to write "At owner's risk" or other words of like import across the face of warehouse receipts simply because the owner of the products did not see fit to have the warehouse company cover his products stored with it by insurance by the warehouse company. Warehouse companies operating under any of the provisions of the Public Warehouse Laws of this State are required to issue uniform warehouse receipts in accordance with Chapter 126, Acts of the Thirty-sixth Legislature, and Section (J) of that Act, as quoted above, makes it mandatory upon a warehouse company to state whether such products are insured or not. If not insured, then the status and liability of the warehouse company is fixed by the law, as set forth in Section 33 of the Permanent Warehouse Act, which makes the warehouse company liability the same as that of a warehouseman, and the liability of a warehouseman is quoted to you in extracts from the decisions above referred to. You are, therefore, advised that it is the opinion of this Department that it is not necessary for the warehouse company to write anything on his receipt other than is required to be contained in a receipt under the Uniform Warehouse Receipt Act. It would be unlawful to write on said receipt the words "At owner's risk" or words of like import.

Yours very truly,

BRUCE W. BRYANT,

Assistant Attorney General.

Op. No. 2029, Bk. 52, P. 322.

INSURANCE—FEES FOR MAKING DEPOSITS OF SECURITIES—DEPOSITORY LAW—DAILY DEPOSITS.

The fees collected by the Commissioner of Insurance and Banking for certificates placed on registered policies are a special fund in the hands of the Commissioner to be used by him primarily to defray the expense incurred in the keeping of the securities. Any excess over the amount of the necessary expense becomes the property of the State and must be deposited in the Treasury by the Commissioner.

The Commissioner should retain these fees and pay therefrom the expenses authorized by the statute, and at intervals when a surplus is ascertained to be on hand, he should deposit same in the Treasury.

These funds when they come into the hands of the Commissioner constitute a special fund and should not be deposited in the Treasury on the day they are received. It is only the surplus, if any, that belongs to the State and should be deposited in the Treasury.

Article 4750, 4751, 4752 Revised Statutes of 1911.

Senate Bill No. 36 enacted by the Regular Session of the Thirty-sixth Legislature.

AUSTIN, TEXAS, April 8, 1919.

Hon. Geo. Waverley Briggs, Commissioner of Insurance and Banking, Capitol.

DEAR SIR:—

FOR ATTENTION HON. CHAS. V. JOHNSON, DEPUTY INSURANCE COMMISSIONER.

The Attorney General is in receipt of your letter, asking an opinion from this Department upon your duties with reference to the handling of certain fees collected by you for registering life insurance policies, and whether or not it is your duty under the new Depository Law to deposit these receipts in the Treasury daily.

The receipts referred to by you arising under Articles 4750 to 4752, both inclusive, of the Revised Statutes of 1911, providing in substance that any life insurance company organized under the laws of this State may deposit with the Commissioner of Insurance and Banking for the common benefit of all the holders of its policies and annuity bonds, certain securities equal to the legal reserve on all its outstanding policies in force, which securities are held in trust by the Commissioner for the purposes specified in these Articles. It is made the duty of the Commissioner to place upon each policy or bond a certificate to the effect that the policy is registered and that approved securities equal in value to the legal reserve thereon are held in trust by the Commissioner. For this service, the company issuing the policy pays to the Commissioner a fee of twenty-five ($.25) cents for each certificate placed on registered policies or annuity bonds.

The Commissioner of Insurance holds the securities so deposited with him as is provided in the last paragraph of Article 4751 as follows:

"The securities deposited under this chapter by each company shall be placed and kept by the Commissioner of Insurance and Banking of the State in some *secure safe-deposit, fire-proof box or vault in the city* or town in or near which the home office of the company is located; and the officers of the company shall have access to such securities for the pur-

pose of detaching interest coupons, and crediting payment and exchanging securities as above provided, under such reasonable rules and regulations as the commissioner may establish."

Article 4752, authorizing the collection of these fees and providing for their disposition, is as follows:

"Art. 4752. Fees for Making Deposits.—Every company making deposit under the provisions of this chapter shall pay to the Commissioner of Insurance and Banking for each certificate placed on registered policies or annuity bonds issued by the company, after the original or first deposit is made hereunder, a fee of twenty-five cents; and the fee so received shall be disposed of by said Commissioner as follows:

"1. The payment of the annual rent or hire of the safety deposit fire-proof box above provided.

"2. Payment for the services of a competent and reliable representative of said Commissioner, to be appointed by him, who shall have direct charge of the securities and safety box containing the same, and through whom, and under whose supervision, the insurance company may have access to its securities for the purposes above provided. The sum paid such representative shall not exceed sixty dollars per annum for each company.

"3. The balance of such fees shall be paid to, or deposited with, the State Treasurer to the credit of the general fund."

From the above-quoted Article, it appears the Legislature has created in the hands of the Commissioner a special fund for a special purpose, that it is contemplated by the Legislature that this fund shall be used to defray the expenses of this provision of the Insurance Law, or that this provision shall be self-sustaining. It is true that any balance of the fees over and above the amount necessary to defray the expenses incurred by the operation of this provision shall be converted into the Treasury and be placed to the credit of the general revenue, but it is only such balance that becomes the property of the State.

This Article of the statute clearly contemplates the Commissioner retaining these fees and dispensing the same under the terms of Article 4752. He, therefore, must of necessity convert the remittances into cash, retain the same and discharge the obligations arising under the act by payments from the fund in his hands. To this end, he would be authorized to deposit these remittances in a bank of his choosing to his credit as Commissioner of Insurance and Banking in a special fund to be drawn upon only for the purposes of this provision of the Insurance Law. A question very similar to the one under discussion was passed upon by the Supreme Court of the State of Missouri in the case of Ex parte Lucas 61 S. W., 218. The Legislature of that State passed an act to establish a board of examiners and to regulate the occupation of barbers. The act provided that the board of examiners should receive a compensation of three ($3.00) dollars a day and railroad and traveling expenses to be paid out of any moneys in the hands of the treasurer of the board. It was asserted that this provision of the act was in conflict with Section 43 Article 4 of the Missouri Constitution, which provides that all money received by the State from any source whatever shall go into the treasury of the State and not be drawn out except pursuant to a regular appropriation made by law. The court in disposing of this contention said:

"The fourth contention is not well founded, for the simple reason that Section 43, Art. 4, applies only to money provided for and received by

the State. The money authorized to be collected under this Act is not state revenue, but is simply a provision to make the board of examiners self-supporting."

The purpose of the Missouri act in authorizing the board to collect certain fees from applicants and to dispense same for the necessary operations of the act was the identical purpose of the Texas Legislature in authorizing the Commissioner of Insurance and Banking to collect fees in the case under discussion. It was not intended by the Texas Legislature that these fees should become a part of the general revenue of the State and be drawn from the Treasury only after specific appropriation made by law, as is provided in Section 6, Article 8, of the Texas Constitution. The purpose here was to provide a fund in the hands of the Commissioner of Insurance and Banking from which to defray the expenses incurred under the express provision of the act, and should any surplus arise, then such surplus, and only the surplus, would belong to the State and be deposited with the Treasurer by the Commissioner.

It is provided by Article 2428, Revised Civil Statutes 1911, as amended by Senate Bill 36 (the new depository law), that:

"All officers of this State charged with the collection of, or who shall come into the possession of State funds or other funds required to be kept by the State Treasury, shall remit or pay such funds into the State Treasury or the State depository designated by the State Treasurer as herein provided daily as the same are collected."

A heavy penalty is placed upon the officer failing to make deposits as above set out.

We have seen in the above discussion that the fees coming into the hands of the Commissioner under the operations of this law are not primarily State funds, and therefore do not come within the meaning of the above-quoted provision of the Depository Act dealing with daily deposits. It is only the balance of such funds, after the payment of expenses, that becomes a State fund.

We, therefore, advise you that the law does not require you to make a daily deposit of the fees paid to you under the law discussed in this opinion. You should hold these fees and safely keep the same in such manner as you may determine and dispense them for the expenses arising by express direction of this law, and when you ascertain that there is a balance in your hands over and above all expenses, you should on that day deposit such balance with the Treasurer. When you have done this, you will have discharged your duties under the act authorizing you to receive the fees, as well as under the new Depository Law requiring daily deposits.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OPINIONS ON STATE, COUNTY AND OTHER DEPOSITORIES.

Op. No. 2167, Bk. 53, P. 498.

ROAD DISTRICTS—COUNTY DEPOSITORIES—BONDS.

Proceeds from the sale of road district bonds must be placed in the county depository.

Articles 632, 2443, 2444, Vernon's Sayles' Civil Statutes, First Supplement.

AUSTIN, TEXAS, December 19, 1919.

Hon. Earle P. Adams, County Attorney, Crockett, Texas.

DEAR SIR:—Your letter of the 15th inst., addressed to the Attorney General, has been received. It reads as follows:

A matter of vital importance to one or more of the road districts in this county has been submitted to me for decision, and I am forced to write you for an opinion on the question involved. The question is this: The First National Bank of Crockett is the County Depository for Houston County. Road District No 9 has voted bonds for One Hundred Thousand Dollars to build public roads in that district. The town of Weldon is in the center of that district, and has a bank therein. This bank desires the proceeds of the bonds deposited in said bank for two purposes. First, this bank agrees to pay four per cent. interest on the daily balance, such interest to go to the benefit of the road district, and second, the deposit of of this money in the bank will greatly aid the bank in assisting the farmers next year. What this bank at Weldon proposes to do is to ship the bonds to the purchaser, drawing draft for the amount of the bonds, and at the same time to deliver to the county treasurer of Houston County, Texas, certificates of deposit payable in monthly installments, running over a period of months while the roads are being constructed. The contention is made that this fund does not become a county fund, which is required to be deposited with the Depository, until the payment of each one of these certificates of deposit, and that the Depository cannot require the commissioners court, or the county treasurer, to deposit the proceeds of the sale of these bonds with the County Depository under these conditions. Of course, the bank at Weldon executes bond to secure the payment of the certificates of deposit. Under these conditions is the money required to be deposited with the County Depository? Will you please answer immediately as the sale of the bonds is being held up on this account?"

You desire to know if it would be legal for a bank other than the county depository to sell the bonds of a road district, issue certificates of deposit payable in monthly installments and pay interest thereon and also give a bond to the district guaranteeing the performance of such contract.

We desire to call your attention to the provisions of Article 632 as amended by Chapter 203, Acts of the Thirty-fifth Legislature, which in part read as follows:

"* * * and such bonds, when so issued, shall continue in the custody of and under the control of the commissioners court of the county in which they were issued, and shall be by said court sold to the highest and best bidder, for cash, either in whole or in parcels, at not less than

the par value, and the purchase money therefor shall be placed in the county treasury of such county to the credit of the available road fund of such county, or of such political subdivision or defined district of such county as the case may be * * *"

By the provisions of Article 2443a Vernon's Sayles' Civil Statutes, First Supplement, Chapter II of the Acts of the Thirty-fifth Legislature, in part reads as follows:

"Whenever, after the creation of a county depository as this chapter provided there shall accrue to the county *or any subdivision thereof*, any funds or moneys from the sale of bonds or otherwise, the county commissioners court of such county at its first meeting after such special fund shall have come into the treasury, or depository of such county, or so soon thereafter as may be practicable, may make written demand upon the duly accredited and established depository of the county for a special and additional bond as such depository in a sum equal to the whole amount of such special fund, to be kept in force so long as such fund remains in such depository. Provided that such extra or special bond may be one and a new bond contemporaneously substituted therefor as such special fund may be reduced. * * *

Article 2444 Vernon's Sayles' Civil Statutes, First Supplement, Chapter II of Acts of the Thirty-fifth Legislature, in part reads:

"As soon as said bond be filed and approved by the commissioners court, and the State Comptroller of Public Accounts, an order shall be made and entered upon the minutes of said court designating such banking corporation, association or individual banker as a depository of the funds or said county until sixty days after the time fixed for the next selection of a depository; and, thereupon, it shall be the duty of the county treasurer of said county, immediately upon the making of such order, to transfer to said depository all the funds belonging to said county, as well as all funds belonging to any district or other municipal subdivision thereof not selecting its own depository, and immediately upon the receipt of any money thereafter, to deposit the same with said depository to the credit of said county, district or municipalities; and, for each and every failure to make such deposits the county treasurer shall be liable to said depository for ten per cent. upon the amount in an action against such treasurer and the sureties on his official bond in any court of competent jurisdiction in the county * * *"

By the provisions of Article 632, Revised Civil Statutes quoted above, it is made plain that no one but the commissioners court is permitted to have the custody and control of the bonds of a road district, that the commissioners court shall retain the control and custody of said bonds until the same are sold to the highest and best bidder for cash. It is also made plain by the provisions of said Article that the money when received from the sale of said bonds is to be placed in the county treasury of the county to the credit of the available road fund of the road district.

By the provisions of Article 2443a quoted above, it is made plain that after the creation of a county depository that all funds or moneys accruing to the county or any subdivision thereof from the sale of bonds or otherwise, demand may be made of said depository for an additional bond in a sum equal to the whole amount of such special fund.

By the provisions of Article 2444, quoted above, it is made manda-

tory upon the county treasurer after receiving the proceeds from the sale of said bonds to transfer the same to the county depository and fixes the penalty for his failure to do so.

The provisions of these articles are plain and unequivocal. The Legislature has provided an elaborate system of depositories and has provided that all funds whether belonging to the county, a subdivision thereof or any defined district regardless from what source obtained, whether from the sale of bonds or otherwise, shall be deposited in the depository either of the subdivision or district and in the event there is no depository for the subdivision or district, then in the county depository. The Legislature had in mind abuses of special funds in the past and to realize the benefits to be accrued, had all funds of whatsoever kind deposited in the selected depository secured by adequate and appropriate bond and drawing interest thereon and for these reasons the above articles and others were made a part of the laws of this State.

The bank at Weldon proposes to take these bonds, sell them and place the proceeds thereof in its vaults. The first question arises,—How is the bank at Weldon to get possession of these bonds in face of the provisions of Article 632, heretofore quoted, which provide that these bonds must remain in the hands of the commissioners' court until sold for cash? The answer is self-evident. It cannot be done. The proposition of the bank at Weldon is in fact but a proposition to become a depository for road district No. 9, of Crockett County. The Legislature has not yet seen fit to authorize road districts to select their own depositories. Until such a law is passed by the Legislature, road districts must deposit their funds in the county depository.

You are, therefore, advised that the proposition made by the bank at Weldon cannot be entertained because of the provisions of the law as quoted to you above.

Yours very truly,

BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 2026, Bk. 52, P. 311.

COUNTY FINANCES—CONTRACT OF COUNTY DEPOSITORY.

The county depository is only entitled to retain the county deposits sixty days from the day the commissioners court convenes at the February term thereof, next following each general election.

Articles 2440, 2443, 2444, Vernon's Sayles' Civil Statutes, 1918 Supplement.

AUSTIN, TEXAS, April 8, 1919.

Hon. I. J. Curtsinger, County Attorney, San Angelo, Texas.

DEAR SIR:—I have your recent letter, addressed to the Attorney General, submitting the following question from the county judge of your county:

"The Commissioners Court of Tom Green County alvertised for bids to be submitted at the February Term of the Commissioners Court by banks to act as the county depository. At the February term of the court there

were two bids submitted, but the Commissioners Court declined to consider the bids and ordered re-advertisement, tenders to be submitted at the March term of the court. At the March term of the court, the First National Bank of San Angelo, being the highest bidder, was declared the depository for Tom Green County. The Central National Bank, then the existing depository, declined to transfer the funds, claiming sixty days in which to make the transfer under the terms of the law.

"*Does the sixty days allowed this depository bank under the law in which to turn over the funds to the newly designated depository date from the March term of the Commissioners Court or from the February term of the Court?* Should this sixty days grace, in this instance, date from the March term then the former depository, although designated for a period of two years, will in reality have been the depository for two years and three months; in this event the newly designated depository will only become active as such depository from a date in May, 1919, and under the terms of the law, calling for the letting of the funds at the February term of the Commissioners Court, then the newly selected depository will only have served as depository for twenty-one months.

"As the First National Bank of San Angelo was designated at the March Term of the Commissioners Court of Tom Green County as the depository for the next ensuing two years, I will greatly appreciate it if you will refer this matter to the attention of the Attorney General's office and obtain his ruling as to when the First National Bank of San Angelo is entitled to act as depository for Tom Green County."

Article 2440, Vernon's Sayles' Civil Statutes, 1916 Supp., provides that the commissioners' court of each county in this State is authorized and required at the February term thereof next following each general election to receive proposals from banking corporations, associations or individual bankers of such county that may desire to be selected as a depository of the funds of such county, etc.

Article 2443 provides that within five days after the selection of the county depository it shall be the duty of the banking corporation, association or individual so selected to execute a bond or bonds payable to the county judge and his successors in office, etc.

Article 2444 provides that as soon as said bond be given and approved by the commissioners' court and the State Comptroller of Public Accounts, an order shall be made and entered upon the minutes of said court, designating such banking corporation, association or individual banker AS A DEPOSITORY OF THE FUNDS OF SAID COUNTY UNTIL SIXTY DAYS AFTER THE TIME FIXED FOR THE NEXT SELECTION OF A DEPOSITORY.

This Department on January 30, 1909, in answering an inquiry similar to yours by First Assistant Attorney General W. E. Hawkins, who is now Associate Justice of the Texas Supreme Court, in conclusion said:

"I am of the opinion * * * that your bank, as the existing county depository, will be entitled to retain the county deposits until sixty days after the time fixed by law for the next election for a county depository."

You are therefore advised that when the Central National Bank of San Angelo was selected as a county depository for Tom Green County in February 1917, it became the depository for a period of time ending sixty days after the term of the commissioners' court of February 1919, the time to be computed from the day the commissioners' court

convenes at its February term 1919. For the sake of illustration we will assume that your commissioners' court convened February 10, 1919. Sixty days from that date the contract of the Central National Bank of San Angelo as county depository for Tom Green County will end and it will be the duty of that bank to transfer all funds belonging to the county to the First National Bank of San Angelo, that being the bank selected as the new county depository.

The fact that the First National Bank was not selected until the March term of the commissioners' court can make no difference, for the statute provides that the bank selected shall be the depository of the funds of said county until sixty days after the time fixed for the next selection of a depository, and the time is fixed by statute to be the February Term next following each general election.

Therefore, the contract of the Central National Bank must end sixty days after the day the commissioners' court convened in February, 1919.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2016, Bk. 52, P. 197.

COUNTY DEPOSITORY—COUNTY COMMISSIONERS—LIQUIDATED DAMAGES —FINES AND FORFEITURES—GOVERNOR.

Vernon's Sayles' Revised Statutes, 1918 Supplement, Article 2441;
Constitution, Article 4, Section 11;
Vernon's Criminal Procedure, Articles 1051-1052;

(1) A deposit of a certified check with a bid to become county depository is in the nature of liquidated damages and no portion of same can be refunded by the county commissioners in case the applicant fails to qualify.

(2) Such deposit does not come within the category of fines and forfeitures and therefore same can not be remitted by the Governor.

AUSTIN, TEXAS, March 25, 1919.

To His Excellency, Governor W. P. Hobby, Capitol.

SIR:—We have yours with reference to the letter of Honorable A. Wildenthal, County Judge of Dimmit County, Texas. In this letter Judge Wildenthal states the county commissioners of Dimmit County advertised for bids for a county depository; that the Asherton State Bank was selected and deposited a check for two hundred fifty ($250.-00) dollars; that the bank selected failed to qualify as provided by law; that the commissioners are inclined to deduct actual expenses caused the county thereby and refund the balance to the bank and that they contrue this deposit as coming under the category of fines and forfeitures, and ask your approval as Governor of a remission of same.

Article 2441 Vernon's Sayles' Revised Statutes, 1918 Supplement, in setting forth the procedure in making bids to act as county depositories uses, among others, the following words:

"Said bid shall be accompanied by a certified check for not less than one-half of one per cent. of the county revenue of the preceding year as

a guarantee of the good faith on the part of the bidder, and that if his bid should be accepted he will enter into the bond hereinafter provided; and upon the failure of the banking corporation, association or individual banker in such county that may be selected as such depository to give the bond required by law, the amount of such certified check shall go to the county as liquidated damages and the county judge shall re-advertise for bids."

Act Feb. 12, 1917, Chapter IV, Section 11.

Whatever the intentions of the Asherton State Bank or of the County Commissioners or of Dimmit County are, such intentions are governed and controlled by the Statute which directed and authorized the taking of certified checks, and that Statute plainly sets out in such language that its meaning can not be misunderstood that such certified check shall go to the county as liquidated damages in case the successful bidder fail to qualify as the county depository. No kindliness of feeling or good fellowship on the part of the parties can vary this statute. Therefore, said certified check should be deposited in the County Treasury by the Commissioners.

The Governor's right to remit forfeitures of any character is confined both by the Constitution and the statutes of the State to criminal matters. Article 4, Section 11, of the Constitution, reads in part as follows:

"In all criminal cases, except treason and impeachment, he shall have power, after conviction, to grant reprieves, commutations of punishment and pardons, and under such rules as the Legislature may prescribe, he shall have power to remit fines and forfeitures."

Articles 1051-1052, Vernon's Sayles' Criminal Procedure, 1916, roads as follows:

"Art. 1051. In all criminal acts, except treason and impeachment, the Governor shall have power, after conviction, to remit fines, grant reprieves, commutations of punishment and pardons."

"Article 1052.—The Governor shall have power to remit forfeitures of recognizances and bail bonds."

It is clear from these that the power of the Governor to remit fines and forfeitures relates only to criminal cases. The matter of the deposit of a certified check by an applicant for county depository is in no way criminal. It is purely civil and is fixed by statute as stipulated liquidated damages and cannot be remitted by the Governor nor by the county commissioners, either in whole or in part.

Yours very truly,

JOHN MAXWELL,
Assistant Attorney General.

Op. No. 2066, Bk. 52, P. 574.

DEPOSITORIES—DAILY DEPOSITS—INTEREST ON STATE FUNDS.

The county tax collector is required to make daily deposits with the county depository of all funds collected by him for the State.

The county depository is liable to the State for interest at the contract rate upon all State funds from the date such funds are deposited until the date the same are paid over to the Treasury by the county tax collector.
Article 7618, R. S. 1911;
Chapter 11, Acts Regular Session Thirty-fifth Legislature;
S. B. No. 36, enacted by the Regular Session of the Thirty-sixth Legislature.

AUSTIN, TEXAS, May 13, 1919.

Hon. Jno. W. Baker, State Treasurer, Building.

DEAR SIR:—In your communication addressed to the Attorney General, you enclose correspondence passing between you and Honorable H. B. Terrell, Comptroller, J. A. Bitter, Tax Collector of Bexar County, and J. O. Terrell, President of Central Trust Company of San Antonio, the depository of Bexar County, and upon such correspondence you desire an opinion from the Attorney General upon the duty of the tax collector to deposit with the county depository daily funds coming into his hands belonging to the State; and further, whether or not the depository is liable to the State for interest on State funds remaining in its hands from the date of deposit until the same is paid over to the Treasurer by the Collector.

By Senate Bill No. 36, enacted by the Regular Session of the Thirty-sixth Legislature, the same being an amendment to the State Depository Law, all officers of this State are required to make daily deposits in the Treasury of all funds belonging to the State coming into their hands. This is the general scheme and purpose of the bill. However, amended Article 2428 contains the following provision:

"Provided that such officers as are required by law to remit to some other officer or department shall instead of remitting to the State Treasury remit as is required by law withi nthe time herein fixed for making remittances to the State Treasurer."

The meaning of the above quoted provision is that where under some other law officers of this State are required to remit to some officer other than the State Treasurer, then the amended State Depository Law requires such remittances to be made daily as is the case where officers remit direct to the State Treasurer.

By Chapter 11, Acts of the Regular Session of the Thirty-fifth Legislature, certain articles of the statute relating to county depositories were amended, and among those so amended was Article 2444 Revised Statutes of 1911. This Article, after providing for the approval of the depository bond by the commissioners' court and State Comptroller of Public Accounts, contains the following:

"And thereupon, it shall also be the duty of the tax collector of such county to deposit all taxes collected by him, or under his authority, for the State and such county and its various districts and other municipal subdivisions, in such depository or depositories, as soon as collected, pending the preparation of his report of such collections and settlement thereon, which shall bear interest on daily balances at the same rate as such depository or depositories have undertaken to pay for the use of county funds, and the interest accruing thereon shall be apportioned by the tax collector to the various funds earning the same. The bond of such county depository or depositories shall stand as security for all such funds. If the tax collector of such county shall fail or refuse to deposit tax money collected as herein required, he shall be liable to such depository or de-

positories for ten per cent. upon the amount not so deposited and shall in addition be liable to the State and county and its various districts and other municipal subdivisions for all sums which would have been earned had this provision been complied with, which interest may be recovered in a suit by the State."

It will thus be seen that the Legislature has expressly provided that the tax collector shall deposit all State funds in the county depository, and that the funds so deposited shall bear interest on daily balances at the same rate as such depository has undertaken to pay for the use of county funds, and the interest accruing thereon shall be apportioned to the fund earning the same. It will be noted that this Article places a heavy penalty upon the collector for failing to make such deposits.

The State funds thus placed with the county depository by the tax collector remain with the depository until paid over to the Treasurer at the end of the month, as is provided in Article 7618 Revised Statutes 1911. This Article provides for the filing at the end of each month a report with the Comptroller of Public Accounts, and provides further, that the collector of taxes shall pay over to the State Treasurer all moneys collected by him for the State during said month, except those amounts he is allowed by law to pay in his county, as well as the commissions on amounts collected.

It, therefore, appears that it is expressly provided by law that the county depository is liable to the State for interest on the daily balances of the tax collector of the funds belonging to the State.

From the language contained in Senate Bill No. 36, enacted by the Thirty-sixth Legislature, it further appears that county tax collectors are not required to make daily remittances to the Treasurer, but they are expressly authorized and required to make daily remittances to the officer to whom they are by law required to remit, which, in this case, is the county depository.

You are advised, therefore, that tax collectors should make daily remittances to the county depository of their respective counties and are not required to make daily remittances to you.

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

Op. No. 2121, Bk. 53, P. 286.

DEPOSITORY—PENALTY FOR FAILURE TO QUALIFY.

A bank selected as a State Depository, failing to qualify within thirty days after being notified of its selection, is subject to the penalty provided for in Article 2424 as amended by Senate Bill No. 36 of the Regular Session of the Thirty-sixth Legislature, and the State Depository Board has no authority to waive such penalty.

AUSTIN, TEXAS, July 23rd, 1919.

Hon. John W. Baker, Secretary, State Depository Board, Capitol.

DEAR SIR: The Attorney General has your favor of the 21st instant from which i tappears that two banks selected as State depositories have failed to qualify as such, although they were notified of their selection, and you desire advice as to whether or not such banks are liable for the penalty prescribed for a failure to qualify.

In reply thereto, we beg to advise, that under Article 2423 as amended by Senate Bill No. 36, enacted by the Regular Session of the Thirty-sixth Legislature, a bank is required to qualify as a depository within thirty days after notification of its selection. Article 2424, as amended by the same act, is in the following language:

"In case any bank that has submitted a bid for keeping State funds shall fail to qualify within thirty days after being notified to do so, it shall forfeit to the State, as liquidated damages, the difference between the interest rate offered and the lowest rate of interest the State is compelled to receive on its funds, under the provision of this chapter for six months, on the maximum amount that said bank proposed to keep, provided that no bank shall be compelled to qualify or be subject to any penalty that was not notified to qualify within four months after the bid was opened."

It will thus be seen that a failure on a part of any bank to qualify within thirty days subjects such bank to a penalty amounting to the difference between the interest rate offered by the bank and the lowest rate of interest the State is compelled to receive calculated upon the amount of funds bid for by the bank.

You are advised that the State Depository Board has no authority to waive this penalty. Neither has any officer of the State such authority.

Section 55, Article 3 of the Constitution of this State provides as follows:

"The Legislature shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any incorporation or individual, to this State, or to any county or other municipal corporation therein."

In the instant case the Legislature has not undertaken to release this debt, which is reduced by the statute to liquidate damages, neither has it in the State Depository Act, nor in any other act, authorized its release or extinguishment by your board. It therefore appears that no attempt has been made to release this debt and that no power rests in the Legislature to release it or to authorize its release.

You are therefore advised that is would be the duty of the Board to demand payment of the liquidated damages from each of the banks as is set out in Article 2424 hereinabove quoted.

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

Op. No. 2030, Bk. 52, P. 234.

STATE DEPOSITORY BOARD—GENERAL CONSTRUCTION OF THE ACT.

I. (a) Senate Bill No. 36 of the Thirty-sixth Legislature creates a State Depository Board and provides for the selection by it of a sufficient number of State depositories to take care of all the funds of the State.

(b) This Act supersedes all former laws and parts of laws in conflict with it.

11. (a) The eighteen depositories selected in February, 1919, under the existing law in existence at that time, will continue to act as such until the first day of March, 1921.

(b) This opinion holds that Senate Bill No. 36 does not in any way abrogate the contracts with these depositories.

IV. (a) The board should at once solicit bids from State and National banks in the State to act as depositories in addition to the eighteen depositories selected under the old law for the reason that it appears there are now $8,000,000.00 in the Treasury over and above the amount that may be taken by the eighteen depositories under their contracts.

(b) These new depositories are selected as additional ones under the authority granted in the Act to select additional depositories when the banks being used are not sufficient to handle all of the funds of the State.

(c) The Depository Board has authority to continue the investment of these excess funds in United States Treasury certificates until such time as the additional depositories may be selected and qualified.

(d) All banks bidding shall be listed in the order of the amount of the rate of interest bid, the highest rate to be listed first, the next highest rate second, and so on until the lowest rate is reached.

(e) The Board shall select from this list a sufficient number of banks to handle the funds on hand.

(f) In event still other banks are necessary, then the Board may select a number of banks from this list necessary to handle the additional funds.

(g) No bank shall be compelled to qualify or be subject to any penalty that was not notified to qualify within four months after its bid was opened.

(h) In bidding, a bank must state the maximum amount of State funds which it will take, not to be less than $10,000.00.

(i) No bank may retain on deposit more than its paid-up capital stock and permanent surplus, and they are required to remit to the State Treasurer all funds in excess of that amount.

V. (a) The State funds in depositories are secured in either of two ways: (1) By the deposit with the Treasury of certain bonds in an amount one-fifth greater than the maximum of State funds proposed to be kept by the bank, or (2) A bond signed by some surety company authorized to do business in Texas in an amount not less than double the amount of State funds to be deposited in the bank.

(b) It is made the duty of the Board from time to time to inspect the securities in the hands of the Treasurer, and to see that the same are actually kept in the vault.

(c) The Board is given authority to require additional securities satisfactory to them.

VI. (a) Should any bank fail to qualify within thirty days after notice of its selection, it shall forfeit to the State as liquidated damages the difference between the rate of interest offered by it and the lowest rate of interest the State is compelled to receive for six months on the minimum amount said bank proposes to keep.

(b) This law does not require the deposit of any amount with the bid, and therefore, to collect this penalty would require a suit in a court of competent jurisdiction.

VII. (a) The State Treasurer is required to keep the funds of the State in the bank or banks in the order of interest offered to the end that the State shall at all times receive the highest rate upon the funds on hand.

(b)) Depositories selected at the beginning of a biennium shall have preference over depositories subsequently selected.

(c) Banks paying the same rate of interest are to be placed in one

class, and a fair and equal balance of money kept on deposit with them in proportion to the mount they are entitled to receive.

(d) Should the State Treasurer fail to deposit funds in accordance with this law, he is liable to the State in five per cent, per month on funds he fails to deposit.

VIII. (a) The Board should expressly provide by an order entered upon its minutes the Treasurer may retain in the State Treasury sufficient funds to meet current demands.

IX. (a) The Treasurer shall issue receipts for all securities deposited with him by the depositories.

(b) The State Treasurer is authorized to convert the securities into money and disburse the same as other funds are disbursed in event a bank fails to pay deposits or any part thereof on the check of the Treasurer.

(c) This summary proceeding is inoperative and to subject these securities to the payment of any shortage or penalty would require a suit in a court of competent jurisdiction.

X. (a) All depositories are required to pay to the State Treasurer at the end of each month the interest on the average daily balances for the month.

(b) This Act provides that all interest paid by depositories shall become a part of the general revenue. This provision is ineffective to divert the interest on the school fund and the prison funds, as well as all other special funds arising from taxation for a specific purpose and the interest arising therefrom should be credited to the particular fund from which it arose.

(c) Any special fund in the Treasury, however, that is not created by taxation for a specific purpose may be controlled by the Legislature, and the interest arising from such fund to be placed in the general revenue under this bill.

(d) The interest on the prison funds should go to the general revenue under this bill, as is used for an illustration in this opinion.

XI. (a) All officers of State coming into possession of State funds or other funds required to be kept in the State Treasury shall pay such funds into the Treasury or designated depository daily as same are collected, and any officer failing to so deposit such funds shall forfeit to the State five per cent. per month on the amount withheld to be collected in a suit by the Attorney General in a court of competent jurisdiction.

(b) In case an official is required to remit to some other official or department, he shall remit on the day such funds are received.

XII. (a) The State Depository Board may designate certain selected depositories as receiving depositories and authorize officers or other persons who come into possession of funds belonging to the State to deposit such funds in such depositories as are most convenient for the Treasurer.

(b) Whether or not receiving depositories are selected is a matter that rests in the discretion of the Board, and unless such depositories are selected all remittances must be made to the State Treasurer.

(c) Remittances to the Treasury or receiving depository are required by this law to be in the form of: (1) cash, (2) registered letter, (3) postoffice money order, (4) express money order on a company authorized to do business in Texas, (5) bank draft on a State or National bank authorized to do business in Texas, and no other form of remittance shall be accepted.

(d) The liability of any person making a remittance shall not cease until the money is actually received in due course of business, which means not until any draft or other item is collected.

XIII. (a) When the funds are deposited in a depository, such depository shall deliver triplicate receipts therefor, one of which the depository shall preserve. and the others he shall forward to the Treasurer and Comptroller respectively.

(b) In event a receiving depository shall have on hand funds in excess of the amount awarded under this Act, such excess shall draw interest, but on the first day of each month and oftener, if requested by the Treasurer, the depository shall remit all State funds in excess of the amount it

is entitled to keep and a failure to so remit shall forfeit the right of the Depository Act.

(c) When a receiving depository has on hand funds in excess of the amount it is authorized to keep, there is no security therefor, the Board should keep constantly in touch with these institutions.

XIV. (a) There are two methods provided in this Act for the clearing of items in the Treasury; the first is, all State depositories are required to collect without cost to the State all checks, drafts and demands for money, and on demand of the Treasurer issue to him free of charge a draft or exchange on a reserve bank. The next method is for the State Depository Board to advertise for bids from all State and National banks with capital stock of not less than $50,000.00 for clearing and safekeeping of State funds and award a contract to the bank offering the highest rate of interest, not less than two per cent. on daily balances.

(b) There was no provision in the old law requiring State depositories to clear these items, and consequently the eighteen banks selected under that law and now acting cannot be required to do so, but banks selected under this Act can be required to clear these items.

(c) These two methods are exllusive and preclude the right of the Treasurer becoming a member of the Austin Clearing House or clearing the items in any other manner, except during the interim before depositories can be selected as is set out hereafter.

(d) The Treasurer shall give a depository ten days' notice of the intention to draw more than one-fifth of the amount the depository is entitled to keep, but this provision does not apply to deposits made during the next preceding thirty days.

(e) The Board would have authority to authorize the Treasurer to clear all items coming into his hands through the Austin Clearing House, or in some other manner for the time intervening between the taking effect of the Act and such time as clearing depositories may be selected under its terms.

XV. The Depository Board is authorized to adopt rules and regulations for the establishment and conduct of State depositories not inconsistent with the provisions of the Act.

XVI. (a) The provision requiring all officers to deposit daily all State funds coming into their hands means that such officers must deposit daily the funds coming into their hands and actually belonging to the State.

(b) The officials are not required to deposit daily funds remitted to them in excess of the amount ascertained to be due.

(c) Any excess remittances may be returned to the senders in such manner as the official sees fit.

(d) This Act does not require all officers to handle all business the day it is received. Should a department not be able to handle the business received during the day, then they are not required to make a deposit of the funds transmitted with the remittance until the exact amount due the State has been ascertained by them.

XVII. When a bank has been notified to qualify as a depository, it shall within thirty days file with the Treasurer certain bonds or vendor's lien or mortgage lien notes secured by a first lien on real estate, and such notes shall be accompanied by abstract of title to the land and an opinion of a reputable attorney, and the Board shall make investigation in regard to the value of the land and require a deposit sufficient to cover the expense of the investigation.

AUSTIN, TEXAS, April 2, 1919.

State Depository Board, Capitol.

GENTLEMEN:—You have verbally requested this Department to give you an opinion upon the legal effect of Senate Bill No. 36 enacted by the Thirty-sixth Legislature, and also to advise the Board as to its duties under the Act. This bill by its terms amends Chapter 1, Title 44 of the Revised Statutes of 1911, which Chapter deals with State depositories. The Act was signed by the Governor on March 31, 1919,

filed in the office of Secretary of State at 10:25 a. m. April 1st, and went into immediate effect by reason of the emergency clause and the necessary vote of both Houses of the Legislature as shown by the certificates of the Clerk of the House and Secretary of the Senate.

I.

The Act in question expressly amends Chapter 1 of Title 44 of the Revised Statutes of the State of Texas 1911, embracing Articles 2417 to 2439 both inclusive and all amendments thereto. Section 2 of the Act expressly repeals all laws and parts of laws in conflict with or not consistent with the Act. The present bill, therefore, supersedes the former laws governing and regulating State depositories, and it is now the only law regulating and governing the same.

II.

The first question that presents itself in a consideration of this measure is the status of the eighteen depositories selected in February, 1919, under the prior law for a term of two years next after March 1st, 1919, and it is necessary before proceeding with a discussion of the Act of the Thirty-sixth Legislature to determine whether or not these depositories are to continue to act, and if so, the effect of the new law upon the contracts entered into with these several banking institutions.

Nowhere, in the Act under discussion, does the Legislature expressly abrogate the contract with these eighteen banks, nor authorize a breach thereof on the part of the Board or the Treasurer. If such was the intention of the Legislature, then the same must be arrived at by a construction of the Act to the effect that having adopted a new system of laws governing the creation of and the regulation of depositories, the same being amendatory of the old law, thereby an abrogation of the present contract will be authorized.

It will be noted that amended Article 2418 provides it shall be the duty of the State Treasurer, between the first and fifth day of January, next, after each general election, to mail notices and to put in operation the machinery for the selection of depositories for a term of two years, beginning March 1st, next succeeding. This law having been enacted and signed by the Governor subsequent to the first day of March and subsequent to the first and fifth day of January, next succeeding the general election, it is apparent that depositories can not originally be selected in accordance with the language here referred to until the lapse of almost two years. We do not feel warranted in placing a construction on this Act that would deprive the State of the interest on its funds for two years. It might be that the Depository Board would at this time be authorized to let contracts under this Act for the unexpired portion of two years which ends March 1st, 1921, but under our interpretation of the Act, as it appears hereafter, it is unnecessary to determine this question. Our view of this Act is that it was the intention of the Legislature to permit the eighteen depositories selected to act for their full term ending March 1, 1921; and that depositories to take the excess over the aggregate amount that the

original eighteen are authorized to receive may be selected under the Act as is hereinafter fully set out.

IV.

A question which demands immediate solution by your Board is whether or not under this bill you are required to immediately solicit bids for the safekeeping of State funds that may be on hand in excess of the amount for which there are outstanding contracts with the eighteen depositories operating under the old law. The maximum amount that may be in the hands of these eighteen depositories is $50,000.00 each, or in the aggregate $900,000.00. I am informed that the Treasurer now has on hand approximately $8,000,000.00 in excess of the amount with the depositories, practically all of which is invested in United States Treasury Certificates maturing on or about August ——, 1919.

Amended Article 2418 makes it the duty of the State Treasurer between the first and fifth day of January next after each general election to mail to each State and National bank doing business in this State a circular letter soliciting bids for keeping State funds for a term of two years next after the succeeding March 1st. The fact that this bill was passed as an emergency measure and went into immediate effect discloses the intention on the part of the Legislature to enact a measure that would immediately make available to the State the interest arising from daily balances of all moneys in the hands of the Treasurer. With this provision in the bill, it cannot be contended that the Legislature intended that operation under the Act should be deferred until January next succeeding the general election held in 1920, or until January 1921, and that the depositories selected under the Act should not come into existence until March 1st, 1921, and thereby lose to the State interest on all funds in the hands of the Treasurer other than the $900,000.00 above mentioned for practically two years.

As has been seen above, the Legislature has not abrogated the contracts with the existing depositories. We, therefore, construe this Act to mean that the Legislature intended to and did recognize the right of the eighteen existing depositories, and that they should be considered as "the banks being used as State depositories" within the meaning of Amended Article 2421, which provides in substance that in case the banks being used as State depositories in this Chapter are not sufficient to handle all of the funds of the State, the Board may cause the State Treasurer to send out a circular letter requesting bids for the State funds, as is provided for in other amended articles for original bids.

It is appropriate to here call your attention to a provision found in amended Article 2432 as follows: "The State Depository Board is hereby authorized and empowered whenever there are excess funds in the State Treasury, for which there is no immediate use, to subscribe for such amounts of United States Treasury Certificates of indebtedness as their judgment may dictate and the interest earned thereon shall become a part of the general revenue fund." The authority thus conferred is in addition to that contained in Chapter 3, Acts

Fourth Called Session Thirty-fifth Legislature, which became a law March 1st, 1918, and under which the $8,000,000.00 above referred to is invested in Treasury Certificates. The former Act provided that the authority should exist only during the continuance of a state of war between the Governments of the United States and Germany, and it would seem from the terms of this Act that should a treaty of peace be signed between these two Governments ending the present war that the authority under that Act would cease. The language contained in the present Act, however, would warrant the Board in failing to exercise its option to cash these certificates until such time as it would require to solicit bids and award contracts for additional depositories under this Act.

From what has been said above, it follows that the existing depositories coming within the meaning of "banks being used as State depositories" would be eliminated from those banks in this State having the right to bid for the keeping of the excess funds. Our construction of this Act recognizes them as existing depositories under the old law with their rights fixed thereunder, and no violence is done them in such a construction. You are, therefore, advised that it will be your duty to solicit bids from each State and National bank doing business in this State for the safekeeping of the excess funds for the unexpired term ending March 1st, 1921, upon the terms and conditions set out in the Act for the solicitation of bids in January next after each general election. In the circular letter sent out by the Treasurer, he will be required to give the date when bids must be in his hands, which shall not be less than thirty days from the date of mailing such letter, and in such letter he shall state the date upon which he shall receive and open such bids.

Under the provisions of Article 2421, it will be the duty of the State Treasurer to make a list in triplicate of all the banks bidding in the order of the rate of interest offered; that is, the bank offering the highest rate of interest shall be listed first, the one offering the next highest rate next, and so on until all banks are listed, as is provided by Article 2420 for original depositories. After these lists have been made up, the Board shall select from the list the number of banks offering the highest rate of interest that will in the judgment of the Board be necessary to keep the excess funds of the State and notify them to qualify under the law. See Article 2422. It is provided in this last mentioned Article that the Board has the power to select another list of banks next in order on such list in event that more depositories are required, or in its discretion the Board may advertise for bids as provided for in Article 2421. In this connection, however, I call your attention to the limitation contained in Article 2424, to the effect that no bank shall be compelled to qualify or be subject to any penalty that was not notified to qualify within four months after the bid was opened. Therefore, unless the necessity for additional banks should arise within four months after the bids are open, you would be required to advertise for additional bids under the last clause of Article 2422.

Article 2419 requires each bank in its bid to state the amount of its paid-up capital stock, the maximum of State funds, to be not less than $10,000.00, it will accept, the rate of interest it will pay on daily bal-

ances, and that such bid shall contain the provision that the books and accounts of such banks shall be open at all times to the inspection of the Board, etc. The maximum amount of State funds that any bank may receive is limited by the provisions of Article 2425. Article 2425 provides that no depository shall be entitled to keep on deposit more than its paid-up capital stock and permanent surplus. Article 2430 requires all banks to remit to the State Treasurer all State funds in excess of the amount it is entitled to keep.

V.

Article 2423 sets out the security that must be given by the depository, which shall consist of certain bonds in an amount one-fifth greater than the maximum amount of State funds said banks propose to keep, or in lieu thereof the bank shall execute a bond signed by some surety company authorized to do business in Texas in an amount not less than double the amount of State funds deposited in said bank.

The duties of the Board with reference to such securities are fully set out in Articles 2423 and 2426, which go into details which it is useless to here repeat, except that I call your attention to the express provision contained in Article 2426 to the effect that the Board shall from time to time inspect the bonds and see that the same are actually kept in the vaults of the Treasury, and if the securities mentioned are not satisfactory, the Board may require additional securities to be given as will be satisfactory to them.

VI.

Article 2424, as amended, provides that should any bank that has submitted a bid fail to qualify within thirty days after being notified, it shall forfeit to the State as liquidated damages the difference between the interest rate offered and the lowest rate of interest the State is compelled to receive for six months on the maximum amount that said bank proposes to keep. To collect this penalty, a suit would be necessary which would have to be brought for its enforcement.

VII.

It is provided by Article 2425 that the State Treasurer shall at all times keep the funds in the bank or banks in the order of rate of interest offered so that the State shall receive the highest rate of interest possible on such funds, provided that the depositories selected in the beginning of a biennium shall retain their preference over depositories subsequently selected.

Under our construction of this Act to the effect that the eighteen depositories selected under the old law are the original depositories in contemplation of this Act, they would be entitled to the maximum amount allowed them by the law under which their contracts were made.

This provision of Article 2425 is limited by the provision of Article 2432 to the effect that it is the duty of the State Treasurer to keep the funds in the depositories paying the highest rate of interest, and

to maintain as nearly as possible a fair and equal balance of money on hand in all State depositories paying the same rate of interest in proportion to the amount each is entitled to receive. This language is plain, meaning simply that the Treasurer shall place all banks paying the same rate of interest in one class and keep funds with them in proportion to the amount they are authorized to receive under their bid and the law.

Your attention is called to the provision in Article 2425 to the effect that if the State Treasurer shall fail to deposit the funds in accordance with the provisions of this Chapter, he shall be liable to the State for five per cent a month on funds he fails to deposit.

VIII.

The Board shauld expressly provide by an order entered upon its minutes that the Treasurer may retain in the State Treasury from time to time sufficient funds to meet the current demands on the Treasurer as is provided in Article 2425. Article 2431 makes a similar provision.

IX.

The securities offered by the successful bidders are required by Article 2426 to be delivered to the State Treasurer and receipted for by him and retained by him in the vaults of the Treasury. This Article also provides for the inspection of such securities by the Board and the demand for additional securities as heretofore mentioned.

We call your attention to the provisions of this article, wherein the State Treasurer is authorized to convert the securities placed with him into money and to disburse the same according to law upon the warrants of the Comptroller when a bank has failed to pay out the funds deposited with it on the check of the Treasurer. It is proper to state here that this summary sale of securities provided for in the hands of the Treasurer is ineffective, because if carried into effect it would be clearly taking the property of the depositor without a trial by court for determining the issues, and, therefore, under well recognized authorities would be the taking of property without due process of law in violation of both the State and Federal Constitutions.

X.

Article 2427 requires all State depositories to pay to the Treasurer at the end of each month the interest on average daily balances for said month, which shall in no event be less than three per cent per annum, and which interest shall become part of the general revenue.

You are advised in this connection that the Legislature had no authority to provide that interest arising from any Constitutional fund arising by a tax levied under authority of the Constitution shall be applied to any other purpose other than the fund from which

it arose. This has direct application to the school funds and to the pension funds and to any other fund that may be in the Treasury, arising from taxation for a specific purpose. Section 5, Article 7 of the Constitution, dealing with permanent and available school fund of the State, provides in part that no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever. The Confederate Pension Fund of this State arises under the provision of Section 31 Article 3 of the Constitution, and while no provision is made against a diversion of this fund or any part thereof, yet it is a fundamental rule that any fund arising by special taxation is dedicated to the purposes for which it is raised and cannot be diverted. It may be said also that the interest arising from the school fund and the Confederate Pension Fund, as well as other special funds arising from taxation, cannot be diverted from those funds under the provisions of Section 7, Article 5 of the Constitution, which provide in substance that the Legislature shall not have power to borrow or in any manner divert from its purpose any special fund that may or ought to go into the Treasury, and it shall be a penal offense for any person or persons to borrow, withhold, or in any manner to divert from its purpose any special fund or any part thereof. The interest arising from the Confederate Pension Fund is certainly a part of the fund under all rules of construction.

There are other funds in the Treasury, however, over which the Legislature has control; as an illustration, we cite the Prison Commission Fund. The Depository Act of 1907 contained a similar provision to the one under discussion to the effect that all interest paid in by the depository shall be credited to the general fund. Under this provision of the old law, the interest on the prison fund was converted into the general revenue. By Chapter 32, General Laws of the Thirty-fifth Legislature, it was specially enacted that "on December 1st of each year, the State Treasurer shall ascertain the interest earned by the fund belonging to the Prison System from the State depositories and place said sum to the credit of the Prison Commission account and send deposit receipt to the Prison Commission." Under this Act of the Legislature, which became effective on the — day of June, 1917, it became the duty of the Treasurer to credit the Prison Commission with the interest received, but under the present Act dealing with State depositories, the Prison Commission will lose this interest and it will go into the general revenue for the reason that the Legislature has the power over that fund to direct its expenditure, the same not being created by taxation for a specific purpose.

The two illustrations above used will suffice for a general rule, and it will not be necessary for the writer to undertake to search out from the statute the various special funds and rule on each particular case.

XI.

Under Article 2428, as amended, all officers of this State, charged with the collection of, or who shall come into possession of, State

funds or other funds required to be kept by the State Treasury, shall remit or pay such funds into the State treasury, or a designated State depository, daily, as the same are collected. And any officer failing to deposit such funds shall forfeit to the State five per cent per month on the amount of such funds for the time such funds are withheld, as liquidated damages. The language here used by the Legislature is broad, comprehensive, and needs no construction. It simply means that the funds of the State, coming into the hands of any collecting officer, shall be by that officer deposited in the State Treasury, or a designated depository on the very same day the same are received. All laws in conflict with this provision are repealed by Section 2 of the Act, and this provision must be obeyed by officials under the penalty of being subject to a payment of five per cent per month on the funds so withheld, the same to be collected in a suit by the Attorney General against the official so offending in a court of competent jurisdiction.

It is also provided by this article that in those cases where an official is required to remit to some other officer, or department, that such officer shall remit to the other officer, or department, on the day such funds are received.

XII.

The State Depository Board is given authority by Article 2429, if it deems it advisable to do so, to designate certain depositories, selected under the Act as receiving depositories, and authorize the officers, or other persons who come into possession of funds belonging to the State, to deposit such funds in any of such depositories as are found most convenient for the State Treasurer. The selection of such depositories, and the question as to whether or not they shall be selected, is left in the discretion of the Board and unless the Board exercises this authority, all remittances must be to the State Treasury.

This amended article contains the following provisions:

"In any event, such funds may be sent in cash by registered letter, by postoffice money order, express money order of any company authorized to do business in Texas, or by bank draft on any State or National bank authorized to do business in Texas. In suc hcases, the liability of person sending same shall not cease until the said money is actually received by the State Treasury or the duly authorized State depository in due course of business."

Our construction of the above quoted section of Article 2429 is that the same is a mandatory provision of the statute and limits the method of remitting funds to the State Treasury or designated depository to the character of remittances mentioned in the Act. In other words, the Treasury of the State, and no depository designated as a receiving depository, has authority to accept remittances in any form other than (1) cash, (2) registered letter, (3) postoffice money order, (4) express money order, of a company authorized to do business in Texas, (5) bank draft on a State or National bank authorized to do business in Texas; and that no other form of re-

mittance shall be accepted. Should a construction be placed upon this language simply that it is directory and that remittances in other forms could be accepted, it would, in our opinion, destroy the very purpose of the Legislature to enumerate the form of remittances the treasury and depositories should accept. The purpose of the Legislature, we think, is made apparent by the use of the term "cash" in describing the form acceptable as a method of remittance. If it had not been the intention of the Legislature to limit the form of remittance, it would have been useless to have designated "cash" as one of the forms, for the reason that, whether the Act mentioned cosh or not, the same would have been accepted; but when the Legislature went further and provided other modes of remittance it clearly indicated that those modes, and no others, were authorized by law.

It is expressly provided in this article that the liability of any person making a remittance to the treasury, or depositories, shall not cease until the money is actually received in due course of business. That is to say, that while it is permissible to remit by bank draft the liability of the person making remittance does not cease until the draft is actually collected.

XIII.

The attention of the Board is next called to amended Article 2430 which provides that where funds are deposited in a depository such depository shall issue and deliver to such person a triplicate receipt therefor; one of which he shall preserve and the other he shall forward to the State Treasurer and the Comptroller, respectively.

I desire to call the attention of the Board to the provision of this article wherein it is stipulated that if any depository shall have on hand funds in excess of the amount of deposit awarded under the Act, the amount shall be considered in computing the average daily balances and draw the same interest, but such depository shall on the first business day of each month, and oftener if requested by the treasurer, remit all State funds in excess of amount it is entitled to keep. And it is provided that any depository failing to make such remittance shall forfeit its right to act as such depository. Under the various provisions of the Act authorizing the remittance to a designated depository, it is possible for such a depository to have on hand funds largely in excess of the amount to which they are entitled and which are not secured by any collateral deposits or surety company bonds. The Board, through the State Treasurer, should keep constantly in touch with this situation, to the end that these unsecured funds of the State should be converted into the Treasury or into the depositories not having an excess amount on hand.

XIV.

The question of clearing the items coming into the Treasury is one of prime importance in the administration of this Act. There

are two articles of the amendatory act dealing with this subject, being Articles 2435 and 2436 of the same. The first provision, in effect, is that all State depositories shall collect, without cost to the State, all checks, drafts and demands for money, and on the demand of the Treasurer, shall issue to him or his order, free of charge, a draft or exchange on a bank designated as a reserve bank. Article 2435 gives to the State Depository Board authority to advertise for bids from all State and National banks, having a capital stock of not less than $50,000, for clearing and safe-keeping of State funds, and the bank offering the highest rate of interest, not less than two per cent per annum on average daily balances, shall be selected to handle collections and clearings.

The provision contained in Article 2436, requiring State depositories to clear checks, drafts and demands for money, was not contained in the law under which the eighteen depositories were selected, and, therefore, those banks could not be forced to clear the item, for the reason that it would be an added burden and such a construction would make the Act violative of the constitutional provision prohibiting the impairing of obligation of contracts that are hereinabove referred to. Therefore, in event the authority given the Board, by Article 2435, to select a clearing depository, is not exercised, then under the provisions of Article 2436, it will become the duty of the State depositories, selected under this Act, to perform such services. They can be required to do so for the reason that when they enter into a contract, under the law, they are bound by all of its provisions.

The method set out in the two articles named is the only method the State Treasurer is authorized to adopt in clearing the items coming into his hands which, of course, precludes his right to be a member of the Austin Clearing House, or to clear the items in any other manner.

In this connection, we call the attention of the Board to the provision of Article 2433 which provides, in effect, that the Treasurer shall give to a depository, making a clearing, ten days' notice of his intention to draw on the funds therein before drawing more than one-fifth of the amount such depository is entitled to keep. This provision, however, does not apply to deposits made during preceding thirty days. That is to say, he may draw the entire aomunt of all funds arising from the collection of items remitted to the bank for that purpose within the next preceding thirty days.

You present, in this connection, the further question of how the Treasurer may clear items remitted to him prior to the establishment of a depository under this bill.

Manifestly, it was not the purpose of the Legislature to require the Treasurer to hold all items in the Treasury until a depository could be established. It is likewise apparent, under the bill, that depositories can not be established in less than thirty days after the Act takes effect, for the reason that notices for bids must be given for at least that length of time. After being notified that its bid has been accepted, a bank has thirty days within which to qualify. Therefore, it may be sixty days, after giving of notice soliciting bids,

that depositories can be established under this Act. In the meantime, it is absolutely necessary to the best interest of the State that the Treasurer have some method of clearing items coming into his possession. In other words, the present law cannot operate until the vehicle upon which it operates can be established by its provisions. The eighteen depositories heretofore selected cannot be compelled to act as clearing houses for the Treasury, because their contracts do not so provide. Neither could they be acceptable as such for the reason their bonds are not sufficient to cover the same.

Under Article 2434, the State Depository Board has the right to make rules and regulations governing the establishment and conduct of depositories and the handling of funds therein, as the public interest may require, not inconsistent with the provisions of the chapter. We are of the opinion that it would not be inconsistent with the provisions of this Act for the Depository Board to authorize the treasurer to clear the items coming into his possession through the Austin Clearing House as he has heretofore done until such time as depositories, or à clearing depository, may be established under the provisions of the Act.

XV.

Article 2434, as amended, authorizes the Depository Board to adopt rules and regulations governing the establishment and conduct of State depositories and the handling of funds therein, but such rules and regulations must not be inconsistent with the provisions of the Act. These rules and regulations must be in writing and entered upon the minutes of the Board. The authority here granted merely authorized the Board to adopt rules and regulations in order to effectually carry out the provisions of the Act, but does not give the Board authority to adopt any rules or regulations that would add any obligations to those imposed upon the depositories by the Act itself. These rules and regulations must necessarily be confined in their effect to the method and mode of handling the business and must not be, in any particular, in conflict with any provision of the Act.

XVI.

Recurring to that provision of Article 2428, as amended, which requires all officers of this State to make daily remittances to the State Treasury, we will now consider the question raised by several of the State officials as to the exact meaning of this requirement. This article imposes a severe penalty for its disobedienee, in that the officer failing to comply therewith shall forfeit to the State five per cent per month on the amount of funds withheld.

It will be noted that the exact language of this article, in so far as it is pertinent to the matter under discussion, is:

"All officers of this State charged with the collection of, or who shall

come into the possession of, State funds or other funds required to be kept by the State Treasury, shall remit * * *"

The duty of State officials, under this article, depends upon the construction of the language "State funds or other funds required to be kept by the State Treasury." The correct answer to this will solve all questions relating to excess remittances and the manner in which such excesses may be returned. In our opinion, we think there can be no question but that the amount of moneys to be deposited in the State Treasury daily by a head of a department is that amount of fees actually earned by the department and the exact amount due to the State by way of taxes or for other purposes that were collected during the day.

By way of illustrating our meaning, we will take a transaction in the office of the Secretary of State. Suppose that officer receives in his morning's mail a proposed charter of a corporation. The incorporators enclose their draft for the amount they have calculated will be due for filing fees and franchise taxes for, say, $105.00. Those fees are payable in advance and he is not authorized to file articles until the same is paid. Upon an examination of the charter and a calculation of the filing fees and franchise taxes due thereon, the Secretary of State finds that the correct amount due is only $100.00. It certainly could not be contended that, simply because the incorporators had erroneously calculated the amount due and sent draft for $105.00, such $105.00 are State funds within the meaning of Article 2428, when the sum of $100.00 was all that was actually due to the State as filing fees and franchise tax. Nor could it be contended that it would be the duty of Mr. Howard, Secretary of State, simply because he had received $105.00, to deposit the same in the Treasury, when $5.00 thereof did not belong to the State, necessitating a special act of the Legislature in order to refund the $5.00 to the incorporators which the State had erroneously collected.

The incorporators of the concern owed to the State of Texas only One Hundred ($100.00) Dollars. It was only that amount that became the property of the State and which the Secretary of State, under the bill, was required to deposit in the treasury; having deposited in the treasury the actual amount due the State, he has complied with the law and he may return the excess to the sender in such manner as he sees fit.

Neither do we construe this law to mean that the officers of the State must remit to the treasury all amounts received by them during the day before they have determined the correctness of the remittances. There are certain seasons of the year during which various departments have an abnormal amount of business coming into their hands. This law does not require, either expressly or by implication, that all business coming into a department during any one day shall be handled during that day. It is not an infrequent occurrence that a department may be so overwhelmed with business that it will be a day, or for that matter several days, behind.

We will use the Secretary of State's office in another illustration to make clear our position on this point. Suppose the Secretary of State receives in his morning's mail a hundred proposed charters or amend-

ments thereto, each having attached thereto the necessary remittance. We will say that with the clerical force in the department it is impossible to pass upon all the charters and amendments during the day and determine the exact amount due the State. We see nothing in this bill that would require the Secretary of State to remove the remittances from these documents and place them in the State Treasury before he had had time to examine and determine what amount, if any, was due the State thereon.

In other words, our construction of this Article is that it is the duty of each officer to each day remit to the Treasurer all amounts ascertained by him, during the day, to be due the State and collected by him; and it is not the purpose of this Act to require him to remit to the treasury all funds coming into his hands, whether due the State or not. A proposed charter may never be approved by the Secretary of State. The incorporators may propose to incorporate a concern not authorized by the statutes. If immediately upon receipt of a proposed charter, he deposits remittance in the treasury and should afterwards refuse to file the charter, then the incorporators could not have their money refunded to them until the Legislature met and passed an act providing therefor. We find nothing in this Act that would warrant us in placing a construction thereon that would work a hardship upon the citizens of this State, much as is indicated above.

XVII.

It is deemed advisable to expressly call the attention of the Board to the provisions of amended Article 2423, and to the character of securities required by the Act to be deposited with the Treasurer in event the depository shall determine to deposit securities in lieu of a surety company bond, as it may do under this Act.

This Article provides that when a bank has been notified to qualify, it shall within thirty days make a deposit of certain securities or execute a surety company bond signed by some surety company authorized to do business in Texas. In the event the depository elects to deposit the securities, then it may deposit with the State Treasurer, in an amount one-fifth greater than the maximum amount of State funds the bank proposes to keep, the following bonds:

(1) United States,
(2) State,
(3) Federal Land Bank located in Texas,
(4) County,
(5) Independent School District,
(6) Common School District,
(7) Municipal,
Or vendor's lien or mortgage lien notes secured by a first lien on real estate of value at least double the amount of said notes exclusive of improvements.

It is further provided by this Section that before any State, county, independent school district, common school, district or municipal bonds shall be received as collateral security, they shall be submitted to the Attorney General and by him approved, and such bonds shall

be registered under the same rules and regulations as are required for bonds in which the permanent school funds are invested, and it is further provided by this Article that such bonds, except the United States bonds, shall be worth not less than par. This provision imposes upon the State Depository Board the duty of ascertaining the value of all bonds offered as collateral security, except bonds of the United States, which they may accept without regard to their present value.

A closer scrutiny of the value of vendor's lien or mortgage notes is demanded of the Board. This Act requires that with such notes there shall be submitted an abstract of title to the land, and also an opinion of a reputable attorney residing in the county where such land is located approving such title. It is provided that the notes shall be secured by the first lien on real estate of value at least double the amount of said notes exclusive of the improvements. The duty is enjoined upon the Board to make such investigation in regard to the value of the land as it deems proper. In other words, the Board must satisfy itself on the title to the land that the attorney rendering an opinion thereon is a reputable attorney and that the land, exclusive of improvements thereon, is worth at least double the amount of the notes outstanding against it. This will require of the Board an exhaustive investigation. They have the right, however, to require of the depository that it deposit a sufficient sum with the Board to cover the expense of investigating the title to the value of the land. Therefore, when vendor's or mortgage lien notes are offered as collateral security, the Board should fix an amount of money which they estimate will be required to defray the expense of making this investigation and require the depository to deposit such amount with them.

It is further provided by this Article that the Board shall have the right to reject with or without cause any abstract, opinion thereon, or any notes or other securities that may be offered. The Board also has the right in its discretion to reject the bond of any surety company offered, and it is provided in this Section that the action of the Board in rejecting said bond shall not be subject to revision.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

Op. No. 2097, Bk. 53, P. 152.

STATE DEPOSITORIES—WAR FINANCE CORPORATION—BONDS

Bonds issued by the War Finance Corporation are not United States bonds within the meaning of the State Depository Act.

AUSTIN, TEXAS, June 18, 1919.

The State Depository Board, Building.

GENTLEMEN: You desire advice from this Department as to whether or not you should accept as collateral security from a bank selected as a State depository certain bonds issued by the War Finance Corporation.

Article 2423, as amended, authorizes you to accept from a depository certain bonds, among others, bonds of the United States. The

question then it,—Are the bonds issued by the War Finance Corporation bonds of the United States within the meaning of this Article of the Texas Statute?

The War Finance Corporation was created and came into existence under and by virtue of the Act of April 5, 1918. The capital stock of this corporation is Five Hundred Million ($500,000,000.00) Dollars, all of which was subscribed by the United States of America, and that amount of money was appropriated by the Federal Congress for the purchase of said stock. Under Section 12 of the Act, the Corporation was empowered and authorized to issue and have outstanding at any one time its bonds in an amount aggregating not more than six times its paid-in capital. The Act provides that such bonds shall have a first and paramount floating charge on all the assets of the corporation, and the corporation shall not at any time mortgage or pledge any of its assets.

Section 17 of the Act is as follows: "The United States shall not be liable for the payment of any bond or other obligation, or an interest thereon issued or incurred by the corporation, nor shall it incur any liability in respect of any act or omission of the corporation."

It seems that by the other terms of the Act the bonds issued by this corporation are secured alone by a lien upon the assets of the corporation, and the United States is not bound for their payment.

We, therefore, advise you that bonds of the War Finance Corporation are not bonds of the United States within the meaning of our Depository Act, and you should decline to accept same as collateral from a bank selected as one of the State depositories.

Immediately upon receiving your request for this opinion, the writer telegraphed the Attorney General of the United States, asking if the bonds of this corporation were the bonds of the United States. After a delay of several days, we received an answer to our telegram, advising us to take the matter up with the Secretary of the Treasury. We have today sent a telegram to the Secretary of the Treasury, asking for the same information. When a reply is received, if the advice is given and the same is contrary to this opinion, we will advise you.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OPINIONS ON ELECTIONS AND SUFFRAGE.

Op. No. 2172, Bk. 53, P. 537.

ELECTIONS—WOMAN SUFFRAGE.

Women in order to vote in primary elections and participate in conventions must possess all the qualifications now required of men.

January 15, 1920.

Hon. John W. Hornsby, County Attorney, Austin, Texas.

DEAR SIR:—Answering your inquiry with reference to what is necessary to qualify women to vote in the primary elections and to participate in the nominating conventions held under the laws of this State during the year of 1920, you are advised:

I.

Every woman who desires to vote in any primary election or who desires to participate in any nominating convention, shall, first of all, possess all of the qualifications necessary of an elector, such as twelve months' residence in the State, six months' residence in the County, and must vote in the precinct in which she lives.

II.

In addition to possessing the qualifications of an elector, she must have paid the same poll taxes that are now required of male voters and must have paid said taxes and obtained a receipt therefor prior to the 1st day of February, 1920. The form of receipt now used for male voters shall be used for female voters.

III.

In addition to the above requirements, the female voter must have paid, not only the State and County poll tax of $1.75, but, if she resides in a city which levies a poll tax upon male voters, she must pay the city poll tax. In other words, she must pay the same poll taxes,—State, County, and City—which are required of male voters.

IV.

And further such female voter must pay said poll taxes in the manner required of male voters, that is to say, if she resides in a city of Ten Thousand inhabitants and over, she must appear in person before the Tax Collector and pay her taxes. If she resides outside of a city of ten thousand inhabitants, she may pay her poll taxes as is required of male voters, either in person or by a written order to an agent authorizing said agent to pay her poll taxes and providing the necessary funds with which said poll taxes are to be paid; and in which event, the tax receipt should be mailed by the Tax Collector to the female

person paying same and shall not be delivered to her agent. The forms for paying poll taxes by agents now applicable to male voters shall likewise be applicable to female voters.

V.

Female voters, more than sixty years of age, or those who are blind, or deaf and dumb, or permanently disabled, or have lost one hand or foot, shall be entitled to vote without being required to pay the poll tax, but such female voter, if she resides in a city of ten thousand inhabitants or over, shall be required to obtain her certificate of exemption from the County Tax Collector before the first day of February, 1920.

VI.

A female voter who will reach the age of 21 years after the first day of February and before the day of the following primary election or nominating convention, and who possesses all of the other qualifications of a voter, shall be entitled to vote at such election, if she has obtained a certificate of exemption from the County Collector before the first day of February which shall specify the day when she will be twenty-one years old and contain all the other requisites of a certificate of exemption. Before the certificate of exemption shall issue, the applicant therefor shall make a written affidavit of her age to be administered and certified to by the county collector, who shall file and preserve the same. The same rules as to residence now required of male voters to obtain tax receipts shall apply as to exemptions for both male and female voters.

VII.

No poll tax is levied on women and the payment of poll taxes by women can not be enforced, but the payment is only prerequisite to the right of women to vote in primary elections or to take part in nominating conventions.

Yours very truly,

C. M. CURETON,
Attorney General.

Op. No. 2201, Bk. 54, P. 112.

ELECTIONS—SUFFRAGE—INFORMATION RELATIVE TO PRECINCT, COUNTY AND STATE CONVENTIONS TO SELECT DELEGATES TO THE NATIONAL CONVENTION.

AUSTIN, TEXAS, April 1, 1920.

Honorable Jno. W. Hornsby, County Attorney of Travis County, Austin, Texas.

DEAR SIR: You state that Honorable A. P. Wooldridge has expressed a desire that information be prepared in writing relative to

the holding of precinct, county and State conventions to select delegates to the National Democratic convention and you request us to furnish you with such information. We have accordingly prepared the following general information based upon the Statutes. This, of course, is general in its nature and does not purport to cover every conceivable contingency that may arise.

The State Convention.

The State Democratic Convention to elect delegates to the National Democratic Convention will be held at such place as may be designated by the State Executive Committee of the party on the fourth Tuesday of May, 1920, which is May 25, 1920.

Precinct Convention.

On the first Saturday in May, 1920, that is, May 1, 1920, a primary convention shall be held in each voting precinct of the county, which precinct primary convention shall elect delegates to the county convention.

Hours of Holding Precinct Convention.

The precinct convention shall be held between the hours of 10:00 o'clock a. m. and 8:00 o'clock p. m. on May 1, 1920.

Qualifications of Members.

Only qualified voters of each voting precinct are entitled to assemble and participate in the precinct convention.

Presiding Officer—Appointment and Qualifications.

The precinct convention shall be presided over by a chairman, who shall have been previously appointed by the county executive committee of the party, and said chairman shall be a qualified voter in said election precinct.

Officers of Precinct Convention.

Said precinct convention may elect from among its numbers a secretary and such other officers as may be necessary to conduct the business of the convention.

Powers of Chairman.

The Chairman of said precinct convention shall possess all the powers and authority that are given to election judges under the provisions of the election laws of this State. This means among other things that he may swear members and interrogate them relative to their qualifications and require them to establish their right to participate in the convention.

List of Voters.

Before transacting any business, the chairman of the precinct convention shall make or cause to be made a list of all qualified voters present; and the name of no person shall be entered upon said list, nor shall he be permitted to vote or to participate in the business of such convention, until it is made to appear that he is a qualified voter in said precinct from a certified list of qualified voters, the same as is required in conducting a general election.

Election of Delegates to County Convention.

After the precinct convention is organized, as above provided, it shall elect its delegates to the county convention and transact such other business as may properly come before it.

Record of Proceedings.

The officers of said precinct convention shall keep a written record of its proceedings, including a list of the delegates elected to the county convention, which record shall constitute the returns from said convention.

The same shall be signed officially, sealed up and safely transmitted by the officers thereof to the chairman of the county executive committee of the party and to be used by the executive committee in making up a roll of the delegates to the county convention.

The County Convention.

The county convention shall be held on the first Tuesday after the first Saturday in May, 1920, which is May 4, 1920, and shall elect delegates to the State convention aforesaid.

Qualifications of Voters.

These conventions are affairs of the Democratic party, and hence only those who are Democrats can participate in same.

In the foregoing, wherever it is stated that only qualified voters can vote or participate in the conventions or be chairman thereof, it means those qualified to vote in primary elections; that is, for instance, persons who, in addition to being qualified voters generally under the Constitution and laws of the State of Texas, are also full fledged citizens of the United States; they must be either natural-born citizens or those fully naturalized; persons who have simply declared their intention to become citizens are not qualified voters within the meaning of the law governing the holding of these conventions.

Women are qualified voters within the meaning of the law governing the holding of conventions of this kind and may vote and participate in such conventions if they are otherwise qualified voters.

Presidential Primary Law.

It will be remembered that the statute passed in 1913 attempting to

provide for the holding of primaries on May 1st to select delegates to the National convention, etc., was held unconstitutional by our State Supreme Court. Waples et al. vs. Morrast, 184 S. W., 180. In this case the court said:

"Tested by legal principles which are clear and established, the payment of the expenses of primary elections of political parties is not a public purpose for which public revenues may be used; and in our opinion the Act in question is therefore unconstitutional and unenforceable."

Thus we must resort to the convention system as above outlined, and which i sprovided for by a previous statute to the one held invalid.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2028, Bk. 52, P. 317.

CONSTITUTIONAL AMENDMENTS—ELECTION—GOVERNOR'S PROCLAMATION—APPROPRIATIONS.

Senate Concurrent Resolution No. 11 is not a proposed amendment to the State Constitution and same does not have to be published.

Where the resolution does not otherwise provide, all proclamations by the Governor calling State elections should be made in accordance with General Election Laws.

An appropriation for expenses of a Constitutional Convention cannot be used to pay for publishing proclamation calling an election to determine whether or not such Convention will be held.

Moneys cannot be appropriated out of the State Treasury by a resolution. It must be done by a bill in due form.

There is no attempted appropriation in Senate Concurrent Resolution No. 11 to defray the expenses of calling the election on the first Tuesday in November, 1919.

AUSTIN, TEXAS, April 8, 1919.

Honorable George F. Howard, Secretary of State, Capitol.

DEAR SIR: This Department has yours of April 2nd, in which you submit the following inquiries, to-wit:

"I am enclosing herewith copy of Senate Concurrent Resolution No. 11, with reference to calling constitutional convention.

(1) "This resolution provides that on the passage of same the Governor shall issue proclamation directing the several officers of this State empowered by law to conduct, manage and supervise elections under the laws of Texas, to call the election for the date set out therein. I would like to know if you construe this to mean I should publish this amendment immediately, or publish within the time as set out in the Constitution.

(2) "Also kindly inform me whether the $100,000 appropriated by this resolution can be used for the publication of the amendment. If not, if you can find in this resolution any amount of money that is designated for this department to use for such publication.

(3) Will you also advise me whether a member of the Senate or House of Representatives, who publishes a paper and asks for the printing of proposed amendments to the Constitution, is legally entitled to do so where

he votes for the measure and for the appropriation covering the expense of printing same."

I gather from your communication that you are under the impression that Senate Concurrent Resolution No. 11 embodies an amendment to the State Constitution and that same should be published as is required for such amendments by the Constitution of the State. I will take the privilege of calling your attention to the fact that said resolution does not embody an amendment to the State Constitution, but calls for a series of elections to provide for an entirely new Constitution for the State. My answer to your inquiries, therefore, is in view of this suggestion.

With reference to your first inquiry, I will state that the resolution calls for three elections: one to be held on the first Tuesday in November, 1919, one to be held the second Tuesday in March, 1920, and one to be held not less than sixty days after the adjournment of such convention, if same should be held, and in addition thereto, provides that the oGvernor shall by proclamation call these elections, and also provides that the Governor by proclamation shall call the Constitutional convention provided for in Section 1 of the resolution on the first Monday in June, 1920. The resolution provides in Section 1 and in Section 9 that all elections provided for in the resolution shall be held according to the laws controlling general State elections, unless otherwise provided in the instrument itself. The resolution in Section 8 provides generally and in other places in the instrument specially that the Governor shall issue the several proclamations above mentioned; the one for the election of delegates to the convention not less than sixty days prior to the date fixed, and the one assembling the convention not less than thirty days prior to the date fixed, and as to the others is silent.

Article 2929, Chapter 3, Title 49, Vernon's Sayles' Revised Statutes reads as follows:

"Notice shall be given to the people of all elections for State and district officers, electors for President and Vice President of the United States, members of Congress, members of the Legislature and all officers who are elective every two years. Such notices shall be by proclamation by the Governor ordering the election, not less than thirty days before the election, issued and mailed to the several county judges."

Article 3081, Chapter 9 of Title 49, Vernon's Sayles' Revised Statutes reads as follows:

"The provisions of this title shall apply to all elections held in this State, except as otherwise herein provided."

These are the only two references in the statutes that would control in a general election pursuant to provisions of this resolution, and in cases in which the resolution itself makes no specific provisions these two provisions of the statutes control. Then, as to your first inquiry, I would advise you that the Governor should issue and publish his proclamations calling elections under the provision of Senate Concurrent Resolution No. 11 for each respective election not less than thirty days prior to the date fixed in said resolution for such elec-

tions, except the election for delegates to the convention, which proclamation should be made not less than sixty days prior to the date fixed, and he should further issue his proclamation convening the Constitutional convention not less than thirty days before the first Monday in June, 1920. These proclamations should be issued and published as other proclamations calling State elections.

In reply to your second inquiry, will state that the $100,000 appropriated in Section 11 cannot be used to pay the expenses of the above publications. It is attempted to appropriate this sum specifically to pay the expenses of the Constitutional convention. It is a well settled rule of law that moneys specifically appropriated by the Legislature cannot be used for any other purpose than that for which they are appropriated. It may not be improper here to call your attention to the fact that the legislature cannot by resolution appropriate money out of the Treasury of this State. This must be done by a bill in proper form and by regular procedure. This Department in a very lengthy and exhaustive opinion of date May 17, 1913, and found on page 321, Book 31, The Opinions of the Attorney General, after an investigation of the authorities and constitutions of practically every State in the Union, advised that such appropriations are unconstitutional and void. It would, therefore, be well for the Special Session of the Legislature either in the general appropriation bill of by special act to appropriate the necessary sum to pay the expenses incident to carrying this resolution into effect.

My answer to the first two inquiries to the effect that the resolution is not an amendment to the Constitution, and therefore it is not required to be published, makes it unnecessary for me to answer your third inquiry.

Yours very truly,

JOHN MAXWELL,
Assistant Attorney General.

Op. No. 2163, Bk. 53, P. 477.

CONSTITUTIONAL AMENDMENTS — ELECTION RETURNS — CANVASSING BOARDS.

The statute requiring the Secretary of State, the Governor and Attorney General on the fortieth day after the election to open and count the returns of an election on the Constitutional amendments is directory, and such Board may perform these services at any time thereafter.

Article 3036, Revised Statutes, 1911.

AUSTIN, TEXAS, December 16, 1919.

Honorable W. P. Hobby, Governor, Honorable W. A. Keeling, Acting Attorney General, Honorable George F. Howard, Secretary of State, Building.

GENTLEMEN: You advise this Department that on the convening of your Board on yesterday, you find that there are no returns from some fifty counties or more of the election held on the 4th day

of November, A. D., 1919, at which election the people of this state voted upon certain amendments to the Constitution. It further appears from your statement to the writer hereof that the returns now in the hands of the Secretary of State as tabulated by your Board indicate the defeat of certain Constitutional amendments that were adopted by the Board of said election according to the unofficial returns of the total vote of the State cast at such election. It further appears that on today, the same being the forty-first day after the election, other returns have come to the hands of the Secretary of State.

Your Board desires advice from this Department on whether or not it may consider returns received after the fortieth day, and whether or not it may delay a declaration of the result and a final count of the vote until the returns from the other counties may be obtained.

An answer to your inquiry depends upon the proper construction to be placed upon those Sections of the Election Laws relating to the subject. Article 3030 Revised Statutes 1911 is as follows:

"County commissioners shall open returns, when.—On the Monday next following the day of election, and not before, the county commissioners court shall open the election returns and estimate the result, recording the State of the polls in each precinct in a book to be kept for that purpose; provided, that in the event of a failure from any cause of the commissioners court to convene on the Monday following the election to compute the votes, then said court shall be convened for that purpose upon the earliest day practicable thereafter.

"(1) The language of this article is mandatory only to the extent that the commissioners court are prohibited from opening the returns and canvassing the result earlier than the Monday next following the election. This article clearly contemplates that from a failure or refusal of the commissioners court after that date to carry out the provisions of this article that it can be done at any subsequent time."

Article 3035, Revised Statutes, is in the following language:

"Returns of election for certain State and district officers.—In all elections for Comptroller of Public Accounts, Treasurer of the State, Commissioner of the General Land Office, Attorney General, State Superintendent of Public Instruction, Commissioner of Agriculture, Railroad Commissioners, Judges of the Supreme Court, Court of Criminal Appeals, Courts of Civil Appeals, and district courts, district attorneys, Representatives in the Congress of the United States, and for the adoption or rejection of proposed Constitutional amendments, the county judge shall, on the Monday next following the day of election, or as soon thereafter as the commissioners court shall have opened the returns and estimated the result, as provided in Article 3030, make out duplicate returns of the election; one of which he shall immediately transmit to the seat of government of the State, sealed in an envelope, directed to the Secretary of State, and indorsed, 'Election returns for .... county, for ....' (filling the first blank with the name of the county and the other blank with the name of the office for which the election was held, or a designation of the proposed amendments to the Constitution voted upon, as the case may be); and the other of such returns shall be deposited in the office of the clerk of the county court of the county where such election was held."

The above two articles provide for the returns of the election to be filed with the Secretary of State. Then follows that article of the

statute under consideration here, the same being Article 3036, and is in the following language:

"Such returns shall be counted, when and by whom.—On the fortieth day after the election, the day of election excluded, and not before, the Secretary of State, in the presence of the Governor and Attorney General, or in case of vacancy in either of said offices, or of inability or failure of either of said officers to act, then in the presence of either one of them, shall open and count the returns of the election."

The question, therefore, to be determined by this office is: Has the Board the power to open and count the returns of the election held on November 4th at any date subsequent to the fortieth day after the election? The fortieth day after the election held on November 4th was December 15th, and we are now called upon to determine whether or not returns received today, on the 16th, may be counted, and also any other returns that may be made to the Secretary of State after this date.

The exact language of the above statute is that "On the fortieth day after the election, the day of election excluded, and not before, ... shall open and count the returns of the election." If the language here used by the Legislature is mandatory, then the official act of the returning board must be performed on the fortieth day after the election and not thereafter, and no returns coming to the hands of the Secretary of State after such date may be considered by the Board. We are of the opinion, however, based upon the authorities hereinafter cited and quoted from, that the statute here under discussion is directory only as to time, and that the returning board in this instance may open and count the returns of the election at any time after the fortieth day. This statute is specific in that it provides that the returns shall not be opened and counted before the fortieth day after the election, and in this it is mandatory. The board would have no power to open and count the returns prior to the fortieth day after the election. Mr. Sutherland in his work on Statutory Construction, Section 611, says:

"Where the provision is in affirmative words and there are no negative words, and it relates to the time or manner of doing the acts which constitute the chief purpose of the law or those incidental or subsidiary thereto, by an official person, the provision has been usually treated as directory."

In the same article this author says:

"Unless a fair consideration of a statute, directing the mode of proceeding of the public officers, shows that the Legislature intended compliance with the provision in relation thereto to be essential to the validity of the proceeding, it is to be regarded as directory merely. Those directions which are not of the essence of the thing to be done, but which are given with a view to the proper, orderly and prompt conduct of the business, and by the failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it will still be sufficient, if that which is done accomplishes the substantial purposes of the statute."

The purpose of holding all elections is to arrive at the will of the majority of the qualified voters of this State, voting upon a subject submitted to them, and all statutes dealing with the procedure of such elections are passed for the purpose only of arriving at the will of the people fairly and honestly expressed at the ballot box. The sole object of the duties imposed upon this returning board is to determine this will of the people so expressed, and the time at which such result is ascertained is not of the essence of the statute, but is merely a direction to such board as to the time such act may be performed, except, of course, the statute positively prohibits the opening and counting of such returns prior to the fortieth day after the election.

Quoting again from Mr. Sutherland on Statutory Construction and from Section 612, we find the following:

"Provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory. Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards. In other words, as the cases universally hold, a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory, unless the nature of the Act to be performed or the phraseology of the statute is such that the designation of it must be considered as a limitation of the power of the officer," citing Wilson vs. State Bank, 3 La. Ann., 196.

The same author gives the rule as laid down in various cases, which we cite as follows: In People vs. Allen, 6 Wend., 486, it was held that a brigade order constituting a court martial issued in July, when by the militia law it was made the duty of the commandant of the brigade to issue such order on or before the first day of June in every year, was valid. In Howland vs. Luce, 16 John, 135, it was held that where it is required by statute that an officer shall take official oath within a certain period, the oath may be afterwards taken; and in Boykin vs. State, 50 Miss., 375, it was held that an offiecr might file official bond at a time subsequent to that required by statute. In Smith vs. Crittenden, 16 Mich., 152, it was held that a statute requiring the township clerk to certify on or before the first Monday in October of each year to the supervisor of his township the amount of the town indebtedness growing out of the payment of bounties was directory, and that such certificate might be made afterwards.

In Pond vs. Negus, 3 Am. Dec., 131, the Massachusetts court held that where assessors of school districts were directed by statute to assess the district tax within thirty days after the clerk had certified the vote for raising the tax was merely directory, as there were no negative words in the statute limiting their power to make their assessment afterwards. So, in the statute under discussion, there is absolutely no direct or implied prohibition against opening and counting returns after the fortieth day.

It is also held in State vs. Harris, 17 Ohio State, 608, that a statute directing the tax to be levied at a given time, and such levy is omitted, it may be levied at different time.

In Ex Parte Heath 3 Hill 42, it was held that a statute required ward inspectors of a city to certify the result of ward elections on the

day subsequent to the closing of the polls or sooner, that their certificate was valid, although it was not made until the second day after the closing of the polls.

Exactly in point here is the case of State vs. Ringgold, 42 Mo. App., 115, where a statute requiring the county clerk to cast up the vote within fifteen days after election is declared to be directory as to time, and that the duty of the clerk continues until performed.

In the case of U. S. vs. DeVisser, 10 Fed., 642, it was held that statutes not designed to affect the rights and liabilities of third parties to only guide the performance of officers of government in the performance of their duties was to be considered as directory only. While in People vs. Lake County Supervisors, 33 Cal., 487, it is held that when a statute specifies the time after or within which an act is to be done, it is usually held to be directory, unless time is of the essence of the thing to be done, or the language of the statute contains negative words or shows that the designation of the time was intended as a limitation of the power, authority or right. As above said, there appears from this statute no purpose on the part of the Legislature to prohibit the opening and counting of these returns after the fortieth day, the only prohibition being that such acts should not be performed prior to the fortieth day.

In Webster vs. French, 12 Ill., 302, that court holds that under a directory statute a duty should be performed at the time specified, but may be valid if performed afterwards.

In Stayton vs. Hulings, 7 Ind. 144, the court said that when a statute is merely directory, a thing omitted to be done at the proper time may be done afterwards, but where a statute expressly prohibits a thing until another has been done, the prohibition cannot be disregarded.

It is held in a St. Louis County Court vs. Sparks, 45 Am. Dec., 355, that a statute specifying the time within which a public officer must perform an official act regarding the rights or duties of another is directory merely, unless the nature of the act or the words of the statute show that it was intended to be a limitation of power.

So, in State vs. Lean, 9 Wis., 279, it is held that if there be no reason why the thing directed to be done might not be done as it in fact was instead of as directed by the statute, no presumption that the departure from the statute could work wrong or injury. Nothing in that or in any other statutes to indicate that the Legislature did not intend that it should rather be done in another way or at another time than not at all, then the courts assume the statute to be directory and the performance good.

The fact that your Board desires this opinion today makes it impossible for the writer hereof to make a more extended search of the authorities and to discuss more at length the authorities herein cited, but this Department deems the above a sufficient citation of the authorities to establish the legal provision that the statute under discussion is directory only, and that the opening and counting of returns, and the declaration of the result of the election held on November 4th after the fortieth day would be perfectly valid.

If it should develop that the returns in the hands of the Secretary

of State on the fortieth day after the election would, when tabulated, show a result at variance with that shown by the tabulation of the full vote of the State on these amendments to the Constitution, then the result would be that the returning officers of the counties failing to send in their returns would have defeated the will of the people of this State expressed at the election. This is a condition that ought not to exist in any free country. No man or set of men, no officer or officers should have it in their power or be allowed by their dereliction, either purposely or by oversight, to defeat the will of the people. This Department urges and recommends to the Legislature of this State the enactment of a law placing a heavy penalty upon any returning officer who fails to perform his duty.

You are, therefore, advised that your board would have authority to open and count all returns coming into your hands after the expiration of the forty days, and that you would be authorized to delay your final count until you can procure the return from those counties not yet reporting, and that when all of the returns are in, or as many thereof as can be procured, your act in opening and counting the returns would be valid.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

Op. No. 2116, Bk. 53, P. 271.

ELECTIONS, VOTERS, RESIDENTS.

A person otherwise a qualified voter is entitled to vote in any county election in such voting precinct of the county as he resides in on the date of the election and is not required to live in such precinct six months unless such voting precinct is within a city of 10,000 population or more. Vernon's Statutes, 2916, 2939, 2952.

AUSTIN, TEXAS, July 16, 1919.

Mr. Jack Allen, County Attorney, Ochiltree, Texas.

DEAR SIR: We have your communication of July 10th, in which you make the following inquiry:

"We are to have election for removal of county seat of Ochiltree County within the next few weeks.

"Please advise whether or not qualified voters living in one precinct and who move to another precinct a few days or even only one day before the election would be entitled to vote in the precinct to which they so move immediately before the election.

"Also please advise status of voter who moves on the day of the election.

"As required by statute when asking you for an opinion, I render as my opinion that such voter so moving from one precinct to another immediately before such election would be a qualified voter entitled to vote in the precinct to which he so moves. And as to voter moving on election day, if he declares that his intentions were fixed, before such removal, to so move, he would be entitled to vote in the precinct to which he on that date moved.

"I cite you for brief required by statute Art. 2939; also to Art. 2916. And cases cited under said Art. 2939, Vernon's Statutes, 1914, especially the case of Little vs. State, 75 T., 616, 12 S. W., 965; also Savage vs. Umphries, 118 S. W., 893.

"Will you kindly let us have this opinion as early as possible as we shall be governed by same in holding said election, which will be at an early date and there will be a great deal of moving from one precinct to another at the time the election is held. Ochiltree, present county seat, is to be moved to Perryton on a new branch of the Santa Fe just being constructed."

In addition to Articles 2939 and 2916 cited by you, I cite you to Article 2952, which I think substantiates your position. The portion of the Article I refer to is a follows:

"If a citizen, after receiving his poll tax receipt or certificate of exemption, removes to another county or to another precinct in the same county, he may vote at an election in the precinct of his new residence in such other county or precinct by presenting his poll tax receipt or his certificate of exemption or his written affidavit of its loss to the precinct judges of election, and stating in such affidavit where he paid such poll tax or received such certificate of exemption, and by making oath that he is the identical person described in such poll tax receipt or certificate of exemption, and that he then resides in the precinct where he offers to vote and has resided for the last 12 months in the State."

This question has been before this Department already and in an opinion rendered on June 21, 1916, found on page 209, published Report and Opinions of the Attorney General of Texas for 1914-16. In a very elaborate opinion by W. P. Dumas of this Department, we held

"That in order to constitute a change of residence of a voter, there must be an actual removal coupled with an intention to abandon the former residence and acquire a new one."

As to whether or not a man has changed his residence in good faith and is entitled to vote in his new place of abode, it is a question of fact to be determined in each case upon its merits. If the voter has in fact moved into a new precinct within the same county in good faith to reside in such precinct and to acquire a residence therein, such voter is entitled to vote at any general county election held subsequent to his acquiring his new residence as aforesaid. This is substantiated by Article 2952 quoted by me and also by the authority quoted by you.

In the case of Little vs. State, 12 S. W., 965, cited by you, Judge Gaines, speaking for the Supreme Court, approves the following charge which specifically substantiates this position.

"But in an election held for the purpose of locating a county seat and to elect county officers, the only test as to residence in order to be a qualified voter would be one year in the State next preceding such election and at least 6 months in the county in which he offered to vote."

This is unquestionably the law in this State except in cities of 10,000 inhabitants or more and in elections which are purely local and relate to the interests exclusively of the election precinct into which the voter moves.

Yours very truly,

JOHN MAXWELL,
Assistant Attorney General.

Op. No. 2200, Bk. 54, P. 105.

ELECTIONS—FURNISHING BALLOTS FOR USE BY ABSENTEE VOTERS.

The County Democrtic Executive Committee is authorized to furnish the county clerk with necessary ballots to be used by absentee voters in primary elections under the Absentee Voting Law, and the county clerk is authorized and it is his duty to deliver to each absentee voter a ballot, as provided in the Act.

Chapter 40, Second Called Session, Thirty-fifth Legislature.

ATTORNEY GENERAL'S DEPARTMENT, March 30, 1920.

Honorable W H. Tolbert, Assistant District Attorney, Fort Worth, Texas.

DEAR SIR: I have yours of the 24th inst., addressed to the Attorney General, propounding an inquiry relative to the Absentee Voting Law, as follows:

"In the First Called Session of the Thirty-fifth Legislature, Article 2939, Chapter 4, Title 49 of the Revised Civil Statutes, an Act was passed amending the above Article, and entitled the absentee voting bill.

"The law requires that the county clerk shall have official ballots printed and distributed to the election judges before time for holding the election. In the amended Act it provides for a voter who is to be absent from his precinct appearing before the county clerk and voting under the provisions laid down in the amended Act. Another provision of the statute is that no one is permitted to have a copy of the ballot except the qualified election judges.

"Will you please advise us whether or not in your opinion it would be legal in view of the other existing statutes for the county clerk to furnish ballots to the absentees as provided in the amended bill."

I respectfully direct your attention, first, to the fact that the Absentee Voting Law, Chapter 40, Acts of the First Called Session, Thirty-fifth Legislature, applies to primary elections only. See the last sentence of the act. This being true, we must look to the statutes governing primary elections, and not to those governing general elections, in order to determine the question.

The Absentee Voting Law provides that the elector may, by complying with the provisions of the Act, cast his vote with the county clerk when he expects to be absent from the county of his residence and at any other place in this State on the day of the election, and that "said clerk shall deliver to such elector one ballot which has been prepared in accordance with the law for use in such election."

Here we have an express provision of the law making it the duty of the clerk to deliver to the elector a ballot "which has been prepared in accordance with the law for use in such election." Now what does the law say with reference to the preparation of ballots in primary elections?

Article 3095, Revised Civil Statutes, provides that: "The official ballot shall be printed by the county committee in each county," and then the statute goes on to say that the committee shall furnish to the presiding officer of the general primary for each voting precinct, at least one and one-half times as many of such official ballots as there

are poll taxes paid for such precinct, as shown by the tax collector's list.

Article 3112 is in the following language:

"The executive committee *shall have general supervision of the primary* in such county and shall be charged with the full responsibility for the distribution of all supplies necessary for holding same in each precinct, to the presiding judge thereof."

It being the duty of the County Executive Committee to have the ballots printed, and the law having provided that it is the duty of the county clerk to furnish the absentee voter with a ballot, the reasonable inference is that it was intended that the committee would turn over a supply of ballots to the county clerk necessary to accomplish the purpose of the Absentee Voting Law, and we hold that this was the intention of the Legislature. It is not to be supposed that the Legislature would do an idle thing, that is, it would not have made it the duty of the county clerk to turn over a ballot to the absentee voter, and, at the same time, intended that it should be unlawful for him to do so, or that it should be unlawful for him to be furnished with a supply of ballots from those charged with the duty of having them printed.

I find nothing in the statutes prohibiting the County Executive Committee from supplying the county cleark with ballots for absentee voters, or making it unlawful for the county clerk to furnish absentee voters with ballots; on the contrary, I am of the opinion that the provision directing the county clerk to furnish the voter with a ballot, together with the other statutes, above mentioned, affords ample authority and direction to the County Executive Committee to supply him with ballots for said purpose and for the clerk to comply with the Absentee Voting Law in delivering ballots to voters.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2235, Bk. 54, P. 289.

ELECTIONS—SUFFRAGE.

1. In both general and primary elections when a voter because of some bodily infirmity, such as renders him physically unable to write, or who is over sixty years of age and is unable to read and write, requires assistance in order that he may vote, such assistance may be given; and in a general or governmental election the voter may make known his wishes in any language which he speaks and the election judge may assist him in any language understood by the voter; but in primary elections such voter is required to make known his wishes in the English language, and the judge in aiding and assisting him can use only the English language..

2. The requirement of the statute as to the use of the English language has no reference to the subject of challenge in either general or primary elections and a voter at either of such elections cannot be challenged because he does not speak and understand the English language.

3. If a voter is able to prepare his ballot without assistance, then he is

entitled to vote in either a general or a primary election, regardless of his inability to speak or read the English language or any other language.

State Constitution, Article 6, Sections 1 and 2.

Revised Statutes, Article 3003, as amended by Chapter 55, General Laws, passed by the Regular Session of the Thirty-sixth Legislature.

AUSTIN, TEXAS, June 23, 1920.

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

DEAR SIR: Your inquiry reads as follows:

"I have reference to the General Laws, passed at the Regular Session of the Thirty-sixth Legislature, page 94, concerning the qualifications of a voter.

"We have a number of native born American citizens who are fully able to prepare their own ballot without any assistance whatever from anybody. These American citizens of Mexican extraction while able to prepare their ballot without any assistance are not able to enter into a sustained conversation in English and in many cases they are not able to understand or speak much English, yet they are able to read and to prepare their ballot without assistance.

"What I want to know is can a judge of election at a city election or otherwise challenge such a voter and ask him questions in English until the voter says he does not understand and then can the judge refuse to allow him to vote on the ground that the voter does not speak or understand the English language?

"A voter enters the polling place, presents his poll tax receipt or certificate of exemption, his name appears on the list and is able to prepare his own ballot. Can a judge then proceed to ask him questions for the purpose of disqualifying him by showing that he cannot speak the English language?"

Your question involves the construction of Article 3003, Revised Statutes, as finally amended by Chapter 55, General Laws, passed by the Regular Session of the Thirty-sixth Legislature. This Article as amended reads:

"Not more than one person at the same time shall be permitted to occupy any one compartment, voting booth or place prepared for a voter, nor shall any assistance be given a voter in preparing his ballot, except when a voter is unable to prepare the same himself because of some bodily infirmity, such as renders him physically unable to write, or is over sixty years of age and is unable to read and write, in which case two judges of such election shall assist him, they having been first sworn that they will not suggest, by word or sign or gesture, how such voter shall vote; and they will confine their assistance to answering his questions, to naming candidates, and the political parties to which they belong, and that they will prepare his ballot as such voter himself shall direct; provided that the voter must in every case explpain *in the English language how he wishes to vote, and no judge of the election shall use any other than the English language in aiding the voter, or in performing any of his duties as such judge of the election*, and in all cases where assistance is given hereunder, two judges of the election shall assist such voter, they having been first sworn that they will not suggest, by word, sign or gesture, how such voter shall vote; that they will confine their assistance to answering his questions in the English language, to naming candidates, and, if the voting be at a general election, to naming the parties to which such candidates belong, and that they will prepare the ballot as such voter directs, in the English language; and where any assistance is rendered in preparing a ballot other than herein allowed, the ballot shall not be counted, but shall be void for all purposes. If the election be a general election, the judges who assist such voter shall be of different political parties, if there be such judges present, *and if the election be a primary election*, a super-

visor, or supervisors, may be present, when the assistance herein permitted is being given, but such supervisor or supervisors must remain silent except in cases of irregularity or violation of the law."

This statute purports to apply to both primary elections and general or governmental elections. The power of the Legislature with reference to primary elections is very much different from its power with reference to general or governmental elections. Kay vs. Schneider, 218 S. W., page 479.

We will first discuss the statute with reference to its bearing, if any, on the subject of general or governmental elections. The first portion of the Article which we have quoted specifies two instances in which a voter may be assisted.

(a) When a voter is unable to prepare his ballot because of some bodily infimity, such as renders him physically unable to write:

(b) When a voter is over sixty years of age and is unable to read and write.

When either one of these conditions obtains, the judges of the election in a general election are authorized to assist the voter.

The next paragraph of this Article as amended provides that the voter must in such case explain in the English language how he wishes to vote and that no judge shall use any other language other than the English language, or in performing any of his duties as such judge of election. We construe the last phrase "or in performing any of his duties as such judge of the election" to refer only to the duties of the judge in giving assistance to the voter. This is plain when the caption of the act is examined, which confines its meaning to the purpose which we have just stated.

Now the question is whether or not this statute, when we interpret it with reference to general or governmental elections, is to be given the meaning that the voter must use the English lagnuage in explaining to the judges how he desires to vote, and that the judge must in turn use to the voter only the English language. We do not think the statute can be given any such meaning with reference to general or governmental elections, for the reason that such an interpretation would be tantamount to a provision requiring that the voter must speak and understand the English language before he would be permitted to vote at a governmental election. In other words, the effect of the statute would be to prescribe a qualification for a voter which is not required by the Constitution of the State. Section 1, of Article 6, of the Constitution enumerates those who shall not be allowed to vote. The enumeration is familiar and it is unnecessary to quote the same. Section 2, of this Article of the Constitution declares that every male person subject to none of the disqualifications enumerated in Section 1, and who shall attain the age of twenty-one years, who shall be a citizen of the United States, and who shall have resided in the State for one year next preceding the election, and six months within the district or county in which he offers to vote, shall be deemed a qualified elector, and every male person of foreign birth subject to none of the previous disqualifications who has six months prior to the election declared his intention to become a citizen shall be deemed a qualified elector.

It shall be noted that the Constitution does not require that the voter shall either speak or understand the English language, although the Constitution clearly contemplates that foreigners who have been here but a short period of time shall be permitted to vote. The effect of Chapter 55, above quoted, if we are to make it apply in the particulars referred to to general elections, is to ingraft upon constitutional qualifications of voters another and different qualification that they must speak and understand the English language. This cannot be done. It is a generally accepted rule that the enumeration in a state constitution of the classes of citizens who shall be permitted to vote is to be taken as to all matters within the purview of the provision as a complete and final test of the right to exercise that privilege, and that the Legislature can neither take from nor add to the qualifications there set out. It is quite true that the Legislature has authority to make reasonable regulations for the exercise of the elective franchise so long as it does not deny the franchise itself either directly or by rendering its exercise so difficult and inconvenient as to amount to a denial. 9 Ruling Case Law, pages 1024-1025.

The text which we cite is based upon many authorities and is undoubtedly the rule of law followed generally by the courts. To say that one who offers to vote at a general or governmental election must explain how he desires to vote in the English language and that the judge must render his assistance in the English language when the voter can neither speak nor understand that language is simply to deny to the voter the privilege of exercising the right of suffrage.

We have therefore concluded and so advise you that when a voter who because he is physically unable to write or is over sixty years of age and unable to read and write requires assistance in order that he may vote, that such voter may explain in any language how he wishes to vote, and the judge of the election may assist him in any language understood by the voter. In other words, the provision to the effect that the voter must explain in the English language how he wishes to vote and that the judge shall not use any other than the English language in assisting him has no application to general or governmental elections.

With reference to primary elections, however, the rule is entirely different. Primary elections are elections under legislative control in the government of political parties and have been held in this State not to be subject to the limitation of suffrage prescribed by the Constitution of the State. Koy vs. Schneider, 218 S. W., page 479.

We are of the opinion, therefore, that when the voter has some bodily infirmity such as renders him physically unable to write, or is over sixty years of age and unable to read and write, offers to vote at a primary election and requires assistance, that such voter must explain in the English language how he wishes to vote, and the judge of such primary election must use only the English language in aiding the voter, or in performing any of his duties as judge of such election in aid of such voter.

In your inquiry you state that you have a number of American citizens who are fully able to prepare their own ballot without any assistance whatever from anybody, although they are not able to

enter into a sustained conversation in English and in many cases are not able to understand or speak much English, yet are able to read and to prepare their ballot without assistance. If the voter is able to prepare his ballot without assistance, then he is entitled to vote in either a general or primary election regardless of his inability to speak or read the English language, or any other language. You state in your inquiry that you desire to know if a judge of election at a city election or any other election can challenge a voter who is able to make his own ballot until such voter states he does not understand the English language, and then refuse to permit the voter to vote because he does not understand the English language. We advise you that neither the judge nor any one else has any such right. The judge cannot challenge the voter for the purpose of ascertaining whether he understands the English language. The ability to understand the English language is not a qualification, nor test of the right to exercise the privilege of suffrage at either a general or a primary election. It is only when the voter requires assistance at a primary election that he must make known his wishes in the English language and to which the judge must respond in the English language. Article 3003, as amended, has no reference to the subject of challenge, nor to the duties of the judge when challenges are made. So far as city elections are concerned, they, of course, are governed by Article 790 of the Revised Statutes, but the rule we have just stated applies to all classes of elections. Of course, Article 790 relates only to actual governmental elections and not to primary elections. The statute which we have discussed would govern primary elections regardless of the purpose for which they were held. Our view of the matter, however, is that Article 3003 as amended in prescribing the English language test for primary elections relates only to that portion of the process of voting when assistance is to be given the voter under the statute and that it has no reference to the subject of challenge, the privilege of the voter thereto, or the duties of the judge. It may be that the general language used, to-wit: "Or in performing any of his duties as such judge of the election," is broad enough to require the judge to use the English language in performing all his duties as such election judge, but the general language must be limited to the purpose expressed in the caption of the act and the caption expressly says that Chapter 30 of the General Laws of the Fourth Called Session of the Thirty-fifth Legislature is amended "by making it mandatory for both parties to use the English language when assistance is given to a voter." It is a familiar rule that if the body of an act is broader than the caption that its meaning will be limited by the intention expressed in the caption.

You are advised, therefore, that in both general and primary elections, when a voter because of some bodily infirmity, such as renders him physically unable to write, or is over sixty years of age and is unable to read and write, requires assistance in order that he may vote, that such assistance may be given, and that in general or governmental elections the voter may make known his wishes in any language which he speaks and the election judge may assist him in any language understood by the voter; but in primary elections such

voter is required to make known his wishes in the English language, and the judge in aiding and assisting him can use only the English language.

You are further advised that the requirement of this statute as to the use of the English language has no reference to the subject of challenge in either general or primary elections and that no voter at either of such elections can be challenged because he does not speak and understand the English language.

Yours very truly,

C. M. CURETON,
Attorney General.

Op. No. 2111, Bk. 53, P. 233.

ELECTIONS—SPECIAL SENATORIAL—CANDIDATES—NAMES ON TICKET.

Where there is no primary election to nominate candidates in a special senatorial election to fill a vacancy, there is no statute expressly prescribing the method of a candidate having his name placed upon the ticket, but the Secretary of State would be authorized to certify to the county clerks of the district the name of any citizen making application in the form and with the board of subscribers thereto, as is required by Articles 3164, 3165, 3166 and 3167, Revised Statutes, 1911.

AUSTIN, TEXAS, July 1, 1919.

Honorable George F. Howard, Secretary of State, Building.
For attention Hon. C. D. Mims, Chief Clerk.

DEAR SIR: You verbally request an opinion from the office of the Attorney General, advising you under what circumstances you would be authorized to certify the name of a candidate for a place upon the ballot to be used in a special election called by the Governor to fill a vacancy in the office of State senator.

In reply thereto, you are advised that there is no express statute upon this question. The nearest applicable statute is Article 3464, together with Articles 3165-6 and 7, which prescribe the method to be followed by independent candidates seeking to have their names placed upon the ballot at a general election. It is provided by those Articles in substance that the name of an independent candidate may be printed on the official ballot in the column for independent candidates after a written application has been signed by qualified voters addressed to the Secretary of State and delivered to him within thirty days after primary election date, as follows: The number of signers requisite varies according to the office to be filled; the number required in a senatorial office is three (3%) per cent of the entire vote cast in any State district at the last preceding general election, provided that the number of signatures need not exceed five hundred.

It will be noted that the language of the above Article is to the effect that the petition with the requisite number of signers must be delivered to the Secretary of State within thirty days after a primary election. In the case presented by you, however, there has been no primary election for the nomination of candidates, although under

Article 3086, Revised Statutes, such a special primary election could have been ordered and held. The effect, therefore, is the application of a candidate running as an independent to have his name placed upon the ballot to be used at general election.

There is nothing in any law of this State relating to the holding of elections that could prohibit you from certifying the name of an independent candidate where there has been no primary, if the requirements of the above articles have been met, but this is the only law that can be construed to authorize you to certify to the county clerks the name of any independent candidate. You would not be authorized to so certify any name unless the same has been presented to you in the form above set out. The mere application of a candidate presented to you in the form used in applications by candidates to have their name placed upon a ballot for a county office would not authorize you to make a certificate, and you should decline to make a certificate merely upon such an application.

We, therefore, advise you that where a candidate running in a general election to fill a vacancy in the office of State senator, files with you a petition signed by three (3%) per cent of the number of votes cast in the district at the last preceding general election, or by five hundred (500) such voters, you would be authorized to certify his name to the county clerks of that district to be placed upon the official ballot at the special election, and that under no other circumstances or procedure would you be so authorized.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OPINIONS ON CHILD, FEMALE AND OTHER LABOR LAWS.

Op. No. 2174, Bk. 53, P. 55.

LABOR LAWS.

The Fifty-four Hour Law applies to females employed as manicurists by lessees and managers of barber shops.

The Fifty-four Hour Law applies to females employed as manicurists by the owners, lessees and managers of barber shops.

Chapter 56, General Laws, Thirty-fourth Legislature.

AUSTIN, TEXAS, January 21, 1920.

Hon. T. C. Jennings, Labor Commissioner, Capitol.

DEAR SIR: This Department is in receipt of your letter dated January 16, 1920, and also the letters of deputies engaged by your Department, wherein you request an opinion from this Department as to whether or not barber shops employing female barbers and manicurists come within and are subject to the provisions of what is known as the Fifty-four Hour Law, being C. S. B. No. 40 contained in the Printed Acts of the Regular Session of the Thirty-fourth Legislature as Chapter 36. The facts and conditions as set forth in your letter are as follows:

"Women barbers and manicurists are being worked more than nine hours per day and fifty-four hours per week in these places, and the claim is set up that they are not employes within the meaning of the law because of the fact that they work on a commission instead of a straight salary.

These women, however, are subject to the same orders, and are hired or discharged in the same manner as are those employed on a regular salary.

I respectfully request a ruling by your Department setting out whether or not the employment of women for more than nine hours in any one day, or more than fifty-four hours in any one week, under the conditions herein stated, constitutes a violation of Chapter 56, General Laws of Texas, enacted at the Regular Session of the Thirty-fourth Legislature."

That portion of the Act in question is Section 1 of Chapter 56, General Laws of the Thirty-fourth Legislature above referred to, which reads as follows:

"No female shall be employed in any factory, mine, mill, workshop, mechanical or mercantile establishment, laundry hotel, restaurant or rooming house, theater or moving picture show, barber shop, telegraph, telephone or other office, express or transportation company, or any State institution, or any other establishment, institution or enterprise where females are employed, except as hereinafter provided, for more than nine hours in any one calendar day, nor more than fifty-four hours in any one calendar week; provided, however, that in case of extraordinary emergencies, such as great public calamities or where it becomes necessary for the protection of human life or property, longer hours may be worked, but for such time not less than double time shall be paid such female with the consent of the said female; provided, this Act shall not apply to stenographers and pharmacists."

In our opinion such act applies to either or both female barbers and female manicurists employed in barber shops and receiving pay

therefor. It is perfectly clear that there is nothing in the act to indicate an intention on the part of the Legislature to exempt from or prevent Section 1 of Chapter 56 heretofore referred to from applying to females employed in barber shops, as the only exceptions to the Act are stenographers and pharmacists. As to that part of your letter which reads as follows:

"the claim is set up that they are not employes within the meaning of the law, because of the fact that they work on a commission instead of a straight salary.

These women, however, are subject to the same orders, and are hired or discharged in the same manner as are thoses employed on a regular salary."

From the above portion of your letter, we are of the opinion that such female employes could not be considered otherwise than as an employe and not as a partner. There is no law to warrant the conclusion that such female is a partner, but on the contrary the owner, lessee or manager of such shop has and exercises a right to employ and discharge such female, neither does such female have any control or management of such barber shop and neither does she share in the losses of same, if any. In the case of Bradshaw vs. Aprson, 36 Tex., 153, the court said:

"This cause must go back for new trial. As the question of partnership must again be determined, it may not be improper here to remark that it is believed to be now a well settled principle of law of partnership that a clerk in a mercantile house, or an employe in any firm of business, who receives a certain per cent. or portion of the profits of the firm, for or in lieu of a salary, is not thereby a partner, and liable for the partnership debts."

The contention that they are not employes because of the fact they are paid on commission basis instead of a straight salary is not well founded or well taken. In Hamberger vs. Marcus, 27 Atl., 681; 157 Pa., 133, 37 Am. St. Rep., 719, the court said:

"The Act providing that the wages of any laborer or the salary of any person in public or private employ shall not be liable to attachment in the hands of the employer includes the commissions owing to a traveling salesman from his employer for goods sold by him, constituting the compensation of the salesman for services performed by him."

Further, in re Luxton Black, 54 N. Y. Supp., 778; 35 App. Div., 243, the court said:

"Wages as used in the law of 1885, Chapter 376, referring to preferences on claims against corporations for 'wages', where a receiver is appointed will include commissions earned by one employed in selling pianos under an agreement to pay him a fixed salary of so much per week and a per cent. on sales, together approximately what his services were reasonably worth."

In the case of Buffalo Steel Company vs. Etna Life Insurance Co., 136 N. Y. Supp., 977, this court said:

"An employe under sixteen years of age permited to operate dangerous machinery prohibited by labor law is employed in violation of law with

an employer's liability policy, accepting liability for injury to one so employed; 'employed,' when so used, having a broader meaning than 'hiring', and merely 'to be in service, to cause to be engaged in doing something.' "

And in the case of United States vs. Morris, 14 Pet., 39 U. S., 463, the court used the following language:

"To be employed at anything means not only the act of doing it, but also to be engaged to do it. To be under contract or orders to do it."

For the reasons above set out, we are of the opinion and so advise you that the provisions of Chapter 56, General Laws of the Thirty-fourth Legislature, apply to owners, lessces and managers of barber shops employing females, as they are from the very nature of things as well as from every fact and condition, clearly within the contemplation of the statute which, as we view it, was enacted for the purpose of protecting females engaged in manual labor.

Yours very truly,
C. L. STONE,
Assistant Attorney General.

Op. No. 2110, Bk. 53, P. 223.

FEMALE EMPLOYES—STATE INSTITUTIONS—HOURS OF WORK.

Where the superintendent of a State institution causes the female employes of the institution to work more than nine hours a day or more than fifty-four hours a week, it is a question of fact as to whether the superintendent of such institution as an individual is guilty of a violation of law.

Article 1451h, Vernon's Criminal Statutes, 1916;
Article 1451l, Vernon's Criminal Statutes, 1916;
Page 101-2, Acts of the First Called Session of the Thirty-fifth Legislature.

AUSTIN, TEXAS, June 30, 1919.

Honorable Beverly Young, M. D., Superintendent Southwestern Insane Asylum, San Antonio, Texas.

DEAR SIR: I have your letter of June 20, addressed to the Attorney General, reading as follows:

"Referring further to our conversation regarding the status of State institutions where female employes are required to work more than eight hours, I should like to know what position we would be in if charges were made against us for this violation of law.

"We have made every effort to secure appropriations from the Legislature sufficient to cut the number of hours, but so far have been unable to do anything and the Labor Commission insists that we must abide by the law."

In reply, your attention is directed to Article 1451h, Vernon's Criminal Statutes, 1916, wherein it is provided:

"No female shall be employed in * * * any State institution * * * for more than nine hours in one calendar day, nor more than

fifty-four hours in any one calendar week; provided, however, that in case of extraordinary emergency such as great public calamitiees, or when it becomes necessary for the protection of human life or property, longer hours may be worked, but for such time no less than double time shall be paid such female with the consent of the said female; provided this shall not apply to stenographers and pharmacists."

Article 1451L, Vernon's Criminal Statutes, 1916, provides that any one who shall permit any female to work more than nine hours in any one calendar day or more than fifty-four hours in any one calendar week shall be deemed guilty of a misdemeanor and upon conviction in any court of competent jurisdiction shall be fined in any sum not less than fifty dollars nor more than two hundred dollars, and each day of such working and each such female employed, required or permitted to work more than nine hours in any one calendar week shall constitute a separate offense.

Your attention is also directed to the fact that the Legislature in making its appropriation for the Southwestern Insane Asylum for the two fiscal years ending August 31, 1919, fixed the number of employes that may be employed by the Southwestern Insane Asylum and fixed the salaries of such employes (see pages 101-2, Acts of the First Called Session of the Thirty-fifth Legislature).

It is unlawful to cause the female employes of the Southwestern Insane Asylum to work more than nine hours a day or more than fifty-four hours a week, except in cases of extraordinary emergencies, but if the Legislature fails to provide a sufficient number of employes to do the work that must be done in order to properly maintain the Southwestern Insane Asylum and to properly care for and treat the patients therein, the superintendent of the Institution will not be guilty of any violation of the law if he causes the female employes of the institution to work more than nine hours a day or more than fifty-four hours a week.

The Southwestern Insane Asylum is a State institution and the superintendent of that institution is an agent of the State and he has no discretion in the operation of that institution, it being his duty to maintain and operate the same in the way and manner and with the number of employes provided for by the Legislature and it is his duty to see that the institution is properly maintained and that the inmates therein receive all necessary care and treatment.

If the Legislature has in fact furnished a sufficient number of employes to do the work connected with the institution, and the superintendent wilfully causes a female employe of the institution to work more than nine hours a day or more than fifty-four hours a week, he is guilty of a violation of the law.

Therefore, in the event the superintendent of the Southwestern Insane Asylum should be prosecuted for working female employes of that institution for a longer period of time than permitted by the statutes, it would be a question of fact as to whether or not it was necessary in order to properly maintain the institution and care for and treat the patients therein, that the female employe be worked more than nine hours a day or more than fifty-four hours a week.

In other words, the State of Texas owns and operates the Southwestern Insane Asylum and the Legislature biennially makes an appropriation for maintaining and operating this State Institution, and definitely fixes the number of employes that may be employed therein and fixes their salary at a certain sum per month. There is a certain amount of work connected with this institution that must be done and if the Legislature has failed to provide a sufficient number of employes to do this work or permit the female employes to only work nine hours a day and not more than fifty-four hours a week, the superintendent has no choice other than to have the work done, even though in order to do so he must cause the female employes to work more than nine hours a day and more than fifty-four hours a week. In doing so, the law is violated, but it is the State of Texas that violates the law, not the superintendent of the institution, and, of course, the State of Texas can be guilty of no offense against the penal laws of the State.

Article 1451h, a portion of which is hereinabove quoted, provides that when female employes are worked overtime that they shall be paid for such time not less than double time. Now the employes for the Southwestern Insane Asylum cannot be paid for their overtime for the reason that the Legislature has fixed their salary at a stipulated amount per month and the superintendent had no authority and no funds to pay them for the over time which they work.

Yours very truly,

E. F. SMITH,

Assistant Attorney General.

Op. No. 1979, Bk. 51, P. 587.

THE CHILD LABOR LAW.

1. The employment or services of a "page" or "a boy employed to wait upon the members of the Legislative Body," does not come under the provisions of the Child Labor Law, enacted by Chapter 59, General Laws of the Thirty-fifth Legislature. Sections 1 and 4, Chapter 59, Acts of the Thirty-fifth Legislature.

2. The Acts of the Legislature under the provisions of the Child Labor or other similar regulatory and restrictive measures do not apply to Acts of the State Government by reason of the familiar principle that a sovereign is not bound by the words of a statute unless expressly named. The Act of the Legislature, known as the Child Labor Law, referred to above, does not so name "State employes" as coming under its provisions, hence they are not covered by said law.

U. S. vs. North Carolina, 136 U. S., 211;

Auditorial Board vs. State, 15 T., 72.

AUSTIN, TEXAS, February 4, 1919.

Hon. W. A. Johnson, Lieutenant Governor, Senate Chamber, Austin, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of recent date which reads as follows:

"I would like to ask your Department if under the Acts of the Thirty-fifth Legislature, or any other statute, it will be necessary for the Senate

of Texas to secure a permit for the employment of a child under age as provided for in the Child Labor Law, to act as page during the session of the Senate."

Replying thereto, we beg to advise that the last Act of the Legislature restricting the employment of children under fifteen years of age was passed by the Thirty-fifth Legislature at its Regular Session, and is known as Chapter 59 of said acts. Sections 1 and 4 of said Act, which only have to do with the subject matter under consideration, read as follows:

"Section 1. Any person, or any agent or employe of any person, firm or corporation, who shall hereafter employ any child under the age of fifteen (15) years, to labor in or about any factory, mill, workhouse, laundry, theatre or other place of amusement or in messenger service in towns and cities of more than fifteen thousand population according to the Federal census, except as hereinafter provided, shall be deemed guilty of a misdemeanor, and upon conviction in a court of competent jurisdiction, shall be punished by a fine of not less than twenty-five ($25.00) dollars, nor more than two hundred ($200.00) dollars or by imprisonment in the county jail for not more than sixty days, or by both such fine and imprisonment. Provided that nothing in this Act shall be construed as affecting the employment of children on farms.

"Section 4. Any person, firm or corporation, their agents or employes, having in their employ or under their control any child under the age of fifteen (15) years who shall require or permit any such child to work or be on duty for more than ten (10) hours in any one calendar day, or for more than forty-eight hours in any one week, shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five ($25.00) dollars, or more than two hundred ($200.00) dollars, or by imprisonment in the county jail not to exceed sixty (60) days, or by both such fine and imprisonment. Provided, that nothing herein or in any other section of this Act shall apply to employment of children for farm labor, or to hours which children may work on farms."

By the provisions of Section 1, no child under the age of fifteen years shall "labor in or about any factory, mill, workshop, laundry, theatre, or other place of amusement or in messenger service in towns and cities of more than fifteen thousand population, according to the Federal census," except as provided for in Section 5 of said Act by securing a permit from the county judge of the county where the minor is located in accordance with the provisions of said Section 5.

It will be noted from the provisions of Section 1, of the Act above quoted, that a "page" under fifteen years of age, employed by the State Senate, a legislative body, is not covered by the language used in the Act unless such "page" is a "messenger" as contemplated by provisions of said Act.

A "messenger" is defined to be "one who bears a message; the bearer of a verbal or written communication, notice or invitation from one person to another, or to a public body." Webster's Revised Unabridged Dictionary.

In Section 3 of the Act under consideration, in referring to and describing a "messenger," such person is referred to as doing "a messenger or delivery business."

A "page" is defined to be "a boy employed to wait upon the members of a legislative body." Webster's Revised Unabridged Dictionary.

From the definition of "messenger" and "page," above quoted, we are of the opinion that the words are not interchangeable; that they do not mean one and the same thing, and that, therefore, the language used in Section 1 of the Act above referred to does not apply in the employment of the services of "pages" or "boys employed to wait upon the members of a Legislature"; and therefore, that their employment does not come under the restrictions of the provisions of said Article above referred to, and that their employment without complying with the provisions of Section 5 of said Act in procuring a permit before, and for, such employment is not in violation of law.

In our opinion, the Acts of the Legislature referred to do not embrace employes of the State government, such as "page" of the Senate or House of Representatives, by reason of the familiar principle that a sovereign is not bound by the words of a statute unless expressly named. The Act of the Legislature referred to does not specifically name "State" employes, hence they are not covered by its provisions.

U. S. vs. North Carolina, 136 U. S., 211;
Auditorial Board vs. State, 15 T., 72;
Carr vs. State, 22 American;
State Report, 637;
State vs. Board of Public Works, 36 Ohio, 415;
Vol. 26, American and English Ency. of Law, second edition, page 478.

Yours very truly,
W. J. TOWNSEND,
Assistant Attorney General.

Op. No. 2177, Bk. 53, P. 561.

CHILD LABOR LAW—MESSENGER SERVICE.

County judges may issue permits for children over the age of twelve years to act as messengers, provided the child has been excused from school under the provisions of the Compulsory Education Law and all of the conditions of Section 5 of the Child Labor Law have been met.

If the child has not been excused from school under the Compulsory Education Law then county judges are only authorized to issue permits to children to act as messengers when such child is over fourteen years old.

Chapter 49, Acts of the Thirty-fourth Legislature; Chapter 59, Acts of the Thirty-fifth Legislature.

ATTORNEY GENERAL'S DEPARTMENT, January 27, 1920.

Honorable T. C. Jennings, Labor Commissioner, Austin, Texas.

DEAR SIR: Your letter of the twenty-first instant, addressed to this Department, has been received. Also a letter from Mr. O. D. Parker, manager of the Western Union Telegraph Company, in this city. Your letter reads:

"I am enclosing herewith a letter from Mr. O. D. Parker, manager of the Western Union Telegraph Company at Austin, Texas, in which he

states that there seems to be some misunderstanding in regard to a former ruling of the Attorney General's Department affecting boys employed in messenger service. Would you please inform this Department whether or not county judges may issue permits to boys between 14 and 15 years of age to work in messenger service when the conditions set out in Section 5 of the Child Labor Law are met? And, whether or not messenger service comes under the class of prohibitive employment for boys between 12 and 15 years, as set out in Section 5 of the Child Labor Law?

"Thanking you for early consideration of this, I am"

In order that we may have the entire matter before us, I also quote Mr. Parker's letter, as follows:

"As there seems to be some misunderstanding as to how sections one and five of Child Labor Law apply to employment of boys between ages of fourteen and fifteen as messenger boys, and whether or not the county judge has authority to issue a permit for their employment as messenger boys; in order to clear the matter up, will you please have the kindness to request of the Attorney General's Department a ruling on same? This is in line with our conversation of today.

"Thanking you for your attention to this matter, I am,"

The opinion referred to by you as being the cause of some misunderstanding was written by the writer on the eleventh of October, 1919, and addressed to Honorable Chester H. Bryan, County Judge, Houston, Texas. In that opinion the writer only attempted to rule on two questions, and in answering these questions it was not necessary to decide or determine the question submitted in your inquiry. The portion of that opinion referred to by you is as follows:

"It was manifestly the intention and purpose of this Act of the Legislature to prohibit children under the age of fifteen years from engaging in messenger service, because of its hazards and danger to life and limb, etc."

From this quotation it will appear that this Department had clearly held that a child under fifteen years of age could not be employed in the messenger service. This was not the intention of the opinion, but in writing the opinion we quoted in part the provisions of Section 1 of Chapter 59 of the Acts of the Thirty-fifth Legislature, but did not quote the exceptions because it was unnecessary for the purposes of that opinion to determine whether a child under fifteen years old was permitted to act as a messenger boy, under the Act.

You now desire to know whether a boy over twelve years of age and under fifteen years of age may be employed in the messenger service under the provisions of the Child Labor Law, being Chapter 59, Acts of the Thirty-fifth Legislature.

Section 1 of this Act reads in part as follows:

"Any person, or any agent or employer of any person, firm or corporation, who shall hereafter employ any child under the age of fifteen years, to labor in or about any factory, mill, workshop, laundry, theater, or other place of amusement, or in messenger service in towns and cities of more than fifteen thousand population, according to the Federal Census, except as hereinafter provided, shall be deemed guilty of a misdemeanor, etc."

Section 2 of this Act prohibits the employment of any child, under the age of seventeen years, in or about any distillery, brewery or any place where intoxicating liquors are kept or manufactured, or in any mine, quarry or place where explosives are used, etc.

Section 3 of the Act makes it the duty of the employer to ascertain, before sending out any employe under the age of seventeen years, doing a messenger or delivery business, whether such child is being sent to any of the prohibited places mentioned in Section 2.

Section 4 of the Act makes it a penalty for the employer to work any child, under the age of fifteen years, more than ten hours in any one day or more than forty-eight hours in any one week, and prescribes a penalty therefor.

Section 5 of the Act provides that the county judge may issue a permit to any child, over the age of twelve years, to work when the earnings of the child are necessary for the support of its mother when widowed, or in needy circumstances, or invalid father or of other children younger than the child for whom the permit was sought and provides the manner of obtaining said permit, and further provides that said child must be able to read and write in the English language, that it is able to perform the work or labor for which a permit is sought and provides that said permit shall not be issued when said child is to be employed in or around any mill, factory, workshop or other places where dangerous machinery is used, or in any mine, quarry, or other place where explosives are used, or in any distillery, brewery, or other place where intoxicating liquors are manufactured, sold or kept, or where the moral or physical condition of the child is liable to be injured, and that the earnings of such child are necessary for the support of said invalid parents, widowed mother or mother whose husband has deserted her, or of younger children and that such support cannot be obtained in any other manner, and that suitable employment has been obtained, etc. There is nothing said in this section with reference to the messenger service.

It is the opinion of this Department, and you are so advised, that in so far as this act is concerned, there is nothing in it which prohibits the employment of a child over twelve years and under fifteen years in the messenger service, but Section 5 of Chapter 49 of the Acts of the Thirty-fourth Legislature, which is known as the Compulsory School Law, prohibits the employment of any child under fifteen years of age during school hours, not lawfully excused from attendance upon school.

Subdivision E, of Section 2, of the same Act provides:

"That any child more than twelve years of age that has completed the work of the fourth grade of the standard elementary school of seven grades and whose services are needed in the support of a parent or other persons standing in parental relationship to the child may, upon presentation of proper evidence to the county superintendent of public instruction, be exempted from further attendance upon school."

These two acts are in pari materia and must be construed together.

You are, therefore, advised that it is the opinion of this De-

partment that a child twelve years of age and over may be employed in the messenger service when both the conditions imposed by Subdivision E of Section 2 of the Compulsory Education Law and those of Section 5 of the Child Labor Law have been met.

In other words, if a child twelve years old has been excused from attendance at school under the provisions of the Compulsory Education Law and the conditions of Section 5 of the Child Labor Law are met with, the county judge may issue the child a permit to labor, provided that he is satisfied that all these conditions have been met and that the messenger service is not liable to injure the moral or physical condition of the child, but if the child has not been excused under the provisions of the Compulsory Education Law, then county judges are prohibited from issuing permits to such child, unless it is fourteen years of age. A child, twelve years of age and under fourteen years of age, not excused from attendance at school under the Compulsory Education Law, but who can comply with all the requirements and conditions imposed by Section 5 of the Child Labor Law, may be employed in the messenger service, provided its employment does not require it to work during school hours.

Yours very truly,

BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 2140, Bk. 53, P 364.

CHILD LABOR LAW, SECTION 1, CHAPTER 59, ACTS THIRTY-FIFTH LEGISLATURE, PROHIBITS THE EMPLOYMENT OF CHILDREN IN MESSENGER SERVICE IN CITIES OF 15,000 POPULATION OR MORE, EXCEPT UNDER CERTAIN CONDITIONS.

"Messenger" is defined to be one who bears a message or an errand and includes "delivery service." County judges are authorized to issue permits to children over twelve years of age to work under the conditions and limitations set out in Section 5, Chapter 59, Acts Thirty-fifth Legislature, and it is immaterial whether the child works during or after school hours, when the conditions are the same..

AUSTIN, TEXAS, October 11, 1919.

Hon. Chester H. Bryan, County Judge, Houston, Texas.

DEAR SIR: Your letter of the 29th ultimo, addressed to the Attorney General, has been received. It reads:

"I have before me copy of your letter to Hon. T. C. Jennings, Commissioner of Labor, with reference to children employed in messenger service in towns of more than 15,000 population. Acting in accordance with this, I have not been issuing permits for children to work in messenger service in this city, but have been issuing permits for boys under 15 years of age to work in delivery service for drug stores, etc.

"I would be glad to have you advise me if, in your opinion, messenger

and delivery service would be construed as one and the same thing. You will readily understand that delivery service is just as hazardous as messenger service, and I am desirous of having an opinion from you on this matter.

"With regard to the conditions under which a child can be given a permit to work, do the same conditions have to apply for children to work after school hours?

"I would thank you to give this matter your early consideration and advise me."

A fundamental rule of statutory construction is that the intention of the Legislature must be looked to and ascertained, if possible. The Legislature is presumed to intend that the language used by it in any bill shall have the usual and ordinary effect. In order to ascertain just what the Legislature had in mind when it wrote into Article 1, Chapter 59 of the Acts of the Thirty-fifth Legislature, the words "messenger service," we must also look to the common acceptation of the meaning of these words. Section 1 of Article 5502 of the Revised Statutes declares: "The ordinary signification shall be applied to words, except words of art or words connected with a particular trade or subject matter, when they shall have the signification attached to them by experts in such art or trade, or with reference to such subject matter." A messenger is defined by Words and Phrases to be "one who bears a message or an errand."

It was manifestly the intention and purpose of this Act of the Legislature to prohibit children under the age of fifteen years from engaging in messenger service because of its hazards and danger to life and limb, as well as an injury to the morals because of their coming in contact with crowded traffic conditions and because of places of questionable character they might be sent to by their employers. It is also a well known fact that at the time the Legislature passed this Act there were in all large cities messenger service companies who employed boys of tender years as messenger boys, whose duties were to carry packages and run errands for the public for hire. The peril to life, limb and morals is just as great to a boy acting as messenger boy or a delivery boy for a drug store as it would be if he were a messenger boy in the service of a telegraph company, or in the general messenger service. The word "messenger" has a general and well known meaning, so that it applies to boys carrying and delivering parcels, running errands of various kinds, as well as delivering written or verbal messages, and you are advised that boys carrying and delivering parcels for drug stores should be considered in the "messenger service."

By your second question, you desire to know if the same conditions must exist for you to be authorized to issue a permit to a boy working after school hours as if he were working during school hours.

In reply to this question, you are advised that the law makes no exception as to when the child should be permitted to work, whether before, after or during school hours. In order for you to be authorized to issue the permit for a child over twelve years and under fifteen years of age to work, the conditions as set out in Section 5, Chapter 59, Acts of the Thirty-fifth Legislature, must exist.

For your information, I am enclosing you a copy of an opinion of this Department, prepared by Honorable C. W. Taylor, Assistant At-

torney General, under date of April 8, 1918, and addressed to Honorable T. C. Jennings, Labor Commissioner.

Yours very truly,

BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 1953, Bk. 51, P. 399.

CHILD LABOR LAW.

No child under fifteen years of age may be employed to labor in or about any factory, mill, workshop, theatre, or other place of amusement, without regard to where such institution is located.

The clause, "in towns and cities of more than fifteen thousand population," used in Section 1 of the Act, applies to only the occupation of messenger service; and the Act prohibits the employment of any child under the age of fifteen years in messenger service only in towns of over fifteen thousand population, according to the last United State census.

Chapter 59, Acts of the Regular Session of the Thirty-fifth Legislature.

AUSTIN, TEXAS, November 16, 1918.

Hon. T. C. Jennings, Commissioner of Labor, Building.

DEAR SIR: In your communication, addressed to the Attorney General, you desire his opinion as to whether or not Chapter 59, Acts of the Regular Session of the Thirty-fifth Legislature, applies to the employment of children in occupations named in the law other than messenger service and other specifically exempted occupations in towns and cities of less than fifteen thousand population.

That portion of Section 1, Chapter 59, Acts of the Thirty-fifth Legislature, pertinent to your inquiry, is as follows:

"Section 1. Any person, or agent or employee of any person, firm or corporation, who shall hereafter employ any child under the age of fiftten (15) years, to labor in or about any factory, mill, workshop, laundry, theatre or other place of amusement or in messenger service in towns and cities of more than fifteen thousand population according to the Federal census, except as hereinafter provided, shall be deemed guilty of a misdemeanor * * *"

I note in your communication that you state that the enrolled bill on file in the office of the Secretary of State shows that a comma appears between the words "amusement" and "or," in the sixth line of the same, as written above, but that such comma does not appear in the printed Act as published by the Secretary of State. We think that the omission of this comma is an immaterial error on the part of the printer, or those charged with the printing of the law.

The function of a comma in punctuation is not necessary, while the same would be entirely proper to elucidate the meaning of the language here used by the Legislators. By the use of the disjunctive conjunction "or" the Legislature has separated the occupations, mentioned in this section, into two classes.

In the first class, we find labor in any factory, mill, workshop, laundry, theatre, or other place of amusement; while, in the second class, there is but one occupation, to-wit, messenger service.

It is a well known rule of statutory construction that clauses of limitation, or provisos, limit those things next preceding, unless, from the language used, it was the intention that such limitation should apply to all preceding provisions of the Act; therefore, the words "in towns and cities of more than fifteen thousand population" relate to, and limit, only the next preceding classification, that is, messenger service.

Another fundamental rule of statutory construction is that the intention of the Legislature must be arrived at. The Legislature is presumed, also, to intend that the language used by it in any bill shall have the usual and ordinary effect. It is manifestly the purpose of this Act of the Legislature to prohibit the employment of children in hazardous occupations and to safeguard them against dangers incident thereto.

The law recognizes that a factory, mill, workshop, laundry, theatre, or other place of amusement, is a dangerous and hazardous occupation. It is immaterial where any of these institutions are located. Any of these industries are just as dangerous located in a small town, or even in a rural precinct, as they would be in the most populous city in the country. It is the operation of the factory, or mill, that is dangerous, and not its location.

Looking to the second class, however,—messenger service—the place of the operation of this occupation is the essential element in determining the hazard. Messenger boys, in the discharge of their duties, go in and out among the crowds on the streets and their entire time is spent in traversing the highways of the town and city in which they are employed.

The Legislature has determined that such occupation is too hazardous in a town of more than fifteen thousand population to permit a boy under fifteen years of age to engage in it.

From what has been said above, it follows that we are of the opinion, and we so advise you, that the clause "in towns and cities of more than fifteen thousand population" applies only to the occupation of messenger service, and does not apply to the employment of children under fifteen years in any factory, mill, workshop, laundry, theatre, or other place of amusement.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

OPINIONS ON PUBLIC LANDS AND MINERAL RIGHTS.

Op. No. 2246, Bk. 54, P. 364.

PUBLIC SCHOOL LANDS—SUBSTITUTE PURCHASERS—CORPORATIONS.

Corporations are not entitled to be substituted on the books and records of the General Land Office as purchasers of public free school lands from the State, and this notwithstanding the fact that such lands may contain minerals for the mining of which such corporations may have been incorporated.

AUSTIN, TEXAS, July 19, 1920.

Hon. J. T. Robison, Commissioner General Land Office, Austin, Texas.

DEAR SIR: The Attorney General is in receipt of your inquiry of March 5, 1920, wherein you state your "Department is in receipt of a certified copy of a deed from the records of Culberson County, showing that H. N. Gregory has sold the soil and the minerals that may be within 160 acres of land out of the E. ½ of Section 29, Block 111, public school, Culberson County, to the Great Southern Sulphur Company, recited in the deed to be a corporation under the laws of Arizona." You state that "the question here involved is whether or not this corporation, if it were a Texas corporation or qualified to do business in Texas, is authorized to receive these lands through title. Could it do so, being a foreign corporation and without authority to do business in Texas?"

From an inspection of the records of your office, it appears that the land here involved at the time it was originally awarded by the State was surveyed public free school lands, not detached and not unsurveyed or scrap land, and falls under the provisions of our law governing the sale and transfer of surveyed public free school land sold to actual settlers as a home. The original application (including a larger part of a section) was filed in the General Land Office July 22, 1914, and the award was made September 11, 1914. At the time of the award, the land was classified as mineral grazing land and the minerals in the land, being reserved to the fund to which the land belonged, did not pass to the purchaser. Proof of three years' occupancy was made and filed in the General Land Office, and certificate of occupancy issued prior to the date of the alleged transfer to the corporation. Certain transfers of the land were made at different times since the award and the vendees, respectively, were substituted, in turn, upon the books and records of the General Land Office for and as purchasers themselves directly from the State (Article 5435 Revised Civil Statutes 1911).

On March 28, 1918, the then claimant of the land, being the then substitute purchaser from the State, executed in due form an instrument in writing, purporting to convey his interest in this land, as well as his rights to prospect for and develop the minerals therein, which right he seems to have acquired under our laws upon that subject, to the Great Southern Sulphur Company, a corporation incorporated under the laws of the State of Arizona. Thereafter this corporation transmitted this instrument to the General Land Office and

seeks to be substituted on the books and records of that office as the purchaser of this land from the State.

At the time of this transfer to the corporation it had no permit to do business in this State, but such permit was issued to it on May 20, 1920. The purposes of the corporation as set out in its permit are: "For the business of carrying on and transacting a mining business, to-wit: To bore, drill, prospect and mine sulphur, gold, silver, copper, lead, zinc, brass, iron, steel, antimony, tin, asbestos and all kinds of ores, metals, minerals and precious stones, also oil, gas and coal, and to mill, prepare, convert and prepare for market and otherwise produce and deal in the same, and in the products and by-products thereof, and in the purchase and sale of such goods, wares and merchandise used for such business."

The sole question here presented is whether or not, under these facts, this corporation has the right to be substituted on the books and records of the General Land Office as a substitute purchaser of this land from the State.

The facts show that the land in question had been occupied by actual settlement for the three years as then required by law as to such land and certificate of occupancy issued prior to the date of the alleged transfer to the corporation. Further settlement or occupancy of the land was not required and hence the corporation was not a prohibited purchaser on the ground that, it being a corporation, it could not be come an actual settler upon or occupant of the land. No further settlement or occupancy was required. (R. C. S. 1911, Arts. 5435, 5436, 5444, 5445; Martin vs. Bryson, 71 S. W., 615; Logue vs. Atkeson, 80 S. W., 137; DeShaze vs. Eubank, 191 S. W., 369.)

At the time of the original sale of this land by the State the sale and transfer of such lands were under the provisions of Chapter 9 of Title 79 of the Revised Civil Statutes of 1911, there having been no change in the law on this subject between the time the Revised Civil Statutes of 1911 became effective and the date of the original sale of this land by the State, and we find that Article 5432 of that Chapter, although it seems to relate primarily to unsurveyed or scrap land, expressly declares that "No corporation shall purchase any land under this Chapter." This same provision remained and was the law at the time of the alleged transfer of this land to the corporation, and is now the law; that is, Chapter 163 of the Published Acts of the Regular Session of the Thirty-sixth Legislature, although it amends Article 5432 and drops from it the provision above quoted, it nevertheless expressly provides, in Section 1, that "No corporation shall purchase any land under this Act." So it is that ever since and for some time prior to the original sale of this land by the State, and continuously down to this time, our law has contained this express inhibition against a corporation becoming the purchaser of State school lands. It is therefore clear that a corporation, at the time of the alleged transfer to this corporation, was, and ever since that time has been, and is now, prohibited from becoming the original purchaser of public free school lands direct from the State. (Mound Oil Company vs. Terrell, 92 S. W., 451).

But may not a corporation become the purchaser of such land from another who is the original or substitute purchaser from the State and

thereby be entitled to be substituted on the books and records of the General Land Office for and as the purchaser of such land from the State, the law with reference to settlement and occupancy as to such land having been complied with and certificate of occupancy issued prior to such purchase by the corporation? We think not.

Article 5436 of the Revised Civil Statutes of 1911 is applicable to the facts here presented. That Article provides, among other things, that "Purchasers * * * may sell their lands" after three years, occupancy "and in such cases the vendee * * * shall file his own application of the Commissioner of the General Land Office, together with the duly authenticated conveyance or transfer from the original purchaser and the intermediate vendee's conveyance or transfer, if any there be, duly recorded in the county where the land lies * * * and thereupon the original application shall be surrendered or cancelled or properly corrected, as the case may be, and the vendee shall become the purchaser direct from the State, and be subject to all the obligations and penalties described by law, and the original purchaser shall be absolved * * * from further liability thereon." Thus the vendee of such original purchaser, in such case, becomes, and by express statutory requirement must be recognized and accepted by the State as though he were in fact, the direct purchaser from the State. In fact, the land not being paid for, there being only a contract of sale, and the original purchaser and intervening vendees being expressly absolved by law from further liability to the State, such final vendee becomes and practically is "the purchaser direct from the State." (Thomas vs. Wolfe, 40 S. W., 182; Johnson vs. Bibb, 75 S. W., 71; Davis vs. Yates, 133 S. W., 281; Payne vs. Cox, 143 S. W., 336). This being true, and since such vendee is only entitled to be substitute for and thereby to become the purchaser from the State of such lands by reason of this provision of our law, which is a part of said Chapter 9, and since it is expressly provided in Article 5432, also a part of that Chapter, that "No corporation shall purchase any land under the provisions of this Chapter," it seems quite clear that a corporation is not entitled to become a purchaser of such lands from the State by substitution under said Article 5436. If corporations were permitted to buy such lands from the original purchasers or their vendees and to be substituted for them as "purchasers direct from the State" where such lands have been occupied for the three years required by law, the result would be that the Commissioner of the General Land Office might have, and doubtless would have, on the books and records of his office many contracts of sale of such lands to corporations when the law expressly provides that no corporation shall purchase such land under the law governing its sale by the State. A corporation so substituted for a purchaser would undoubtedly become, in fact as well as in law, a "purchaser direct from the State," and that under the provisions of Chapter 9, when it is expressly provided that "No corporation shall purchase any land under the provisions of this Chapter."

Nor do we understand that the fact that the land in question contains the minerals for the mining of which the corporation was created, and the acquisition of which might seem necessary to and to be within the purposes of the corporation, would bring into operation a dif-

ferent rule or afford a basis for a different conclusion. Our law makes ample provision, or seeks to do so, for the acquisition and mining of minerals on such lands both as to individuals and corporations, as separate from the ownership of the soil or surface of such lands, including the right of ingress and egress for mining and mine operation purposes, and hence no necessity exists for the corporation to acquire the title, or to have the right to acquire the title, to the soil or surface of such lands in order hat it may carry on the business of mining the minerals from such lands. (Chapter 83 p. 158, Published Acts Regular Session Thirty-fifth Legislature).

Article 5435 of the Revised Civil Statutes of 1911 may seem to have some bearing upon this question, but if it has it contains no provision different from or that would altar or modify the effect of the provisions of Articles 5432 and 5436 herein referred to. Said Article 5435 provides in effect that purchasers of school land from the State on condition of settlement shall not sell such land prior to one year after the date of the award; that after the lapse of such time the purchaser may sell such lands to another qualified purchaser and require the vendee in such case to complete the three years occupancy of such land, if the three years occupancy has not already been completed. This Article says nothing about the substitution of the vendee of such lands upon the books and records of the General Land Office as the purchaser of such land from the State, but its whole burden seems to be that in the event the original purchaser from the State should convey his lands to another qualified purchaser prior to the completion of the three years occupancy, his vendee in such case must complete the three years occupancy of such land as required by law. As amended, however, this Article provides that the vendee in such case "may be substituted for the original purchaser or his vendor, and thereby become a purchaser direct from the State by filing in the General Land Office a complete chain of title through personal transfers which have been duly executed and recorded in the county or counties in which the land is situated, or in the county to which such county may be attached for judicial purposes and the payment of the lawful fees, and by so doing the vendee shall thereby assume and become liable to the State for the amount due the State upon the unpaid purchase price, together with all interest due and to become due thereon, and that the obligation of the original purchaser or any vendor shall be enforcible against the vendee as if he were the original purchaser." We find, therefore, that this Article, as amended, provides that the vendee, on being substituted for the original purchaser or his vendee, becomes and must be regarded as a purchaser of such land direct from the State, and therefore, and for the same reason, leads us to the same conclusion as we have already reached with reference to Article 5436. This Article was not in effect at the time the land here in question was originally awarded, nor at the time of the alleged conveyance of it to this corporation, but if it be given no other effect, as regards this transaction, it at least evidences a continuing purpose on the part of our Legislature to prohibit corporations from becoming purchasers from the State of our public school lands. (Chapter 163, p. 312, Published Acts Regular Session Thirty-sixth Legislature).

We are of the opinion, therefore, and you are so advised, that the Great Southern Sulphur Company has not the right to be substituted on the books and records of your office, and thereby to be recognized by the State, as a purchaser from the State of the land in question, and that the alleged conveyance to this corporation should not be filed or recognized by you as such.

You will also consider this ruling as an answer to your inquiry of March 12, 1920, with reference to an alleged conveyance of the N. ½ of Section 10 and the N. ½ of Section 11 in Block 111, State public school lands, situated in Culberson County from W. J. Hicks and wife to the Toyah Valley Sulphur Company, stated by you to be a corporation under the laws of the State of Delaware. As a further reason for not filing this transfer and accepting the Toyah Valley Sulphur Company, stated by you to be a corporation under the laws of the State of Delaware. As a further reason for not filing this transfer and accepting the Toyah Valley Sulphur Company as a substitute purchaser from the State in the place of W J. Hicks and wife, beg to say that we are advised by the Secretary of State that there is no foreign corporation by the name of Toyah Valley Sulphur Company that has a permit to do business in this State. There is a Toyah Valley Sulphur Company, however, incorporated and existing under the laws of this State, but if it should develop that the Toyah Valley Sulphur Company referred to by you is the one incorporated under the laws of this State instead of under the laws of some other state, such corporation is nevertheless not entitled to be substituted upon the books and records of your office as a purchaser from the State of the lands mentioned, and that for the reasons indicated in the foregoing opinion.

In this connection your attention is called to a former opinion of the Attorney General rendered you under date of January 19, 1910, to this same effect. (Reports & Opinions of the Attorney General, 1908-10, p. 354). While there have been some changes in our laws with reference to the sale of public school lands since that opinion was rendered, we do not find these changes of such a nature as to require or justify a different conclusion from the one reached in that opinion.

Yours very truly,

BRUCE W. BRYANT,
W W. CAVES,
Assistant Attorney General.

Op. No. 2244, Bk. 54, P. 351.

OIL AND GAS—UNIVERSITY LANDS—LEASE—RENTAL—COMBINING OR GROUPING PERMITS.

University lands are not embraced in the provisions of Chapter 81 of the Published Acts of the First and Second Called Sessions of the Thirty-sixth Legislature, except to the extent provided for in Section 17 of that Act.

One who leases University lands from the State for oil and gas production purposes is liable to the State for a sum of money equal to two dollars an acre for all lands embraced in such lease, same to be paid when

such lease is executed, and for a like sum annually thereafter, payable in advance, so long as such lease remains in effect.

The combining or grouping of permits on University lands with permits on other lands is not authorized.

REFERENCES.

Article 2634, Revised Civil Statutes, 1911;
Chapter 83, Published Acts, Regular Session, Thirty-fifth Legislature;
Chapter 19, Published Acts, First and Second Called Sessions, Thirty-sixth Legislature;
Chapter 81, Published Acts, First and Second Called Sessions, Thirty-sixth Legislature.

AUSTIN, TEXAS, July 15, 1920.

Hon. J. T. Robison, Commissioner, General Land Office, Austin, Texas.

DEAR SIR: The Attorney General is in receipt of yours of the 2nd ult. requesting a ruling from him on the following questions:

"It has become important and quite urgent for this Department to ad vise whether or not one who develops oil and gas in University lands, and applies for a lease thereon, would be under the necessity of paying two dollars per acre for the lease, as provided for in Act of 1917, or whether one would be relieved of payment of the two dollars per acre as provided in Act of 1919, Chapter 81.

"Again, can University lands be combined or grouped with school land, as provided for grouping in the aforesaid Chapter 81, Acts of 1919?"

Since there are no other provisions of our law in point, we assume that your first question is based upon the theory or supposition that Section 14 of Chapter 81 of the Published Acts of the First and Second Called Sessions of the Thirty-sixth Legislature, hereafter referred to as the Act of 1919, is applicable to University lands. Otherwise such lands are clearly embraced in the provisions of Section 7 of Chapter 83 of the Published Acts of the Regular Session of the Thirty-fifth Legislature, hereafter referred to as the Act of 1917.

Section 7 of the Act of 1917 reads as follows:

"If at any time within the life of a permit one should develop petroleum or natural gas in commercial quantities the owner or manager shall file in the General Land Office a statement of such development within thirty days thereafter, and thereupon the owner of the permit shall have the right to lease the area included in the permit upon the following conditions:

"1. An application and a first payment of two dollars per acre for a lease of the area included in the permit shall be made to the Commissioner of the General Land Office within thirty days after the discovery of petroleum or natural gas in commercial quantities.

"2. Upon the payment of two dollars per acre for each acre in the permit a lease shall be issued for a term of ten years or less, as may be desired by the applicant, and with the option of a renewal or renewals for an equal or shorter period, and annually after the expiration of the first year after the date of the lease the sum of two dollars per acre shall be paid during the life of the lease, and in addition thereto the owner of tthe lease shall pay a sum of money equal to a royalty of one-eighth of the value of the gross production of petroleum. The owner of a gas well shall pay a royalty of one-tenth of the value of the meter output of all gas disposed of off the premises.

"3. The royalties shall be paid to the State through the Commissioner of the General Land Office at Austin, monthly during the life of the lease.

All payments shall be accompanied by the sworn statement of the owner or manager or other authorized agent showing the amount produced since the last report and the market value of the output and a copy of all pipe receipts, tank receipts, gauge of all tanks into which petroleum may have been run, or other checks and memoranda of amount put out or into pipe lines or tanks or pools. The books and accounts, the receipts and discharges of all pipe lines, tanks and pools and gas lines and gas pipes and all other matters pertaining to the production, transportation and marketing of the output shall be open to the examination and inspection at all times by the Commissioner of the General Land Office or his representative or any other person authorized by the Governor or Attorney General to represent the State. The value of any unpaid royalty and any sum due the State under this Act upon any lease shall become as prior lien upon all production produced upon the leased areas and the improvements situated thereon to secure the payment of any royalty and any sum due the State arising under the operation of any portion of this Act.

"4. The permit or lease shall contain the terms upon which it is issued, including the authority of the Commissioner to require the drilling of wells necessary to offset wells drilled upon adjacent private land, and such other matters as the Commissioner may deem important to the rights of the applicant or the State."

Section 14 of the Act of 1919 reads as follows:

"If oil or gas should be produced in paying quantities upon any land included in this Act, the owner of the permit shall report the development to the Commissioner of the General Land Office within thirty days thereafter and apply for a lease upon such whole surveys or tracts in each permit as the owner or owners of a combination or permits may desire to be leased and accompany the application with a log of the well or wells, and the correctness of the log shall be sworn to by the owner, manager or driller, and thereupon a lease shall be issued without the payment of any additional sum of money and for a period not to exceed ten years, subject to renewal or renewels."

Without setting out our reasons for so holding, not deeming it necessary to do so in view of the evident purport and purpose of the Act, and especially by reason of Section 17 of the Act, it is our opinion that none of the provisions of the Act of 1919 were intended to apply to University lands otherwise than to the extent provided for by said Section 17. That section reads as follows:

"The provisions of this Act, so far as they relate to a combination of permits and extensions of time for beginning development and time for development, shall apply to permits heretofore issued and those hereafter issued upon University land."

What is the purpose of this section, and what is its effect as to University lands? Since in our opinion this Act, and therefore Section 14 of the Act, does not include University lands, nor permits on such lands, otherwise than to the extent provided for by this section, that is, since but for this section University lands, as well as permits on such lands, would not have been embraced in any of the provisions of the Act, it follows that this section must have been inserted in the Act for the purpose of bringing these lands, or permits on them, within those provisions of the Act mentioned in it. This being true, it follows that it is only those provisions of the Act that are mentioned in this section that were intended to be applicable to University lands, or to permits on such lands. But if it be conceded that without this sec-

tion other provisions of the Act would be applicable to University lands, which we do not concede and which we do not believe could be seriously asserted, then the effect of Section 17 would be to limit the Act in its application of these lands, or to permits on them, to those provisions named in said section. This theory would bring us to the same result as the other. It is only upon one or the other of these theories that the presence of this section in the Act can be intelligently accounted for. Otherwise it would serve no purpose and could be given no effect. This being true, the question to be determined is whether or not, as under the first theory, this section brings University lands, or permits on such lands, within the provisions of the Section 14 of the Act, or, as under the other theory, whether or not it excludes such lands from the provisions of said Section 14. As either theory will bring us to the same result we make no distinction between them in our discussion.

It will be noted that Section 17 extends or limits certain provisions of the Act to permits on University lands; not to University lands as such, but to permits on such lands. What are these provisions? There are three. Those that apply to (1) a combination of permits, (2) the extension of time for beginning development, and (3) time for development. Section 14 clearly contains no provisions pertaining to the extension of time for beginning or completing development and hence that part of Section 17 relating to extensions of time cannot have the effect of bringing permits on University lands within any of the provisions of that section. It contains no provisions pertaining to extensions of time and hence no such provisions that could be extended to such permits either by Section 17 or otherwise.

The only other provisions of the Act that Section 17 seeks to extend to permits on University lands are those relating to a combination of permits. Does that part of Section 17 pertaining to a combination of permits have the effect of extending to permits, or to a combination of permits, on University lands any of the provisions of Section 14? We think not. Section 14 deals with the leasing of lands included in the Act on which oil or gas may have been developed in paying quantities, and not with permits. It makes it the duty of one holding a permit or a combination of permits on land included in the Act to make certain reports and to apply for a lease on such land within thirty days from the date on which oil or gas may be produced on such land in paying quantities, and in such case directs the issuance of a lease on such land without the payment of any additional sum of money. There is nothing in this section applicable to permits or to a combination of permits as such and hence nothing in it that could be extended to permits on University or other lands, either by Section 17 or otherwise. Its provisions relate to certain lands, that is, to lands included in the Act, and not to permits or to a combination of permits as such on those or any other lands. It is true that Section 14 uses the expression "a combination of permits" but clearly only for the purpose of identifying the person and land to which the section relates, that is, such of the lands included in the Act as may have oil or gas produced on them in paying quantities, and the person or persons who may be the owner or owners of the permit or combination of permits on such lands. These provisions have reference to

the land and persons mentioned and not to permits, while, as has been stated, Section 17 declares certain provisions of the Act relating to a combination of permits to be applicable to permits on University lands. Since Section 17 extends only to permits on University lands certain provisions of the Act applicable to a combination of permits, and since Section 14 contains no provisions applicable to permits of any kind, it follows that the former does not and cannot extend the provisions of the latter to University lands.

As to your second question, we have reached the conclusion that the law does not authorize permits on University lands to be grouped or combined with permits on other lands. Section 12 of the Act of 1919 authorizes the grouping or combining of permits on lands included in that Act, that is, on surveyed Public Free School and Asylum lands sold by the State with a mineral classification or reservation, and by Section 17 of the Act the same is authorized as to permits on University lands, but we know of no law authorizing the grouping or combining of permits on other lands. Since, therefore, there is no law authorizing the grouping or combining of permits on other lands, that is, if permits on other lands may not be grouped or combined, it follows that the grouping or combining of permits on University lands with permits on such other lands is not authorized.

But may not permits on University lands be grouped or combined with permits on such Public Free School and Asylum lands? We think not. One reason is that the law does not expressly authorize it. Section 12 of the Act of 1919 authorizes permits on lands included in that Act to be grouped or combined with other permits on such lands. Section 12 of the Act extends this provision to permits on University lands, that is, authorizes permits on University lands to be grouped or combined with permits on any other lands. Another reason is that certain provisions of the law applicable to permits on such Public Free School and Asylum lands are not applicable to permits on University lands, and certain provisions of the law applicable to permits on University lands are not applicable to permits on such Public Free School and Asylum lands. Still another reason is that the leasing of these respective lands is required to be upon different terms and conditions. Hence to combine or group permits on University lands with permits on Public Free School and Asylum lands, or with other lands, would render confusing if not impossible of application those provisions of our law applicable to permits upon and to the leasing of these respective lands, as well as to operations under such leases.

We are of the opinion, therefore, and you are so advised:

FIRST: That one leasing University lands from the State for oil and gas production purposes is required to pay therefor to the State a sum of money equal to two dollars an acre upon the area to be included in such lease at the time the lease is executed, and a like sum annually thereafter upon all such lands as remain within and subject to such lease.

SECOND: That the combining or grouping of permits on University lands with permits on other lands is not authorized.

It will be understood, of course, that this ruling has to do with the combining or grouping of permits as provided for by said Act of 1919

and is not intended to have any bearing upon those provisions of the law that relate to the sale of permits or leases.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2240, Bk. 54, P. 373.

MINERAL PERMITS—LIMITED TO FOUR SECTIONS IN CERTAIN INSTANCES, AND TO CITIZENS OF THE UNITED STATES.

Under the provisions of the Mineral Act of 1917, a person who has a permit on four sections of land in one block cannot receive a mineral permit, either directly from the State, or by purchase from another on any land adjoining the four sections.

Section 2 of the Mineral Act of 1917 limits the right of obtaining mineral permits either directly from the State, or from any other source, to citizens of the United States, or to persons who have declared their intention of becoming citizens of the United States.

Sections 2, 3 and 18, Chapter 83, Acts of the Thirty-sixth Legislature, Regular Session.

AUSTIN, TEXAS, July 29, 1920.

Hon. J. T. Robison, Commissioner of General Land Office, Austin, Tex.

DEAR SIR: I have your letter of the 27th instant addressed to the Attorney General, wherein you request a ruling from this Department as to "whether or not an assignee of a mineral permit can hold two such permits, each of four sections, should the land in those sections join."

Section 2 of Chapter 83, Acts of the Thirty-sixth Legislature, Regular Session, provides that "any person * * * * being a citizen of the United States, or having declared an intention of becoming such" is qualified to receive a mineral permit on the land included in the Act.

Section 3 of the Act outlines the procedure that must be followed by one who desires to obtain a mineral permit on any surveyed land included in this Act from the State, and then provides that "when one has obtained four sections or that equivalent, eligible to be embraced in one permit, such applicant shall not obtain any more land within two miles thereof."

Section 18 of the Act provides that a person owning a mineral permit may sell the same to any person "Who may be qualified to receive a permit or lease in the first instance."

What was meant by the language quoted in Section 18? It is suggested that the Legislature intended by the use of this language to prevent persons not citizens of the United States from purchasing mineral permits. It was not necessary for the Legislature to place this language in Section 18 for that purpose for the reason that had this language been omitted from Section 18, a person not a citizen of the United States, unless he had declared his intention to become such, could not purchase a mineral permit on any land included in this Act.

Section 2 of the Act says that citizens of the United States and those who have declared their intention of becoming such may obtain the right to prospect for and develop the mineral named in the Act "under the provisions of this Act." This is a case where the maxim "expressio unius est exclusio alterus" may be applied; that is to say, the Legislature, by naming the class of people who could obtain mineral permits under this Act, expressly excluded all others. Those who can obtain plural permits under this Act are citizens of the United States, and those who had declared their intention to become such. A citizen can only obtain a permit "under the provisions of this Act." The act provides two ways in which a permit may be obtained; first, a permit may be secured direct from the State; second, a permit may be purchased from the person who derives his title from the State. Neither of these methods is open to any one except the class of people named in Section 2 of the Act.

Had the language "who may be qualified to receive a permit or lease in the first instance" been omitted from Section 18, a person could not purchase a permit unless he belonged to the class named in Section 2 of the Act. It cannot be presumed that the Legislature did a vain and useless thing; therefore, it must be held that by the use of the above language in Section 18, the Legislature did not intend to refer to those persons already disqualified by the provisions of Section 2 from becoming the owners of mineral permits.

It is our opinion that the language hereinbefore quoted from Section 18 was intended by the Legislature to refer to citizens of the United States who, under the provisions of Section 3 of the Act, had obtained a permit on four sections of land in one block.

We think we are correct in our conclusion for several reasons. We have already seen that under no reasonable construction could this language apply to those people disqualified by the provisions of Section 2 of the Act from obtaining permits on any land included in the Act. Hence, by deduction, we find the language must apply to that class of people who by the provisions of Section 2 of the Act are given the right to obtain mineral permits under the provisions of the Act, but who, for some reason, are disqualified to purchase a particular permit.

As already noted, Section 3 of the Act says in effect that when a person has obtained a permit on four sections of land in one block that he shall not obtain any more land within two miles thereof. The Legislature had some reason for limiting the amount of land that one person could secure a permit on to four sections in one block. What that reason was it is not necessary for us to consider.

It is true that the limitation to four sections is found in Section 3 of the Act, which is the section outlining the procedure that must be followed by one qualified under the provisions of Section 2 to receive a permit directly from the State, and therefore it is argued that it could not apply to a person desiring to purchase a permit from some source other than the State. If Section 3 stood alone and apart from all other provisions of the Act, this would be true, but it is a well-known rule of statutory construction that a statute

must be considered as a whole, that all parts of the statute must be considered together, and that construction of a statute is to be favored and must be adopted if reasonably possible, which will give meaning to every word, clause and sentence of the statute, and operation and effect to every part and provision of it.

Without Section 18, there would be no authority in the Act for a person to sell a mineral permit. With Section 18 in the Act, a person owning a permit may sell it to any person "who may be qualified to receive a permit or lease in the first instance." A person owning a permit on four sections in one block is not qualified to receive a permit on any additional land adjoining these four sections in the "first instance"; that is, directly from the State. Therefore, he cannot purchase a permit on any additional land adjoining these four sections from another source other than the State.

As already stated, the Legislature had a purpose in limiting one person to a permit on four sections in one block. This purpose could not be accomplished if the Legislature permitted a person owning four sections in one block to purchase permits from other persons on land adjoining the four sections. If the Legislature had permitted this, then they would have permitted a person to secure permits on more than four sections in one block, by direct methods, while refusing him the right to secure such permits by a direct method. This the Legislature will not be presumed to have done.

The construction we have given this Act with reference to the subject under consideration makes the different parts of the Act harmonize with one another, and harmonizes the different parts of the Act with the announced purpose of the Legislature to prohibit one person from receiving permits on more than four sections in one block.

It will not be presumed that the Legislature intended to be inconsistent with itself. Where a statute is susceptible of two constructions, one of which will make the Act inconsistent with itself and the other construction will be adopted that will bring together and harmonize all the provisions of the Act.

Having in mind these various rules of statutory construction, we are convinced that under the provisions of Chapter 83, Acts of the Thirty-fifth Legislature, Regular Session, a person owning a permit on four sections of land in one block cannot obtain either directly from the State or by purchase any additional land adjoining the four sections, and you are so advised.

Yours very truly,

E. F. SMITH.
Assistant Attorney General.

Op. No. 2237, Bk. 54, P. 28.

OIL AND GAS PERMIT—FORFEITURE—SOLDIERS—TIME FOR DEVELOPMENT.

There is no Federal nor State law extending to soldiers the time within which to begin development work on lands covered by oil and gas permit.

Chapter 81, Acts First and Second Called Session Thirty-sixth Legislature, relating to relinquishment to owner of soil certain interest in oil and gas, and providing for forfeitures, in no way changes the provisions of Chapter 83, Acts Regular Session Thirty-fifth Legislature, pertaining to forfeiture of permit covering river bed for failure to begin development work on such land within the time required.

AUSTIN, TEXAS, March 12, 1920.

Honorable J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: We have yours of the 2nd ultimo, which is as follows:

"On June 25, 1917, one filed an application for an oil permit on a portion of the Brazos River in Palo Pinto County. This permit was issued July 28, 1917, for a term of two years. No development work was begun and has never been begun. The holder of the permit was mustered into the army and was discharged in April, 1919, but was given an army officer's commission and placed in the army officers' reserve, subject to be called into service at any time.

"The question arising is, does any Federal or State statute extend any rights that this party had to this permit beyond the date the permit expired by its own limitation?

"Does Chapter 81, Act of July 31, 1919, have any bearing upon this permit?

"See an opinion by your Department to this office dated August 3, 1918, concerning the spirit of the Federal Statute."

On examination of our files, we find that on August 2, 1918, this Department by Mr. C. B. Smedley, Assistant Attorney General, wrote you as follows:

"Replying to your letter of August 1 to the Attorney eneral, you are advised that in our opinion Chapter 57 of the Acts of the Fourth Called Session of the Thirty-fifth Legislature, relates only to sales of school land on condition of settlement and very clearly has no reference whatever to permits or leases for prospecting for oil on public land." Letter Book 222, p. 630.

We also find that this Department on August 3, 1918, by Mr. G. B. Smedley, Assistant Attorney General, further answering you upon the same question, addressed to you the following letter:

"Referring to my letter to you of yesterday, in which you were advised that Chapter 57 of the Acts of the Fourth Called Session of the Thirty-fifth Legislature had no relation to permits and leases for prospecting for oil on public land. I call your attention to the Act of Congress of March 8, 1918, commonly known as the SOLDIERS' AND SAILORS' CIVIL RELIEF ACT, and which is printed in the advanced sheets of the Federal Reporter for April 25, 1918.

"This Act was intended to prevent judgments by default, foreclosures and the imposition of forfeitures and penalties against persons in the military service during the war. It may be that the subject of forfeiture of permits or leases to prospects for oil on public lands does not come directly within the spirit of that Act.

"In this connection, I call your attention to the fact that by Section 19 of the Mineral Act of 1917, the Commissioner of the Land Office is given considerable discretion in the matter of forfeiting mineral permits and leases.

"I further call your attention to the case of Underwood vs. Robison, 204 S. W., 314, in which the Supreme Court held that the failure of the owner of mineral rights in school lands to comply with certain require-

ments of the Act of 1913 would not *ipso facto* work a forfeiture of such mineral rights, but that the rights would not be forfeited until the Commissioner had endorsed a termination of the rights on the permit in his office.

"The language of Section 19 of the Act of 1917, in so far as it relates to the method of forfeiture, is very similar to that of the Act of 1913.

"In view of the foregoing, I deem it not improper to suggest to you the consideration of the question whether you would be justified in withholding the forfeiture of permits and leases of mineral rights in public lands belonging to persons in the military service." Letter Book 222, p. 657.

Our Legislature has passed a number of acts for the relief of Texas citizens engaged as soldiers in the late war, but none of them suspend or extend the time within which a soldier, the owner of an oil or gas permit, "shall in good faith begin actual work necessary to the physical development" of the area covered by his permit.

We have been referred to Chapter 20 of the Statutes of the United States of America, passed at the Second Session of the Sixty-fifth Congress (1917-18), entitled "An Act to extend protection to the civil rights of members of the military and naval establishments of the United States engaged in the present war," approved March 8, 1918, and known as the Soldiers' and Sailors' Civil Relief Act, to S. J. Res. 33 entitled a "joint resolution to relieve the owners of mining claims who have been mustered into the military or naval service of the United States as officers or enlisted men from performing assessment work during the term of such service," approved July 17, 1917, and to H. J. Res. 241 entitled a "joint resolution to suspend the requirements of annual assessment work on mining claims during the year 1919."

Both of these resolutions clearly, and by express terms, relate to the provisions of Section 2324 of the Revised Statutes of the United States pertaining to mining claims under the laws of the United States, and do not have and cannot have any application whatever to oil and gas permits issued under the law of this State.

While the Act of Congress above referred to contains many provisions granting civil relief to soldiers in various matters, our attention has not been directed to and we do not find any provision in this Act extending or suspending the time within which a soldier, the owner of an oil and gas permit issued under our State law, is required to begin development work on the area covered by such permit, or that would preclude the forfeiture, for any reason for which a forfeiture is authorized by our State law, of such a permit owned by a soldier.

The permit in this case was issued under the Act of March 16, 1917, relating to river beds and channels and other lands, and covers lands located wholly within the bed or channel of a river declared to be navigable by the law of this State, and the question of the forfeiture of this permit must be determined by the provisions of that Act.

Chapter 81 of the published acts of the First and Second Called Sessions of the Thirty-sixth Legislature, approved July 31, 1919, relating to the relinquishment to the owner of the soil of a certain interest in the oil and gas therein, relates exclusively to "the surveyed

free school and asylum lands" of this State and, possibly, in a certain measure, to University lands, but makes no reference to "river beds and channels" and in no way amends or changes the Act of March 16, 1917, in so far as that Act relates to the forfeiture of permits to prospect for oil and gas upon lands constituting some part of the bed or channel of a navigable stream in this State.

We are of the opinion, and you are so advised, that there is no Federal nor State statute that extends any rights that the holder of this permit had beyond the date the permit would expire under the provisions of said Act of March 16, 1917, and that the Act of July 31, 1919, has no bearing upon this question.

Yours very truly,

W. W. CAVES,
Attorney General.

Op. No. 2047, Bk. 52, P. 347.

MINERAL PERMIT—CANCELLATION OF.

The Land Commissioner is not authorized to cancel oil and gas permit where permittee fails to pay ten ($.10) cents to surface owner.

April 11, 1919.

Hon. J. T. Robison, Commissioner, General Land Office, Capitol.

DEAR SIR: On March 31st, you addressed to this office the following question:

"Under Section 19, of the Mineral Act of 1917, Chapter 83, you will note conditions for forfeiture of permits and leases and among them it says 'or refuse to make proper remittances in payment of royalty or other payments,' and the question arises as to whether or not these other payments would apply to the holder of a permit who refused to pay the owner of the surface the 10 cents per acre as provided in the statute, that is, can this Department cancel a permit or lease if the owner declines to pay the owner of the surface that 10 cents per acre?"

Replying to the above question, you are advised that Section 5, Chapter 83, Acts of 1917, reads as follows:

"When the Commissioner receives an application that was filed with the county clerk or an application that was filed with the surveyor and the field notes and plat, one dollar filing fee and ten cents per acre for each acre applied for and a sworn statement by the applicant showing what interest he has in other permit, lease or patent issued under this Act and in good standing, he shall file same, and if upon examination the application, or the application and field notes, are found correct and the area applied for is within the provisions of this Act, the Commission shall issue to the applicant or his assignee a permit conferring upon him an exclusive right to prospect for and develop petroleum and natural gas within the designated area for a term not to exceed two years."

Section 8 of said Chapter 83 reads as follows:

"In the event the surface of an area included within the operations of this Act has heretofore been or may hereafter be acquired by one prior to

the filing of an application under the provisions herein, but the owner of the permit or lease shall pay to the *owner of the surface annually in advance during the life of the permit or lease ten cents per acre*, and the sum so paid and accepted by the surface owner shall be full compensation for all damages to the surface."

Section 19 of said Chapter 83 reads as follows:

"If a permit or lease should be issued upon a statement by the applicant which is false or untrue in material matters, or should the owner of a *permit* fail or refuse to begin in good faith the work necessary to the development of the area within the time required, or should the owner of a permit fail or refuse to proceed in good faith and with reasonable diligence in a bona fide effort to develop an area included in his permit after having begun the development, or should the owner of a permit fail or refuse to apply for a lease within the prescribed time, or should the owner of a lease fail or refuse to proceed in good faith and with reasonable diligence and in a bona fide effort to develop, operate and put out the mineral or other substance at any time during the life of the lease, or should the owner of a *lease* fail or refuse to make proper remittances in payment of *royalty* or *other payments* or fail or refuse to make the proper statement, or fail to furnish the required evidence of the output and market value and material matters relating thereto when requested, or fail to make the *annual payment on the area, when requested so to do, the permit or lease, as the case may be, shall be subject to forfeiture, and when the Commissioner is sufficiently informed of the facts which subject the permit or lease to forfeiture, he may declare the same forfeited by proper entry upon the duplicate permit or lease kept in the General Land Office.* When forfeiture has been declared, a notice of that fact shall be mailed to the proper county clerk and the area shall be subject to the application of another than the forfeiting owner when the notice has had time to reach the county clerk through due course of mail; provided, the Commissioner may exercise large discretion in the matter of requiring one to develop gas wells, and providing further, that all forfeitures may, within the discretion of the Commissioner, be set aside and all rights reinstated, before the rights of another intervene."

As a general rule, under the statute, which is very similar to the one under consideration, and in fact operates like, and has the same force and effect as to forfeitures and rescisions as the school land purchase law, the Act of April 1, 1887, and the subsequent statutes on the same subject, authorize the commissioner of the .General Land Office to declare school lands purchased from the State forfeited, where the interest remains unpaid, and by said statute the commissioner is empowered to recind sales of said school land where the purchaser fails to comply with the terms of the purchase, *whether the sale was made before or after enactment of the law.*
This is the holding in Fristoe vs. Blum, 45 S. W., 998, and has been followed by subsequent decisions as follows:

Wagoner vs. Black, 52 S. W., 584;
Lamless vs. Wright, 86 S. W., 1039;
Cobb vs. Webb, 64 S. W., 793.

It is also held in Fristoe vs. Blum that the commissioner of the General Land Office is authorized to declare purchases of school land forfeited for nonpayment of interest, whether such purchase was made before or after the enactment of the law, the statute authorizes same merely providing a remedy, and is not unconstitu-

tional as being retroactive or impairing the obligation of contracts.

The school land statute referred to authorizes the land commissioner, for the State, to enter into a contract for the sale of school and other lands, and therefore when such contract is entered into the State becomes a party to the contract with a citizen or subject, and the same law applies to it as under like conditions governs the contracts of individuals. To uphold this a long line of cases are cited in the above mentioned case, p. 999. The opinion further states:

"As there is a perfect contract, the State is bound to perform it according to its legal tenor and effect, and to redeem the pledge it has declared to be irrevocable. In entering into the contract, it laid aside its attributes as a sovereign, and bound itself substantially as one of its citizens does when he enters into a contract. Its contracts are interpreted as the contracts of individuals are, and the law which measures individual rights and responsibilities measures, with few exceptions, those of a State, whenever it enters into an ordinary business contract. * * * There is not one law for the sovereign and another for the subject; but when the sovereign engages in business, and the conduct of business enterprises, and contracts with individuals, although an action may not lie against the sovereign for a breach of the contract, whenever the contract, in any form, comes before the courts, the rights and obligations of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. * * * So long as he (meaning the original purchaser of the land) paid the purchase money and interest, the State could not deprive him of the land. He was within the protection of the Constitution. On the other hand, the State, by the common law, had the right as a vendor, upon the failure of purchaser to perform his part of the contract, to *recind* the sale made to him and resume its control of the land. The contract was purely executory, and the superior title remained in the State the same as it would have remained in the individual under like cihcumstances."

From this discussion it is conclusive that the Legislature was authorized to pass a law giving the commissioner of the land office the power to cancel the permit or lease inquired about, after the owner thereof declined to pay the State or the owner of the surface the amount provided by statute, and same could be made operative and effective as to lands purchased burdened with a mineral classification either before or after the mineral Act of 1917 was passed. Such a law would be only a remedy or matter of contracting and carrying the contract into effect, enforcing the State's rights in the minerals in the land which it had reserved prior to the purchase of said lands, although said lands might have been purchased before any one made application for mineral permit or lease.

As to whether such mineral Act made such provisions, there may be some question. Section 19 of said Mineral Act, 1917, p. 165, says:

"Should the owner of a *permit* fail or refuse to proceed in good faith and with reasonable diligence, etc. (no part of this article referring to owner of permit requires the payment of the 10 cents per acre referred to), or should the lease (meaning lessee) fail or refuse to proceed in good faith and with reasonable diligence and in bona fide effort to develop, operate and put out the mineral or other substance at any time during the life of the lease, or should the *owner of the lease* fail or refuse to make proper remittances in payment of royalty or other payments, or

fail or refuse to make the proper statement, or fail or refuse the required evidence of the output, etc., * * * or fail to make the annual payment on the area when requested so to do, the permit or lease, as the case may be, shall be subject to forfeiture * * * he may declare same forfeited by proper entry upon the duplicate permit or lease kept in the General Land Office."

From this statement of the statute it would appear that although Section 8 provides that the owner of the permit or a lease shall pay the owner of the surface, annually in advance, during the life of the permit or lease, 10c per acre, etc., the commissioner would not be authorized to forfeit said permit (a better word being rescind said permit) if the person owning the permit had not procured a lease thereon, as it seems the requirement of payment, a failure for which the commissioner could forfeit, applies to leases and persons holding leases under said law by contract with the State, provided he has legal authority to forfeit it all for such failure of payment to the owner of the soil. There is no contract existing between the owner of the soil and the person holding the mineral permit, or the lease, except the statutory provision above referred to, which statutory provision is not clear as to its meaning.

It is evident that the Legislature, by using the word "forfeit" or "forfeiture," meant "rescision," as under the above decisions with reference to school land, and applying the same rule, the owner of the application or permit, if the same has been granted, has only a claim or right that he might mature into a lease or title, and a contract is purely executory, and a superior title remains in the State. The only language that would authorize the commissioner to forfeit the nonpayment, is, that as follows:

"Failure or refusal to make proper remittances in payment of royalty, or other payments, * * * or failure to make the annual payment on the area when requested so to do," as applicable to your inquiry.

These two clauses require payment to actually be made, and it cannot be held that the land commissioner can compel the owner of the lease to actually make the payment, for he could not pay it unless the owner of the surface would accept the payment, and there is no clause in this statute, that I have been able to find, that requires the land owner to accept payment in full satisfaction of the annual right thereby secured by the owner of the lease or permit. Section 8 does provide that "the sum so paid and accepted by the surface owner shall be full compensation for all damages as to the surface," but this refers to the acceptance by the surface owner, and if he refuses to accept such payment then the owner of the lease or permit could not be required to do anything further. The land commissioner possibly could adopt a rule of the office with reference to tender of the 10c per acre annually as Chapter 83 contains several provisions with reference to rules and regulations that may be adopted by the Commissioner of the General Land Office. The first of said clauses is found in Section 2, which reads as follows:

"Any person or association of persons, corporate or otherwise, being a citizen of the United States or having declared an intention of becoming

such, desiring to obtain the right to prospect for and develop the minerals and substances named above that may be in any of the areas included herein, may do so under the provisions of this Act, together with such rules and regulations as may be adopted by the Commissioner of the General Land Office relative thereto and necessary for the execution of the purposes of this Act."

Section 22 with reference to such rules and regulations reads as follows:

"All development in water or on islands, marshes, reefs or river beds and channels shall be done under such regulations as will prevent the pollution of the water, and for the prevention of such pollution the Commissioner of the General Land Office may call upon the Game, Fish and Oyster Commissioner for assistance in the adoption and enforcement of rules and regulations for the protection of the waters from such pollution. The Commissioner of the General Land Office may cancel a claim, location, file, permit or lease or patent for a failure or refusal of the owner to comply with such *rules* and *regulations* as may be adopted."

It will be seen that the latter part of the clause provides:

"The Commissioner of the General Land Office may cancel the claim, location, file, permit or lease or patent for failure or refusal of the owner to comply with such rules and regulations as may be adopted."

Section 26 reads as follows:

"The Commissioner of the General Land Office shall have the general supervision of all matters necessary for the proper administration of this Act and he is *authorized* to *adopt rules* and *regulations* and to *alter* or *amend* them from time to time as he may deem necessary for the protection of the interests involved and not inconsistent with the provisions herein."

It will be seen that the Commissioner is by this course fully authorized to adopt such rules and regulations and to amend same as he may deem necessary in the handling of such applications, permits and leases, and in fact the general procedure under said Chapter 83. We are not advised by the above letter as to whether the Commissioner has adopted rules and regulations under said chapter, and if so, as to what such rules are. Therefore, we will hold that under the present law above stated and as it reads and provides, the Commissioner is not required by such law to forfeit said permits for failure to pay to the owner the annual 10c rental as inquired about; however, we believe that the rule was intended by the Legislature to be different as to leases, and reading the same in connection with the proper rules of the office, it might be construed that the owner of the lease could be required to tender said money to the owner of the surface, but we do not find any rule by which the owner of the surface could be compelled to accept such payment. This applies to purchasers of the land under said Act prior to the time of the making of the application for mineral permit, as said statute provides that:

"Neither the filing of an application under any provision of this Act nor the issuance of a permit or lease on any of the unsold land included herein

shall prevent the sale of the surface without the minerals and in case of such sale subsequent to the posting of any notice or the filing of an application the *purchaser shall not be entitled* to the *ten cents per acre* that is *provided for owners of the surface at the time of filing*, nor shall such owner be entitled to any damages that may be occasioned by the working of any area."

Yours very truly,
W. F. SCHENCK,
Assistant Attorney General.

Op. No. 2170, Bk. 53, P. 516.

PUBLIC LANDS—QUANTITY ONE PERSON AUTHORIZED TO PURCHASE—SUBSTITUTE PURCHASER—UNDIVIDED INTEREST LIMITATION—CANCELLATION OF INVALID AWARD—APPLICATION FOR LAND PREVIOUSLY SOLD TO ANOTHER.

1. One who had purchased from the State as many as eight sections of surveyed public school land in Jeff Davis County after April 19, 1901, none of which sales had been cancelled as invalid for some reason other than abandonment, or for some fact or condition not the fault of such purchaser, prior to January 3, 1916, was not entitled to purchase from the State any more such land in said county on applications filed by him on January 3, 1916, even though he may have transferred to others, prior to January 3, 1916, all such land so previously purchased by him from the State, and this notwithstanding that for certain purposes his vendees may be entitled to be substituted for the original purchaser, and for certain purposes, to be regarded themselves as original purchasers from the State.

2. The vendee to whom one claiming surveyed public free school land under a purported but invalid sale to him by the State has transferred an undivided interest in such land is not entitled to be substituted for the original purchaser from the State, and cannot, by reason of being such vendee, be substituted for the one to whom the purported sale was made so as himself to become and be entitled to be regarded as an original purchaser of such land from the State.

3. The Commissioner of the General Land Office will not be required by mandamus to reinstate and complete a purported sale by the State of surveyed public free school land invalid from its inception and cancelled by him for that reason even though same may have been cancelled by him after the lapse of more than a year from the date of such purported sale.

4. For one to acquire the right to have awarded to him surveyed public free school land such land must be on the market and subject to sale at the time his application is made, and even though a purported sale of such lands may be, and may have been from its inception, invalid and void as against the State, such a sale may nevertheless be valid as against all other adverse claimants and an applicant is not entitled to have such land awarded to him, even after the concellation or forfeiture by the State of a purported sale invalid as against the State, but valid as to such applicant, on an application filed prior to such cancellation or forfeiture.

Such a purported sale, as far as the applicant is concerned, is valid and has the effect of taking the land off the market.

AUSTIN, TEXAS, January 6, 1920.

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

DEAR SIR: We have your letter of the 26th ult., making certain inquiry in reference to public free school lands heretofore awarded to

one Joseph B. Odell and for the purchase of certain tracts of which applications by Windsor W. Stewart were filed with you on May 2, 1918.

Your inquiry, simple as it may appear, raises quite a number of questions of vital importance, and for this reason, as well as for the further reason that there has heretofore existed, and now seems to exist, quite a divergence of opinion as to some of these questions, the writer deems it expedient to discuss these questions at some length, even at the risk of being tedious.

We will first state such facts, taken from your letter and certain records of your office, as are necessary to an understanding of and a proper disposition of the questions raised by your inquiry.

Prior to January 3, 1916, and prior to April 5, 1915, but after April 19, 1901, Joseph B. Odell applied for and there were awarded to him at least eight sections of public free school land situated in Jeff Davis County, and on said January 3, 1916, Odell applied for and there were awarded to him an additional eight sections of land in said county, but before applying for these eight sections, Odell had conveyed to others all the lands theretofore purchased by him, and those to whom he conveyed had filed their transfers together with their substitute applications and obligations in the General Land Office and such purchasers had been and on January 3, 1916, were substituted on the books and records of the General Land Office for Odell as the purchasers of said lands, so that at the time Odell filed his application, January 3, 1916, Odell did not own any of the lands theretofore purchased by him.

The awards of these eight sections to Odell were on May 2, 1918, and ever since made have been, and are now, in good standing on the books and records of the General Land Office, not cancelled by the Land Commissioners, and not assailed by the institution of any suit attacking their validity.

On December 20, 1916, Odell and wife conveyed to R. H. Prunty the eight sections awarded to Odell on his applications of January 3, 1916, and on May 11, 1918, Prunty and wife reconveyed this land to Odell, and on June 1, 1919, Odell and wife conveyed an undivided one-half interest in this land to C. B. Matthews, all of which transfers were filed in the General Land Office July 14, 1919.

On May 2, 1918, Windsor W. Stewart filed in the General Land Office his application to purchase from the State four of the eight sections awarded to Odell on his application of January 3, 1916. Stewart's applications were rejected on the ground that the land applied for had been previously awarded to Odell, which award to Odell had not been forfeited nor cancelled and was in good standing on the books and records of the General Land Office on May 2, 1918, when Stewart's applications were filed. Stewart has returned his first payments on this land and insists that he is entitled to those sections on the ground that the award of them to Odell was unauthorized and should be cancelled.

Under these facts you have propounded to us the following inquiry:

"On the return of the first payment should I issue awards on the applications filed by Windsor W. Stewart, and cancel the sales to Odell?"

Before answering your question, we will first state four propositions which we believe to be the law applicable to and decisive of the issues raised by your inquiry on the facts stated. These are:

FIRST: One who had purchased from the State as many as eight sections of surveyed public free school land in Jeff Davis County after April 19, 1901, none of which sales had been cancelled as invalid for some reason other than abandonment, or for some fact or condition not the fault of such purchaser, prior to January 3, 1916, was not entitled to purchase from the State any more such land in said county on application filed by him on January 3, 1916, even though he may have transferred to others, prior to January 3, 1916, all such lands so previously purchased by him from the State, and this notwithstanding that for certain purposes his vendees may be entitled to be substituted for the original purchaser, and for certain purposes, to be regarded themselves as original purchasers from the State. (R. C. S. 1911, Arts. 5418, 5420; Chapter 150 Pub. Acts Regular Session Thirty-fourth Legislature, approved April 5, 1915; Houston vs. Koonce, 156 S. W., 202; Ford vs. Robison, 201 S. W., 401; Johnson vs. Bibb, 75 S. W., 71; Cunningham vs. Terrell, 111 S. W., 651; Burnett vs. Wommock, 85 S. W., 1199; Reininger vs. Pannell, 101 S. W., 816; Davis vs. Yates, 133 S. W., 281; Goodwin vs. Koonce, 130 S. W., 620; Art. 5435 R. C. S. 1911 as amended by Chapter 163 Pub. Acts Regular Session Thirty-sixth Legislature, approved April 3, 1919; R. C. S. 1911, Art. 5436; see also Section 5, of said Chapter 163 Acts Thirty-sixth Legislature; Letter Press Book pp. Atty Gen. 638. (Jan. 1919 Letter Press Book 165, p. 437).

SECOND: The vendee to whom one claiming surveyed public free school land under a purported but invalid sale to him by the State has transferred an divided interest in such land is not entitled to be substituted for the original purchaser from the State, and cannot, by reason of being such vendee, be substituted for the one to whom the purported sale was made so as himself to become and be entitled to be regarded as an original purchaser of such land from the State. (State Con. Art. 7, Sec. 4; R. C. S. 1911 Arts. 5405, 5406, 5422, 5436; Chapter 150 Pub. Acts Regular Session Thirty-fourth Legislature, approved April 5, 1915; Sanford vs. Terrell. 87 S. W., 656; Arts. 5410 and 5435 as amended by Chapter 163 Pub. Acts Regular Session Thirty-sixth Legislature, approved April 3, 1919.)

THIRD: The Commissioner of the General Land Office will not be required by mandamus to reinstate and complete a purported sale by the State of surveyed public free school land invalid from its inception and cancelled by him for that reason even though same may have been cancelled by him after the lapse of more than a year from the date of such purported sale. (R. C. S. 1911, Arts. 5458 and 5459; Buchanan vs. Barnsley, 112 S. W.. 118; Pruett vs. Robison, 192 S. W., 537; Erp vs. Robison, 156 S. W., 180; Rep. & Opp. Atty. Gen. 1912-1914, page 510.)

FOURTH: For one to acquire the right to have awarded to him surveyed public free school land such land must be on the market and subject to sale at the time his application is made, and even though a purported sale of such lands may be, and may have been from its inception, invalid and void as against the State, such a sale may

nevertheless be valid as against all other adverse claimants, and an applicant is not entitled to have such land awarded to him, even after the cancellation or forfeiture by the State of a purported sale invalid as against the State, but valid as to such applicant, on an application filed prior to such cancellation or forfeiture, such purported sale, as far as the applicant is concerned, being valid and hence having the effect of taking the land off the market. (R. C. S. 1911, Arts. 5416, 5488, 5489; Nobles vs. Magnolia Cattle Co., 9 S. W., 448; Logan vs. Curry, 69, S. W., 129; Adams vs. King, 66 S. W., 484; King vs. Robison, 128 S. W., 368; Wyeart vs. Terrell, 100 S. W., 133; Adams vs. Terrell, 107 S. W., 537; Erp vs. Tillman, 131 S. W., 1057; Erp vs. Robison, 155 S. W., 180; Pruett vs. Robison, 192 S. W., 537.)

Applying these propositions to the facts of this case, we are of the opinion, and you are so advised, that the award of the eight additional sections to Odell on his applications filed January 3, 1916. was invalid from its inception and that you are authorized to cancel same for this reason. We are further of the opinion, however, and you are so advised, that even if the award of said additional eight sections made to Odell on his applications filed with you on January 3, 1916, should be cancelled, Stewart is nevertheless not entitled to have awarded to him the four of said sections applied for by him on May 2, 1918, on his application of that date.

Having thus answered your inquiry, we will now discuss the issues raised, taking them up in the order hereinbefore given.

FIRST.

After the Act of 1915 went into effect it was the general opinion that one might purchase from the State as many as eight sections of surveyed public free school land, at least in certain counties, regardless of the fact that he might have theretofore, but after April 19, 1901, purchased from the State in such county as many as eight or more sections of such land and that a purchaser under the Act of 1915 was not required to disclose in his application the surveyed public free school lands theretofore but after April 19, 1901, purchased by him from the State, and our understanding is that quite a quantity of additional such lands were sold under this theory to parties who had theretofore, but after April 19, 1901, purchased the quantity of such land allowed to be awarded to them under previous law. An examination of our various laws on this subject will show that this theory was erroneous.

Article 5420, Revised Civil Statutes of 1911, purports to have been taken from the first part of Section 3, Chapter 125, published Acts of the Regular Session of the Twenty-seventh Legislature, approved April 19, 1901, but this article in its present form is not found in any of the published acts of our Legislature. In bringing this part of this section forward and incorporating it into the Revised Civil Statutes of 1911 as Article 5420 certain words were added to and others stricken from the section by the codifiers.

Said Section 3 of the Act of 1901 prohibited the sale of more than *four* sections of public free school land to any one person after that Act went into effect, April 19, 1901.

Chapter 103 of the published Acts of the Regular Session of the Twenty-ninth Legislature, approved April 11, 1905, provides that "In the counties . . . Jeff Davis . . one who has not purchased a complement of land under this Act *or former law* prior to the filing of his application or applications may buy not to exceed eight sections of 640 acres each, more or less, or such part thereof as will complete his complement under this Act, *including the former purchases since April* 19, 1901," etc. It will be noted that this Act nowhere declares what shall constitute a "complement" of land except as to Jeff Davis and certain other counties, as to which counties the complement is increased to eight sections; and this Act nowhere states that it repeals or amends, in fact it makes no specific reference to, any former law.

Chapter 20 of the published Acts of the First Called Session of the Thirtieth Legislature, approved May 16, 1907, is declared to be amendatory of the Act of 1905. It amends Sections 5 and 6 of that Act, pertaining to the quantity of land that may be sold to one person, and adds thereto certain other sections. This Act, like the Act of 1905, nowhere declares what shall constitute a "complement" of land except as to Jeff Davis and certain other counties, as to which counties the "complement" is again declared to be "not to exceed eight sections of 640 acres each, more or less." To this Act, however, is added the provision that "one who has purchased or may hereafter purchase on condition of settlement *four* sections of 640 acres, more or less, wholly or partly within any county *other than those hereinbefore named* (having reference to Jeff Davis and certain other counties) since said date (April 19, 1901?) shall not purchase any more," and further provides that "one who has *heretofore* or who may hereafter purchase a *complement* as aforesaid (having reference to Jeff Davis and other counties) shall not purchase any more."

Bearing in mind these provisions of the Act of 1901, 1905 and 1907, it is clear that Article 5420, Revised Civil Statutes of 1911, as reworded and brought forward by the codifiers, makes no change in the law as it existed when the Revised Statutes were adopted. This is aptly illustrated by the following quotation of said Article 5420 wherein the words added to said Section 3 of the Act of 1901 by the codifiers are underscored and those left out are enclosed by parentheses as shown by the original codification bill now on file in the office of the Secretary of State, to-wit:

"Article 5420. The Commissioner of the General Land Office is hereby prohibited from selling to the same party more than *one complement* of *four or eight* sections of land, *according to the county*, and all applications to purchase land shall also disclose the prior lands purchased by the applicant from the State, if any (since the taking effect of this Act), and the residence of the applicant at said time, and if it appears therefrom, or from the records of the Land Office, that said applicant has already purchased land aggregating four *or eight* sections *according to the county* (since the taking effect of this Act) *since April* 19, 1901, his application shall be rejected; provided, this shall not apply to sales made to a purchaser and afterwards cancelled as invalid for some reason other than abandonment, and where the purchaser himself was not at fault."

Then came the Act of 1915—Chapter 150 of the published Acts of the Regular Session of the Thirty-fourth Legislature, approved April

5, 1915. This Act does not in terms specifically amend or repeal any former law, and that it was not intended so to do is evident from the wording of its first section. which is:

"On the first day of September, 1915, and on the first day of each January, May and September of each year thereafter, the surveyed lands and portions of surveyed and unsurveyed land shall be sold under the *terms, conditions, limitations and regulations as is now provided by law, except as changed herein.*"

As to the quantity of land that might be sold to any one person the only changes made are: (Sec. 2) Land situated in certain named counties (not including Jeff Davis County) may be sold in quantities not to exceed two sections; (Sec. 3) Land situated in certain other named counties (including Jeff Davis and other counties) may be sold in quantities not to exceed eight sections and in whole tracts only, and without condition of settlement; (Sec. 4) Land that is situated in any other county than those named in this Act may be sold in certain other quantities. The Act makes no reference whatever as to lands that may have been bought under any former law by one applying to purchase under this Act, nor to the requirement that an applicant to buy under this Act shall disclose in his application lands theretofore, but after April 19, 1901, purchased by him, nor to the prohibition against selling more than a certain quantity of land to any one person who may have previously purchased land under any former law. No reference whatever is made to these provisions as embodied in the law prior to the passage of this Act, and it is evident, from a reading of the Act, that it cannot, either as a whole or as to any of its provisions, be construed as repealing, by implication or otherwise, or as containing any substitute provisions for, these provisions of former laws. Hence, under a well established and universal rule of statutory construction, these provisions remained and are now the law.

The Act of April 3, 1919, provides for the sale of not more than eight sections of surveyed public free school land to one person without reference to any particular counties.

It is thus clear that from April 19, 1901, to April 15, 1905, the law prohibited the sale of more than four sections of surveyed free school land to one person on applications filed after April 19, 1901, and it is equally clear that the law now prohibits, and since April 15, 1905, has prohibited, the sale of more than eight sections of surveyed public free school land in Jeff Davis county to any one person on applications filed after April 19, 1901.

We are aware of what might be denominated the "doctrine of substitution" as gathered from certain authorities hereinbefore cited, which is in effect that for certain purposes the vendee of an original purchaser from the State of surveyed public free school land may be substituted for the original purchaser, and being so substituted becomes himself entitled to be regarded as an original purchaser, but are of the opinion that that doctrine is not applicable to the facts of this case as pertains to Odell's right to the additional land awarded to him on his application filed January 3, 1916. All the cases in which this doctrine was applied were those in which the rights of the vendees of the original purchasers were assailed, while in this case it is

the eligibility of Odell, the original purchaser, to purchase additional land after he had already purchased the quantity allowed by law to be sold to one person that is questioned. The law is quite plain, too plain to need interpretation or to be explained away, to the effect that one who after April 19, 1901, has purchased the quantity of land permitted to be sold to one person shall not purchase any more; also that the sale of additional land to such person by the Commissioner of the General Land Office is expressly prohibited by law.

To say that one may convey his purchased land to another and thereby wash himself of such purchases so as to be entitled to buy again, and again, and again, indefinitely, would do undoubted violence to the law, so as to make it read that "The Commissioner of the General Land Office is hereby prohibited from selling to the same party more than one complement of (four or) eight sections of land (according to the county), *unless such party prior thereto has transferred the lands theretofore sold to him*, and "if it appear . . . that said applicant has already purchased land aggregating (four or) eight sections (according to the county) since April 19, 1901," *and has not theretofore transferred such land to others*, "his application shall be rejected," and "One who has heretofore, or who may hereafter, purchase a complement . . . shall not purchase any more *so long as he remains the owner of such complement.*" Clearly this is not the law, and yet these underscored words must be read into the statutes before it can be held that the fact that Odell had transferred to others the land purchased by him prior to January 3, 1916, he on that account stood as one who had never, prior to January 3, 1916, purchased any public free school land in Jeff Davis County and was therefore entitled on that date to buy the full complement of eight sections in said county. The inhibition of this law is against those who have *purchased* from the State a certain amount of land since a certain time, and not against those who may *own* a certain amount of such land at the time of the filing of their applications for additional lands.

This construction of this law in no way conflicts with, but is in consonance with, those decisions of our courts which originated and have applied what I have called the "doctrine of substitution." The case of Cunningham vs. Terrell, hereinbefore cited, has been referred to as holding that one who has purchased a complement of land may purchase additional land after he has transferred to another a part of his original purchase, but that case does not so hold. In that case one who had purchased a full complement exchanged one of his sections for another section of school land contracted for by another. The court merely held that this did not constitute a purchase (not even under the "doctrine of substitution") from the State of additional land. We make special reference to that case. It has nowhere been held, as far as we have found, that one can purge himself of previous purchases by transferring them to others and thereby qualify himself to become the purchaser of other lands, and certainly, in the face of the plain provisions of the law, it cannot be seriously so contended.

It is suggested that on the transfer by Odell to Prunty of this land Prunty thereupon became substituted for Odell and entitled to be regarded as the original purchaser from the State and that there-

upon the invalidity of the original reward to Odell became immaterial. One answer to this is that Prunty did not file his transfer in the General Land Office, and was never substituted in the Land Office as a substitute purchaser for Odell and did not become a purchased in any sense from the State, in fact was never known to and never became a contracting party with the State in respect to this land. It is true that the transfer was later filed in the Land Office but not until some time after Prunty had re-conveyed the land to Odell, and, in fact, not until more than a year after Odell had transferred an undivided interest in the land to Matthews. Under the facts Prunty never did become a substituted original purchaser from the State for Odell, and Odell never did become a substituted original purchaser from the State for Prunty. At most the filing in the Land Office of the several transfers in reference to this land could only be for the purpose of making Matthews a substituted original purchaser for Odell, or, possibly, for Prunty, and that Matthews could not become a purchaser from the State, by substitution or otherwise, of an undivided interest in this land, has already been shown. We do not understand that the transfer by Odell to Prunty and the re-transfer by Prunty to Odell, under the facts, bring either Odell or Prunty within the "doctrine of substitution" so as to make at this time the invalidity of the original sale by the State to Odell, as pertains to Odell's right to the land as against the State immaterial.

Hence, our conclusion that prior to January 3, 1916, Odell had exhausted his privilege of buying surveyed public free school land, he having therefore, but after April 19, 1901, purchased as many as eight sections of such land in Jeff Davis County and was not entitled to have awarded to him the additional eight sections on his application filed January 3, 1916, and that the award of said additional land was unauthorized and was and is invalid and void.

SECOND.

The lands "set apart to the public free school fund of the State shall be sold under such regulations, at such times, and on such terms as may be prescribed by law." Thus the Constitution puts upon the Legislature, and not elsewhere, the power and responsibility of prescribing the regulations, time and terms for the sale of the public free school lands of the State, and such lands are to be sold in accordance with regulations, at the times, and upon the terms, so provided, and none other.

Among other regulations prescribed at various times by the Legislature the Act of April 5, 1915, provided that the surveyed public free school lands of the State situated in Jeff Davis County should be "sold in quantities not to exceed eight sections of 640 acres each, more or less, to one person, and *in whole tracts only,*" and this law was in operation at the time of the transactions had by Odell, Prunty and Matthews in respect to the eight sections of land awarded to Odell on his application filed January 3, 1916,— when Odell and wife conveyed to Matthews an undivided one-half

interest in this land. When these transfers were filed in the General Land Office the law required that such lands be sold *in whole tracts only,* There are other provisions clearly indicating that such land shall be sold in "sections" or "tracts," but there is not now and never has been any provision authorizing the original sale by the State of an undivided interest in such lands, and such a sale would be unauthorized.

If, therefore, Matthews could not have originally purchased from the State an undivided interest in these lands, and he could not, it follows that he cannot be accepted and regarded by the State as an original purchaser from the State as to such interest in said lands under the "doctrine of substitution." One cannot become in law the purchaser, original or otherwise, and whether by original sale or by substitution, from the State of an undivided interest in surveyed public free school lands, there being no law so authorizing. It is argued that inasmuch as the State has the right to sell the whole of the eight sections it also has the right to sell an undivided interest in them, that the right to sell the whole title carries with it the right to sell a part interest in it. Ordinarily this is true, but the Commissioner of the General Land Office is only authorized to sell surveyed public free school lands in the manner provided by law, and the law specifically requires not only that such lands be sold in whole tracts, but "in whole tracts only." It is probably true that the State by proper legislation could provide for the sale of an undivided interest in such lands, but in our opinion the Commissioner of the General Land Office could not do so in the absence of legislative authority so directing.

Hence, we conclude that Matthews has not become and is not entitled to be regarded as a purchaser from the State of said interest in said lands, either as an original or substitute purchaser, so as to make immaterial, on the State's part, the invalidity of the original sale of said interest to Odell, and that notwithstanding said sale by Odell to Matthews of said interest in said lands the original sale of said eight sections to Odell, as to the whole of said lands, and as to both Odell and Matthews, was and is invalid, and that the authority of the Commissioner of the General Land Office to cancel said sale by the State to Odell remains and is not affected by said transfer of said interest in said lands by Odell to Matthews and the filing by Matthews of said transfers in the General Land Office. This holding is not in conflict with the opinion of this Department shown in letter press book of Opp. Atty. Gen., page 638, beg. Jan. 3, 1919, Opp. No. 2068.

THIRD.

That the Commissioner of the General Land Office will not be required by mandamus to reinstate a purported sale of surveyed public free school land "invalid from its inception," that has been for that reason cancelled by him, even though such cancellation was made after the expiration of a year from the date of the purported sale, and notwithstanding the provisions of Chapter 29 of

the published Acts of the Regular Session of the Twenty-ninth Legislature (Arts. 5458 and 5459 of the Revised Civil Statutes of 1911) was expressly held by our Supreme Court in the case of Erp vs. Robison, 155 S. W., 180. That was a case in which a sale had been made to Erp before the previous sale had been officially "forfeited" by the Land Commissioner, and which sale to Erp had been previously held by the Supreme Court to have been unauthorized and therefore invalid. (Erp vs. Tillman, 131 S. W., 1057), and which sale to Erp had been cancelled by the Land Commissioner, under advice from this Department by letter dated February 17, 1911. Erp sought by mandamus to have the sale to him reinstated on the ground, among others, that under the provisions of said articles 5458 and 5459, the cancellation of the sale to him was unauthorized, such cancellation having been made after the expiration of more than a year from the date of the sale to him. In disposing of this contention our Supreme Court in that case said.

"The holding of this court in Erp vs. Tillman that in that controversy the Erps were entitled to prevail and to a judgment in their favor for this land gives no additional force to the position of relators in this proceeding. That decision was not effectual to impart to this sale a validity as against the State that it did not originally possess.

"In holding that the sale was not in compliance with law, the court there substantially decided that it was invalid as against the State, but that under the operation of the Act of March 15, 1905 (Articles 5458, 5459, R. S., 1911), because no suit had been brought for the land within one year from the date of its award, it was a sale valid against all other adverse claimants. The sale to Erp, in our opinion, undoubtedly has under this Act the status of entire validity as to all such claimants, but not as against the State. The statute was intended as one of repose and to conclude all such adverse claims after the lapse of a year from the date of the award, giving to a purchaser protection and security from attack by all claimants other than the State after his award has stood unassailed for such period of time and placing it beyond the power of any one but the State to thereafter interfere. But the proviso of the Act relieves the State from the option it possesses as to all other persons, but it clearly reserves to the State the right of election to either abide by or repudiate any sale not had in compliance with the law. It thus clearly appears that the Act has no vitalizing power as against the State, and cannot be availed of to require the Commissioner of the General Land Office, and executive officer in charge of such department, to recognize and fulfill for the State a sale which under the law was invalid in its inception. The failure of the State to repudiate such a sale would not make it valid or entitle the claimant to enforce such rights in respect thereto as inhere only under a lawful purchase."

Hence, we conclude that said articles 5458 and 5459 do not operate so as to preclude the State, acting through the Commissioner of the General Land Office, its executive officer charged with the resonsibility of properly handling the large landed interests of the State, from cancelling and refusing to recognize as valid the award of the additional eight sections made to Odell on his application filed January 4, 1916, same being not only not authorized but expressly prohibited by law and which purported sale is therefore invalid. Such a purported sale is not binding on the State as a contract, being prohibited by law, and the cancellation of it by the State and the refusal of the State longer to recognize and perfect it, cannot be

construed as impairing the obligation of contract, there being no contract in law, nor as depriving any person of property without due process of law, such person never having acquired any property or property rights under such purported but unauthorized and prohibited sale.

FOURTH.

That for one to acquire the right to have awarded to him surveyed public free school land such land must be on the market and subject to sale at the time his application is made is statutory. Article 5416, Revised Civil Statutes of 1911, provides:

"When the applications and obligations aforesaid have been filed in the General Land Office, and upon inspection they are found correct, *and the land is found to be classified and valued, and on the market for sale the day the application was filed*, or on any prior date and still unsold, and the first payment made as required by law, it shall be the duty of the Commissioners to award the land to the one offering the highest price therefor, ... Land that is or may be on the market, and not filed on as herein provided, may be filed on and sold to anyone at any time," etc.

The case of Erp vs. Tillman, 151 S. W., page 1057, discusses and analyzes a number of cases bearing on the proposition here stated. Some of these cases appear to conflict on the question as to whether or not one is entitled to an award on an application prematurely filed, but the Court shows that the apparent confusion comes from the application of the rule to the particular facts in each case. Among other cases discussed is that of Hazelwood vs. Rogan, 67 S. W., page 80, and in discussing that case the court says:

"Hazelwood vs. Rogan establishes a proposition which is equally clear although the application of it under differing circumstances sometimes gives rise to questions, mainly of fact, which require close discrimination. It is that one who has filed an application which is premature and therefore ineffectual to secure a right because the land cannot then be bought, yet has the right to make application when the proper time has come, and, under proper circumstances, this may consist in the use for that purpose of papers already prepared and on file and the payment already in the proper hands. We make the qualification, 'under proper circumstances,' because it is not held in Hazelwood vs. Rogan, has never been held, and could not properly be held, that an application, which has no effect when filed, because the land is not open to purchase, must yet, as a matter of couse and under all circumstances, be treated as one made and operating after the land has come on the market if there be no intervening right. The mere statement of the propositions which lie at the foundations of these cases shows there is no conflict between them, and it is only on the supposition that the latter case goes to the extent last indicated that even a theoretical inconsistency would arise."

That a purported sale of surveyed public school land may be invalid and void as against the State and yet valid and effective as to all other adverse claimants, is also well established. In the case of Nobles vs. Magnolia Cattle Co., 9 S. W., 448, appellee attacked the sale to appellant on the ground of fraudulent representations in his application to purchase, and the court said:

"If such representations were false—and we have no reason to doubt

it—it was an attempt to defraud the State .... But plaintiff could not take advantage of the fraud. That could be done only by the State .... The sale was valid, so far as the plaintiff was concerned, until set aside by the State .... But these are matters of which the State alone has the right to complain, in a proper way, and in the time limited."

The case of Erp vs. Tillman was one in which an award to Erp that had stood unassailed for more than a year from its date was attacked for invalidity by Tillman. The court found that the award was invalid from its inception but, in view of the provisions of Articles 5458 and 5459 of the Revised Civil Statutes of 1911, the court says:

"The award in such a contest as this constitutes the title of the purchaser which may be produced in evidence without special pleading, and when it is produced and shown to have stood for a year, this statute, of which the court must take notice, *makes it conclusive evidence of a sale valid against every one but the State.*"

Erp's title, although invalid as against the State, was upheld, under the provisions of said articles 5458 and 5459, as against Tillman.

After the foregoing decision in the Erp-Tillman case the Commissioner of the General Land Office cancelled the sale to Erp for invalidity and Erp brought suit for mandamus to compel the reinstatement of his purchase. In this case, and referring to the Erp-Tillman case, the court says:

"In holding that the sale was not in compliance with law, the Court there substantially decided that it was invalid as against the State, but that under the operation of the Act of March 16, 1905 (Articles 5458, 5459, R. S., 1911), because no suit had been brought for the land within one year from the date of its award, it was a sale valid against all other adverse claimants. The sale to Erp, in our opinion, undoubtedly has under this Act the status of *entire validity as to all such claimants, but not as against the State*.................As was there plainly decided and as we have already affirmed, after the lapse of a year from the award to Erp the sale to him **became valid against every one but the State**, necessarily vesting in Erp, as between all other persons and himself, the superior right and will to the land. *Such was its status when Tillman filed his application; and, so long as it continued, Tillman nor anyone else could acquire a valid title.*"

Erp vs. Robison, 155 S. W., 180.

Whatever may have been the rule prior to the enactment of articles 5458 and 5459, and whatever the rule may be as to sales attacked within a year from their date, it cannot now be questioned that an award of public free school land that has stood unassailed for a year or more, although otherwise invalid and void, is valid as against all parties except the State; and that it follows that so long as such an award is permitted by the State to stand such land is "sold," is off the market and not subject to sale, as far as other subsequent claimants are concerned, is conclusive, and it follows that one filing an application to purchase such land during the continuance of such a statutes thereby acquires no more right or title to the land than if such previous award was in all respects valid and binding not only upon all others but upon the State as well, which means that he acquires no right or title to the land whatever.

Following are some of the authorities considered in disposing of this case:

Harper vs. Terrell, 13 S. W., 949;
Slaughter vs. Terrell, 102 S. W., 399;
Cambell vs. Enochs, 107 S. W., 878;
Buchanan vs. Barnsley, 112 S. W., 116;
King vs. Robison, 128 S. W., 368;
Erp vs. Tillman, 131 S. W., 1057;
Nations vs. Miller, 146 S. W., 261;
Erp vs. Robison, 155 S. W., 180;
Rainer vs. Durrill, 156 S. W., 589;
Mitchell vs. Thomas, 172 S. W., 715;
Ford vs. Robison, 201 S. W., 401;
Houston vs. Koonce, 156 S. W., 302;
Schaner vs. Schaner, 202 S. W., 1010;
Burnham vs. Terrell, 78 S. W., 500;
Moore vs. Rogan, 73 S. W., 1;
Johnson vs. Bibb, 75 S. W., 71;
Davis vs. Yates, 133 S. W., 281;
Goodwin vs. Koonce, 130 S. W., 620;
Clark vs. Altizer, 145 S. W., 1041;
Burnett vs. Wommock, 85 S. W., 1199;
Martin vs. Marr, 85 S. W., 932;
Reinger vs. Pannell, 101 S. W., 816;
Cunningham vs. Terrell, 111 S. W., 657;
Opinions Attorney General, dated May 12, 1919, Letter Book Copies, beginning January 3, 1919, page 638. (Opinion No. 2068.)
Rep. and Opp. Atty. Gen., 1912-'14, p. 510.

Yours very truly,
W. W. CAVES,
Assistant Attorney General.

AUSTIN, TEXAS, February 17, 1920.

Honorable J. T. Robison, Commissioner of the General Land Office, City.

DEAR SIR: In our opinion to you dated January 6, 1920, and approved by this Department February 14, 1920, at page 6 of the opinion, we use the following language:

"Applying these propositions to the facts of this case, we are of the opinion, and you are so advised, that the award of the eight additional sections to Odell on his applications filed January 3, 1916, was invalid from its inception and that you are authorized to cancel same for this reason."

Without changing the legal question involved, but merely for the purpose of conforming this verbiage to the wording used elsewhere in the opinion on this point, you are advised that this wording has been changed so as to read as follows:

"Applying these propositions to the facts of this case, we are of the opinion, and you are so advised, that the award of the eight additional sections to Odell on his application filed January 3, 1916, was invalid from its inception and if cancelled by you for that reason you would not be required by mandamus to re-instate same."

This letter accompanies the opinion referred to and is to be considered as part of same so far as it relates to the change in wording as herein stated.

Yours very truly,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2144, Bk. 53, P. 396.

APPLICATIONS FOR OIL AND GAS LEASES.

All applications for mineral leases as provided for in Chapter 19, Acts of the Second Called Session of the Thirty-sixth Legislature, must be considered on the day and at the hour designated in the notice sent out by the Land Commissioner.

If an applicant mails or sends his application for land coming on the market October 16th and his application is received by the Land Commissioner prior to October 16th but by reason of an ambiguous and uncertain endorsement on the envelope containing the application his bid is not discovered until some time subsequent to October 16th, it cannot then be considered.

The land was advertised to be awarded on October 16th and the award made on that date is binding on the State. A person to whom a mineral lease is awarded has the right to know that his title is good and that it will not be disturbed by the State some time in the future because a bid higher than the one he made and which was accepted by the State has been found.

AUSTIN, TEXAS, October 31, 1919.

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

DEAR MR. ROBISON: I have your letter of October 25, addressed to the Attorney General, enclosing an envelope in which was received by you an application to lease certain lands included in Chapter 19, Acts of the Second Called Session of the Thirty-sixth Legislature. Your letter reads as follows:

"I am enclosing one of our lists of submerged oil and gas areas coming on the market October 16, 17, and 18, and a copy of an envelope containing three applications from Norman E. Warren, of Friend, Nebraska, two for Goose Creek areas coming on the market October 16 and one for a Matagorda area coming on the market October 17, the endorsement on the envelope reading 'Application to lease minerals, date on market'2 October 16; 1 October 17, 1919.'

"The envelopes containing applications to lease these areas were kept in a receptacle provided for the purpose, to be taken out and opened in accordance with the endorsement therein. At 2 p. m. on the 16th these envelopes were examined for the purpose of opening those endorsed to come on the market October 16th. In this examination the endorsement of October 16th in the double endorsement of 'October 16th and October 17th, 1919,' on the envelope containing Warren's applications was overlooked, only the date of October 17th being caught, and this particular envelope was stacked with those on hand to be opened October 17th. The opening on the 16th was in the presence of some of the applicants and others interested in the proceedings, all of the envelopes taken out of the recptacle having been opened and the results announced, the names of the highest bidders appearing next day in the newspapers.

"At 2 p. m. on the 17th, the receptacle for applications was unlocked

and the envelopes for that date taken out to be opened. Among them was the envelope in question which was opened and the contents ascertained. The two applications of Mr. Warren for Goose Creek areas coming on the market October 16 found therein, which as stated were opened October 17th, carried higher prices than any of the applications opened on the 16th for the same areas.

"Kindly advise me whether I should treat as valid Mr. Warren's application for areas coming on the market October 16th as against those properly endorsed and opened on the 16th for the same areas. Question as to uncertainty of the endorsement, and my authority to have opened the envelope prior to the 17th, and other matters pertaining to it have been raised.'

Section 4 of Chapter 19, Acts of the Second Called Session of the Thirty-sixth Legislature, which is the act authorizing the leasing of lands in the manner described in your letter provides "Applications ......for any area shall be delivered into the General Land Office on or before the day and hour on which the area will be subject to lease in sealed envelopes on which shall be endorsed in substance 'Application to Lease Minerals', and in addition thereto the date the area will be subject to lease...." The endorsement on the envelope containing the applications of Mr. Warren was ambiguous and uncertain, yet, had the date, October 16" been observed, you would, in the opinion of this Department have been justified in opening the envelope on October 16th. For neither the laws nor the rules and regulations of your Department, so far as we are advised, prevent a person from enclosing applications for land coming on the market on two or more different dates in the same envelope.

The provisions of Chapter 19 have not, so far we are advised, been construed or interpreted by the courts. However, the provisions of this Act with reference to applications for leases are somewhat similar to those of Article 5410, Vernon Sayles' Texas Civil Statutes, 1914. Article 5410, which is a section of the act of April 15, 1905, provides in part "When the land is to come on the market at some future date, the envelope shall have endorsed thereon as follows: 'Application to buy land; Sections...., Block...., Grantee...., County ..., Date on market....,'......When the envelope so endorsed is received in the land office, it shall be safely and securely kept and preserved by the commissioner or his chief clerk, without being opened until the day following the date endorsed thereon as to when the land comes on the market, and one or both of them shall begin at ten o'clock a. m. on the day following the day the land comes on the market to open the envelopes for inspection of the applications, and such action as is herein provided for...." In the case of Byrne vs. Robison, 103 Texas, 20, the Supreme Court of this State, speaking through Chief Justice Gaines with reference to said Article 5410, said in part:

"The scheme of the Act of April 15, 1905 (under which the transaction in controversy was had), was to sell the unsold school lands to the highest bidder. In order to accomplish this, bidders were requested to make application in the terms of the Act and to enclose the same in envelopes, addressed to the Commissioner of the General Land Office with certain endorsements thereon, offering to buy the land, giving the amount of the bid and with certain other prerequisites prescribed by law. The envelopes were to remain in the Land Office unopened until the day next after that named as the day of sale and at 10 o'clock of that day were to be opened

and the land was to be awarded to the highest bidder therefor. *The language is peremtory and absolute. There is no provision for a delayed application, from whatever cause the delay may arise.* The idea of the Legislature seems to have been to have the applications all in by a certain day, and that from those that were on file the Commissioner should determine who was entitled to the land and make his award. Those that were not on file could not be considered, *and no provision is made for re-opening the matter and considering them thereafter.* * * * We think the Legislature was of the opinion that the applications on file at 10 o'clock on the day after the date of sale should only be considered, and that the highest bidder among them should be entitled to buy the land."

We are of the opinion that the same construction or interpretation, with certain minor exceptions as to details, such as the difference in the hour in which the applications shall be opened and considered, may be given Section 4 of said Chapter 19.

As stated above, had the date, October 16, on the envelope containing Warren's application been observed, you would have been justified in opening the envelope on that date. This date was not observed; all that was observed was the date, October 17. His applications for the areas coming on the market October the 16th were not before you when you were considering the applications for the areas he applied for. It is not necessary for us to decide whose the fault. The fact remains that his applications were not considered on October 16th, in fact they were not even known to exist on that date, so far as you were concerned, for his envelope containing these applications had been filed with those to be opened on October 17th. At two o'clock p. m., October 16th, applications were to be considered for the areas coming on the market on that date. And in the language of Judge Gaines "The language is peremptory and absolute." And again in the language of Judge Gaines: "There is no provision for a delayed application, from whatever cause the delay may arise." The enevelope, containing the applications of Mr. Warren not on file with those to be opened October 16, and again quoting Judge Gaines: "Those that were not on file could not be considered, and no provision is made for re-opening the matter and considering them thereafter."

These areas coming on the market subject to lease for oil and gas development, October 16, were applied for prior to October 16th. On that date the applications were considered and the areas awarded to the person making the highest bid. The person to whom the area was awarded should know of a certainty that his right to prospect for and develop oil and gas in the land awarded him will not be disturbed by the State. His bid and its acceptance by the State constitutes a contract that is binding on the person who made the bid and on the State. Can the State breach this contract or set it aside on the ground that after it was made it was discovered that another application had been made for this area and the bid offered was higher than the one offered by the person to whom the area was awarded? To state the proposition is to refute it. If the matter of considering these applications could be re-opened one day after the award was made, it could be re-opened ten days, ten weeks or ten months after the award was made, and a person to whom an award was made would never know for certain whether he had a valid lease to the area awarded him. He could not with any assurance expend time, labor and money in

development work. It would not only be a breach of its contract by the State, but it would be detrimental to the interests of the State. It is to the interest of the State to encourage those who lease these areas, to the end that development work may be carried to completion, oil and gas wells brought in and thus the State be enriched.

You are therefore respectfully advised that there is no provision of law authorizing the re-opening of the consideration of applications for the areas coming on the market October 16th, and you are further advised that it would be contrary to sound public policy to do so. The award should stand as it was made when the applications were considered October 16th.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2228, Bk. 54, P. 260.

COUNTY SCHOOL LANDS—LEASE OF SAME.

The commissioners court of a county is authorized to lease the county schools lands of the county in consideration of a certain sum of money to be paid by the lessee, and certain specified permanent improvements to be placed upon and to become a part of the land by the lessee.

AUSTIN, TEXAS, May 25, 1920.

Honorable H. R. McInnis, County Attorney, Llano County, Llano, Texas.

DEAR SIR: The Department is in receipt of yours of April 22, 1920, propounding to us a certain inquiry stated by you as follows:

"Llano County owns 17,712 acres of school lands situated in Tom Green County, Texas. Under the law the commissioners court of Llano County has the control and management of same. Can the commissioners court of this county legally enter into a contract to lease said land for a term of years for a consideration of a certain sum per acre per annum, and in addition to this, certain specified improvements, to be placed on the land by the lessee, said improvements to become the property of the county at the expiration of the lease."

The question here presented seems to have been settled by the case of McInnes vs. Wallace, 38 S. W., 816, decided by our Court of Civil Appeals at San Antonio, in which a writ of error was denied by our Supreme Court. That suit grew out of a contract between McInnes and Atascosa County, according to the terms of which certain school lands belonging to Atascosa County were leased to McInnes for a term of five years at a half-yearly rental of $304.78, payable January 1st and July 1st of each year, the first payment to be made January 1, 1892, the contract further providing that McInnes should fence the land and on so doing was to be allowed therefor a credit of $5.00 on the rental payments first becoming due after the fence was completed. McInnes fenced the land as provided for by the contract but failed to make certain of the rental payments

and suit was brought against him by the county on July 5. 1895, for the sum of $2,443.00 as rental due on the contract, and for interest thereon at the rate of twelve per centum per annum. McInnes contended that the contract was null and void because of its provision with reference to fencing the lands. The case was tried without a jury and judgment was rendered by the trial court in favor of the county for $2,916.89. Both parties appealed. In disposing of the question thus raised, the court says:

"There are only two assignments of error, which present but one point,—the illegality and invalidity of the contract,—because it provided for an application of a portion of the rental money to purposes other than the benefit of the available school fund. It is provided in the Constitution (Article 7, Section 6) that 'all lands heretofore or hereafter granted the several counties of this State for educational purposes are of right the property of said counties, respectively, to which they were granted, and title thereto is vested in said counties, and no adverse possession or limitation shall ever be available against the title of any county. Each county may sell or dispose of its lands in whole or in part in any manner to be provided by the commissioners court of the county. * * * Said lands, and the proceeds thereof, when sold, shall be held by said counties alone as a trust for the benefit of public schools therein; said proceeds to be vested in bonds of the United States, the State of Texas, or counties in said State, or in such other securities, and under such restrictions as may be prescribed by law, and the counties shall be responsible for all investments; the interest thereon, and other revenue, except the principal, shall be available fund.' That the section quoted authorizes the leasing of the school lands by the respective counties has been authoritatively settled by the Supreme Court. Falls Co. vs. De Laney, 73 Tex. 463; 11 S. W., 492. Having the power to lease the lands, there can be no doubt that the reasonable discretion of the commissioners court in fixing the rental price would not be interfered with. Had the commissioners court of Atascosa County leased the schools (lands) for $500.00 less than it did, the contract could not have been attacked for illegality, on the ground of the rental price; and we do not think that the fact that, in addition to receiving that sum, the obligation to build a fence around the school lands was inserted in the contract, would render it null and void. There was no diversion of school funds to other purposes. The $500 had not become a part of the school fund. The court had the authority to lease the land for $2,243, the amount of rental money less $500; and there can be no valid reason why the court, in the interest of the improvement of the land for rental purposes, should not have leased the land for $2,243 and a fence. There was not a diversion thereby of the fund to any other than school purposes. It is a matter of common knowledge that unfenced pasture lands would be almost valueless, and, if the commissioners court was forbidden to make any contract into which anything looking to the fencing of school lands entered, it would practically deny the right of the counties to lease their school lands. No one would be willing to pay full rental value for land, and, in an addition, bear the expense of fencing it, and, if the rent was cut down to a figure that would justify the building of fences, the commissioners court would be accomplishing indirectly what it is contended it could not do directly. We do not deem it necessary to pass upon the power and authority of commissioners courts to make out of the collected rental money of school lands improvements that would be needed to render the lands effective in producing a larger and steadier school fund, for that is not the case presented; but we hold that it is no breach of the trust reposed in a county to lease its school lands, and have the fencing enter into and become a part of the rental contract. In the supplemental petition there is an admission that the fence was built as contracted for by appellant, and this admission obviated the necessity of proof of that fact. While it is provided in the contract that a failure to pay the rent should give the county the option to terminate the

lease, there is no provision for a forfeiture of the amount paid out agreed to be paid for the fence. There is no assignment of error presenting the question as to the error in failing to allow pay for the fence, but in view of the fact that it was admitted in the pleadings that the fence was built we conclude that it is of such a character that it should be considered without an assignment. The $500 should have been deducted from the amount due by appellant, and it is therefore the judgment of this court that the sum of $500 be deducted from the amount of the judgment of the district court, as reformed, it is affirmed."

We are, therefore, of the opinion, and you are so advised, that the commissioners court of your county can legally enter into a contract to lease the school lands of that county for a term of years in consideration of a certain sum per annum to be paid to the county for the benefit of your county available school fund, and may allow as part consideration for such lease the making of certain specified permanent improvements upon said land by the lessee, such improvements to become and remain the property of the permanent school fund of the county as being attached to and constituting in a legal sense a part of such lands.

Yours very truly,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2049, Bk. 52, P. 368.

SCHOOL LANDS—PURCHASE OF EIGHT SECTIONS IN BREWSTER AND PRESIDIO COUNTIES.

1. "A" is not qualified at this time to purchase other school lands in said counties.
2. In second paragraph of your letter, if "B" refers to "A" then above would apply.
3. If "B" is different party, then may purchase under certain conditions, if not otherwise disqualified.

AUSTIN, TEXAS, April 12, 1919.

Honorable J. T. Robison, Commissioner General Land Office, Capitol.

DEAR SIR: On September 30, 1918, you addressed to the Attorney General the following letter:

"In the year 1907, eight sections of land situated in the counties of Brewster and Presidio were awarded to 'A' on his applications filed in this office to purchase the same on condition of settlement and occupancy, one of the sections being designated as the home tract and the other as additional thereto. He failed to file in this office his affidavit showing settlement on the land within the time required by law, and the awards to him were duly cancelled, and the lands put on the market and sold to another person. Is 'A' qualified at this time, under the laws, to purchase other school lands in said counties?

"On the first of September of this year a tract of land situated in Brewster County was placed on the market. 'B' filed his application here to purchase it as containing 255 acres at $5.00 per acre, transmitting with his application $127.50 as first payment, and his note or obligation for

$1,147.50 as the deferred payment. The true and correct area, according to field notes filed in this office prior to September 1, 1918, is 270 acres. The land was appraised at $1.00 per acre and notice thereof given to the county clerk."

Referring to the first paragraph of said letter, I would suggest that Article 5419 Revised Statutes reads, in part, as follows:

"One who has not purchased any land since April 19, 1901, may purchase, on condition of settlement, in the counties of Brewster, Crockett, Edwards, El Paso, Jeff Davis, Kinney, Pecos, Presidio, Sutton, Terrell and Val Verde, not to exceed eight sections of six hundred and forty acres each, more or less, which are wholly within said counties. *One who has heretofore, or may hereafter, purchase a complement as aforesaid shall not purchase any more.*"

Article 5420 R. S. reads as follows:

"The Commissioner o. the General Land Office is hereby prohibited from selling to the same party more than ane complement of four or eight sections of land according to the county; and all applications to purchase land shall also disclose the prior lands purchased by the applicant from the State, if any, and the residence of the applicant at said time; and, if it appear therefrom, or from the records in the Land Office, that said applicant has already purchased land aggregating four or eight sections, according to county, since April 19, 1901, *his application shall be rejected;* provided, this shall not apply to sales made to a purchaser and afterwards canceled as invalid for some reason *other than abandonment, and where* the purchaser himself was not at fault."

Article 5419, Revised Statutes, reads as follows:

"All of the surveyed school land wholly or partly within the counties of Andrews, Brewster, Cameron, Crane, Crockett, Dimmit, Duval, Ector, Edwards, El Paso, Gaines, Hidalgo, Jeff Davis, Kimble, Kinney, LaSalle, Loving, Maverick, McMullen, Midland, Pecos, Presidio, Reeves, Starr, Sutton, Terrell, Terry, Upton, Uvalde, Val Verde, Ward, Webb, Winkler, Yoakum, Zapata and Zavala shall be sold on condition of settlement as provided by this Act and existing statutes, except tracts of one hundred acres or less shall be sold for cash. The land purchased by one, either for cash or on deferred payment without condition of settlement, shall not be computed against him in his purchase on condition of settlement. Every purchaser on condition of settlement shall in person reside continuously on either the designated home tract or on some portion of the land purchased as additional thereto, for three consecutive years next succeeding the date of the award of the home tract, or from the date of the award of the first tract, as additional to a home already owned, as the case may be, including the ninety days allowed to settle. The proof of such settlement and residence shall be made as now provided by statute."

Article 5444 Revised Statutes reads as follows:

The Commissioner of the General Land Office shall prescribe suitable regulations whereby all purchasers shall be required to reside upon, as a home, the land purchased by them for three consecutive years next succeeding the date of their purchase, except when otherwise provided. Such regulations shall require the purchaser to reside upon the land for three consecutive years herein mentioned, and to make proper proof of such residence and occupancy to the Commissioner of the General Land Office within two years next after the expiration of said three years, by his affidavit, corroborated by the affidavits of three disinterested and credible

persons, to be certified by some officer authorized to administer oaths; and on making such proof the Commissioner shall issue to the purchaser, his heirs and assigns, a certificate showing that fact. If any person has sold the whole, or any part of, his purchase under this or any former law, his vendee, or if he refuses to do so, the vendor himself, may make proof of occupancy as provided herein."

Chapter 150, Acts of 1915, undertakes to make some changes or additions to the public land laws and the articles mentioned, but these articles do not appear to be repealed.

From the first paragraph in your letter, it appears that the purchaser, "A," appeared to be at fault in forfeiting the lands mentioned. The latter part of the Article 5420 provides, in fact, that if the awarding should be cancelled on account of abandonment by the purchaser or on account of the purchoser's fault, then he cannot become a purchaser a second time; provided his first application included the eight sections in said counties for which he was entitled to make purchase.

Referring to the second paragraph of your letter, if "B," referred to therein, means the same person as "A" represents in the first paragraph, then it would appear that "A" has already had the benefit of his purchase rights, he having previously purchased eight sections as shown by the first paragraph; however, if "B" is a different person, then a different question arises.

It would appear that he has undertaken to purchase said land on a basis of 255 acres when the land office records show there to be 270 acres. If this be the only person making application for the purchase of this land, the price offered might be considered as it has been placed upon the market by the Land Office at $100 per acre, and this could be done regardless of the price per acre mentioned in the application to purchase.

As in the case of Marshall vs. Robison, 191 S. W., 1136, it seems that the aggregate price prevailed instead of the actual price per acre mentioned. It might appear from this decision that the "price per acre was immaterial" when the cash and the obligation sent in by the purchaser aggregated a fixed amount, showing the intention of, and the price offered by, the bidder.

However, if there is only one bidder, it would appear that the Commissioner should sell same in aggregate price or in price per acre on a basis of 270 acres in the tract; and he should require the purchaser of this land to make such corrections, if there are no other purchasers bidding more, fixing the price at $5.00 per acre as shown by the bid of the applicant to purchase.

The rule of the office in this character of case should be that it would protect the interest of the State to the best advantage.

Yours very truly,

W. F. SCHENCK,
Assistant Attorney General.

Op. No. 2105, Bk. 53, P. 198.

PUBLIC LANDS.

Acts 1913, Chapter 160.

1. Board of Appraisers, authorized to revalue lands only.
2. Commissioner of Land Office only person authorized to reclassify.

AUSTIN, TEXAS, June 25, 1919.

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

DEAR SIR: On June 21, 1919, you addressed to C. M. Cureton, Attorney General of Texas, the following inquiry:

"On June 4, 1909, J. T. Grimes purchased Section 82, Block 11, H. & G. N. Ry. Co., in Pecos County, as grazing and mineral. Thereby the minerals were reserved to the State.

"July, 1914, this land was forfeited for nonpayment of interest and, under the Reappraisement Land Act of 1913 and a further amendment of 1915, this land was reappraised by the Board of Land Appraisers and reclassified as grazing, and the owner repurchased the land December 6, 1915.

"The question arises as to whether or not the Board of Land Appreaisers had authority to classify the land, or rather reclassify, in addition to their authority to revalue the land. If they had authority to reclassify the land as well as to reappraise the land, then the new sale under dry grazing would relinquish the mineral that the State had theretofore held. If the Board of Land Appraisers did not have the authority to reclassify the land, then such reclassification would be a nullity and the State would still own the minerals under the original purchase.

"There are other sales that are the reverse of this; that is, were sold as grazing or agricultural, and that were by the Board of Appraisers classified as mineral land and so repurchased. Which position do you deem lawful for this Department to assume? That is, would the State hold the minerals according to the original classification or according to the reclassification by the Board of Appraisers?"

The Act of the Thirty-third Legislature, Regular Session, Chapter 160, was passed for the express purpose of relieving the drouth sufferers in Western Texas who had purchased school or other public lands at a greater price than the real value of the same. It was intended to cover lands purchased between January 1, 1907, and January 1, 1913. The caption of the Act reads as follows:

"An Act to provide that owners of public free school land purchased from the State of Texas after January 1, 1907, and prior to January 1, 1913, on condition of settlement and residence, which land may hereafter be forfeited for non-payment of interest as now provided by law provided said forfeiture was caused by reason of interest accrued or accruing, prior to the taking effect of this Act, shall have the right to repurchase a complement of Sections of said land as now provided by law and leaving any lien and valid contractual right existing in and to the land so repurchased unimpaired, providing for the creation of a commission to re-value such land as may be desired to be repurchased under this Act and declaring an emergency."

Section 3 of said Act creates a Board of Appraisers consisting of three members to be composed of the Commissioner of the General Land Office and two members to be appointed by the Governor of the

State. By said Act and clause, said Board of Appraisers and each member thereof were clothed with the authority and power to administer oaths, to take testimony, etc., and, when organized, it was the duty of said Board to notify the Commissioner of such organization and that it was ready to receive from him the list of lands, names of forfeiting purchasers, and other information and data, as provided in Section 2 of said Act—which Section 2, in substance, provides when any of the lands included in said Act have been forfeited for non-payment of interest, the Commissioner of the General Land Office shall forward such list of lands to the proper county clerk, and within 30 days after the receipt of said list by the clerk, the owner mentioned in the preceding section, who may wish to repurchase any or all of the land, not to exceed one complement of sections, that he may have permitted to be forfeited, shall advise the Commissioner of the General Land Office of such wish. As soon as practicable after the receipt of such advice, it was the duty of the Commissioner to furnish said Board of Appraisers a complete list of such lands, together with the names of the persons who have advised him of this desire to purchase said land, etc., giving the post-office address of each person, *as well as such other information he may have in his possession as will enable said board to properly appraise said lands as hereinafter provided.*

Said section 3 further provides that, upon receipt of such data and information, said board shall ascertain the *reasonable values* of said land and appraise same accordingly, and shall prepare triplicate notices of the appraisement and *classification.*

It will be noticed that the word "classification" is not used in this Act except in said Section 3 as above underscored, and evidently means with reference to appraisement of valuations. The caption of the Act provides that said Commission should have the authority to *revalue* such lands and evidently it was the intention of the Legislature to express in the caption the full authority of the Commission, and this being true, it had only such authority as was delegated by the caption of the Act and by the Act itself, which authority was limited to the revaluation. This is still clearer by referring to the above clause again wherein it first says:

> "Said Board shall ascertain the reasonable values of said land and appraise accordingly."

After thus revaluing and appraising, the expression follows:

> "Shall prepare triplicate notices of the appraisement and classification."

This last clause was placed therein for the purpose of requiring notices to be sent, one to each of the owners and to the Commissioner of the General Land Office and retaining one in its possession until completion of its duties under said Act. Therefore, such notices could contain only the valuations as appraised by said Board, and the word "classification" appearing as it does adds nothing to the duties of the Board; neither does it broaden the latitude of their authority.

Therefore, we conclude that such Board of Appraisers had no statutory authority as such Board to reclassify the lands designated in

said Act. They simply took the lands as they found them under the report of the Commissioner, and after due inspection and proper consideration, they either raised the valuation placed thereon by the Land Commissioner, or permitted it to stand, or lowered the same in keeping with their judgment as to what the real value of said lands were. They had no authority to go further, either individually or collectively as such Board.

A question might arise, however, as to the acts of the Land Commissioner, being a member of said Board and, at the same time, the Land Commissioner of Texas. Under Article 5407, Vernon's Sayles' Civil Statutes, the Commissioner of the General Land Office was authorized to classify the lands in question. Said Article reads, in part, as follows:

"The Commissioner of the General Land Office may, from time to time, as the public interests may require, *classify or reclassify, value or revalue* any of the lands set apart for the benefit of the public free school, lunatic asylum, the blind institute, the deaf and dumb institute, and the orphans' home, etc."

Also, under the mineral statutes, the Commissioner of the Land Office, during the time referred to, was authorized and required to classify certain public lands as mineral lands. Therefore, if the lands inquired about were reclassified by the Land Commissioner and the proper records made in his office, independent of the acts of said Board, it is likely that such reclassification would be binding upon the lands in question. I can find no protection in Chapter 160 from such independent acts of the Land Commissioner when such land owner permitted his lands to forfeit, and were so forfeited. It might be that the Land Commissioner could make a change in the classification that was really not intended by the Act. Said Act does not repeal any existing laws, neither does it undertake to abridge the duties of the Land Commissioner, and in case he so acted, there might be some question as to the effect of such reclassification made properly and legally in his office by him as such officer.

There can be no question as to the Commissioner's right and duty to take full control over said lands and reclassify same, if the owner of said land, at the date of forfeiture, should not exercise his right to repurchase as Section 40 of said Act provides, as follows:

"If the owner, at the date of forfeiture, shall not exercise his right to repurchase, the Commissioner of the General Land Office shall again place the land on the market for sale, as is now provided by law for the sale of leased land. In all such sales, the same terms, conditions, limitations, penalties and requirements now prescribed by law for the sale of other public free school lands in the same county and the payment therefor, shall govern such sale."

Said Act provides:

"If such forfeiting owners desire to repurchase the land at the *appraised value* placed thereon by said Board, they shall file their applications therefor in the General Land Office within 90 days after the date of notice of appraisement, together with 1/40th of the appraised value and their obligations for the remaining portion of the purchase price bearing 3% interest per annum."

It evidently was the intention of the Act to permit the owner of the land to voluntarily forfeit the same and repurchase said lands, the owner having exclusive right to do so during said 90 days period, at the price of valuation fixed thereon by said Board, that being the only charge contemplated by said Act during said time. Therefore, I assume that the Land Commissioner took no steps as such commissioner which would change the title or status of said lands during said time.

Under the case of Curry vs. Marshall, page 895, first column, section 5, it is held:

"The land being already classified and appraised, it was immaterial whether or not a reclassification and reappraisement was made and notice thereof given to the clerk. Such classification and appraisement having been made prior to the sale to Smith in 1910, under the law, the reclassification and reappraisement was not necessary."

This question arose, however, under said Chapter 160, but after the original owner of the land had failed to exercise his exclusive rights to repurchase, said lands were forfeited. Therefore, it would seem that, after the expiration of said 90 days, said forfeited lands were entirely beyond the control of said Board and within the exclusive jurisdiction of the Land Commissioner.

Therefore, we have reached the conclusion as set forth hereinabove.

Yours very truly,

W. F. SCHENCK,
Assistant Attorney General.

Op. No. 2068, Bk. 52, P. 569.

SALES UNDER EIGHT SECTION ACT—SUBSTITUTE PURCHASERS.

1. Substitute purchasers, who have complied fully with the law, may hold lands purchased though grantor was not qualified purchaser.

May 2, 1919.

Hon. J. T. Robison, Land Commissioner, State Office Building.

DEAR SIR: On May 5th you addressed this Department the following inquiry:

"Under the Land Sales Act of 1915 this Department construed that Act to authorize one to purchase eight sections of school land in the non-settlement counties, regardless of the quantity theretofore purchased. In conference with your Department under a previous administration, that view was concurred in. I think a written opinion was given, but am unable to find it. In the case of Ford vs. Robison, 201 S. W., 401, the Supreme Court held such sales were void.

"During the Regular Session of the Thirty-sixth Legislature, which adjourned in March, present year, a bill to validate those excessive sales was defeated. This Department is getting ready to cancel such sales as the Ford case held to be void. It is found that some of such sales have been transferred to other persons. Your opinion upon the validity of such of these sales as have been transferred to others is desired on account of the

holding by the Courts of Civil Appeals and Supreme Court in the cases of Johnson vs. Bibb, 75 S. W., 71, and Burnett vs. Womack, 85 S. W., 1199.

Respectfully,

"P. S.—Assignees under the transfers referred to have been substituted on the records of this office."

We understand from the above letter that quite a number of sales were made under the Land Sales Act of 1915 to persons ineligible to by said lands on account of disabilities of said purchaser or purchasers under the provisions of Sales' Revised Statutes, Article 4520; as well as the holding of Ford vs. Robison, 201 S. W., p. 401. The effect of the holding in said case "was to read into Section 8 of said Act of 1905 the restrictions set out in said Article 5420 which forbade the Commissioner to sell to the same party more than one complement of four or eight sections of land, according to the county." The articles of Revised Statutes, 1911, referred to are as follows:

Art. 5418: "One who has not purchased any land since April 19, 1901, may purchase, on condition of settlement, in the counties of Brewster, Crockett, Edwards, El Paso, Jeff Davis, Kinney, Pecos, Presidio, Sutton, Terrell and Val Verde, not to exceed eight sections of six hundred and forty acres each, more or less, which are wholly within said counties. One who has heretofore, or who may hereafter, purchase a complement as aforesaid, shall not purchase any more. One who has purchased or may hereafter purchase on condition of settlement four sections of six hundred and forty acres each, more or less, wholly or partly within any county other than those hereinabove named since said date, shall not purchase any more on condition of settlement. One who has purchased less than a complement, as aforesaid, may hereafter purchase in any county such number of sections as his lack of a complement in the county of the former purchase bears to a complement in the county of such former purchase. One who has heretofore purchased land on condition of settlement, which lies partly within an eight-section county and partly within a four-section county, shall be considered for the purpose of future purchase by him as having purchased in a four-section county. Every additional survey applied for shall be situated within five miles of the designated home tract, except the survey on which the lessee, who may apply (to buy) out of his lease, may have placed permanent and immovable improvements of the value of five hundred dollars, need not be within such radius. No survey shall be sold in any county except as a whole, notwithstanding it may be leased in two or more parts.

Art. 5419. "All of the surveyed school land wholly or partly within the counties of Andrews, Brewster, Cameron, Crane, Crockett, Dimmit, Duval, Ector, Edwards, El Paso, Gaines, Hidalgo, Jeff Davis, Kimble, Kinney, LaSalle, Loving, Maverick, McMullen, Midland, Pecos, Presidio, Reeves, Starr, Sutton, Terrell, Terry, Upton, Uvalde, Val Verde, Ward, Webb, Winkler, Yoakum, Zapata and Zavala shall be sold on condition of settlement as provided by this Act and existing statutes, except tracts of one hundred acres or less shall be sold for cash. The land purchased by one, either for cash or on deferred payment without conditions of settlement, shall not be computed against him in his purchase on condition of settlement. Every purchaser on condition of settlement shall in person reside continuously on either the designated home tract or on some portion of the land purchased as additional thereto, for three consecutive years next succeeding the date of the award of the home tract, or from the date of the award of the first tract, as additional to a home already owned, as the case may be, including the ninety days allowed to settle. The proof of such settlement and residence shall be made as now provided by statute.

Art. 5420. "The Commissioner of the General Land Office is hereby prohibited from selling to the same party more than one complement of

four or eight sections of land, according to the country; and all applications to purchase land shall also disclose the prior lands purchased by the applicant from the State, if any, and the residence of the applicant at said time; and, if it appear therefrom, or from the records in the land office, that said applicant has already purchased land aggregating four or eight sections, according to county, since April 19, 1901, his application shall be rejected; provided, this shall not apply to sales made to a purchaser and afterwards canceled as invalid for some reason other than abandonment, and where the purchaser himself was not at fault."

The Land Act passed by the Thirty-fourth Legislature (see laws Regular Session, Chapter 150), in part read as follows:

Section 1. "On the first day of September, 1915, and on the first day of each January, May and September of each year thereafter, the surveyed lands and portions of surveyed and unsurveyed land shall be sold under the terms, conditions, limitations and regulations as is now provided by law, except as changed herein.

Section 2. "Land that is situated in the counties of Andrews, Brooks, Crane, Cameron, Duval, Ector, Gaines, Hidalgo, Jim Hogg, Jim Wells, Kinney, Kleberg, La Salle, Loving, Maverick, McMullen, Midland, Starr, Sutton, Travis, Terry, Upton, Uvalde, Ward, Webb, Willacy, Winkler, Yoakum and Zapata may be sold in quantities not to exceed two sections of 640 acres each, more or less, to one person, and in 80-acre tracts, or multiples thereof, and on condition of actual settlement of some portion of the land so purchased and continuous residence thereupon for three consecutive years, as now provided by law.

Section 3. "Land that is situated in the counties of Brewster, Bandera, Culberson, Crockett, Edwards, El Paso, Jeff Davis, Kerr, Kimble, Menard, Pecos, Presidio, Real, Terrell and Val Verde may be sold in quantities not to exceed eight sections of 640 acres each, more or less, to one person, and in whole tracts only, and without condition of settlement and residence."

* * *

As stated by your letter the case of Ford vs. Robison holds that a person who has purchased his complement of public lands referred to in said statutes is not eligible to purchase further or additional lands. I note the postscript in your letter which is as follows.

"Assignees under the transfers referred to have been substituted on the records of this office."

I gather that you mean that such that such assignees or transfers as you refer to in your letter have complied with the requirements of Article 5436, Vernon's Sayles Statutes, and thereby prior to the intervening of the rights of any other person or persons became the substituted purchaser from the original purchaser, and the original purchaser, whether he was qualified or disqualified to purchase, was released from all obligations incident to said purchase.

Said Article 5436 reads as follows:

"Purchasers shall have the option of paying the purchase money for their lands in full at any time after they have occupied the same for three consecutive years; and when they have made such payment in full, together with the proof that they have occupied the land for three consecutive years, they shall receive patents for the same upon payment of the patent fee prescribed by law. Purchasers prior to August 12, 1907, may also sell their lands, or a part of the same, in quantities of forty acres, or

multiples thereof, at any time after the sale; and in such cases the vendee, or any subsequent vendee, or his heirs or legatees, shall file his own obligation with the Commissioner of the General Land Office, together with the duly authenticated conveyance or transfer from the original purchaser and the intermediate vendee's conveyance or transfer, if any there be, duly recorded in the county where the land lies, or to which said county may be attached for judicial purposes, together with his affidavit, in case three years' residence has not already been had upon bare land and proof made of that fact, stating that he desires to purchase the land for a home, and that he has in good faith settled thereon, and that he has not acted in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase, save himself; and thereupon the original obligation shall be surrendered or canceled or property credited, as the case may be, and the vendee shall become the purchaser direct from the State, and be subject to all the obligations and penalties prescribed by law, and the original purchaser shall be absolved in whole or in part, as the case may be, from further liability thereon; and, if he or his vendor has already resided on his home section for three years, or when he or his vendor, or both together, shall have resided upon it for three years, the additional lands purchased may be patented at any time."

The case of Fitzhugh vs. Johnson, 133 S. W., 913, holds substantially, where a purchaser of school land abandons his purchase, the substitution of a third person for another person was complete and took the land off the market though the attempted sale to the second purchaser was void for his failure to deposit the first payment with the State Treasurer. From this decision it would seem that although the original sale was void, if a substitute purchaser filed his obligations in the land office and pursued all the requirements of the statute, he becomes the original purchaser. This is upheld in a very well considered opinion by Chief Justice James in the case of Davis vs. Yates, 133rd S. W., p. 281, which opinion was upheld by the Supreme Court, said court refusing a writ of error therein. This case in substance held that * * * "a purchaser of the rights of one to whom school land has been awarded occupies by substitution, on the Commissioner accepting him, the possession of an original purchaser, but he takes subject to any right to the land that intervened between the award and his purchase." This statement is quoted from the syllabus. In these cases quite a number of other cases are cited upholding these propositions. Among them are Johnson vs. Bibb, 75th S. W., p. 71, and Burnett vs. Womack, 85 S. W., p. 1199.

It is the general rule that forfeitures of land are not favored when there has been a legal compliance on the part of any holder of the same, and the person first complying with the requirements of law is the person whose interest is first cared for. Therefore from the holding of the courts as above indicated, we assume that where substitute purchasers come within the holdings of these decisions, although the original purchaser might not have had the legal right to have made and carried out the terms of the purchase, that such subsequent holder will be permitted to redeem the lands, if he is in every way qualified to do so and has complied fully with the law regulating substitute purchasers, and no right of third persons have intervened. It is evident from said case of Ford vs. Robison,

however, that all other persons who suffered under the disabilities referred to in your letter would be debarred from purchasing or holding said lands.

Yours very truly,

W. F. SCHENCK,
Assistant Attorney General.

Op. No. 2067, Bk. 52, P. 543.

PUBLIC LANDS—MINERAL CLASSIFICATIONS—REINSTATEMENT.

1. Owner of school lands forfeits rights thereto unless he carries out all obligations of purchase.
2. Original purchaser has statutory right to reinstate, provided rights of third party may not have intervened.
3. Purchase of said lands after forfeiture is intervening party or right.
4. Reclassification different to former classification, reserving minerals therein, is change of status, preventing reinstatement.

May 7, 1919.

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

DEAR SIR: On May 1st, 1919, you addressed the following inquiry to this Department:

"October 30, 1899, J. M. Kidd purchased the NE ¼ section 22, Block 6, Certificate 2/845, T. & P. Ry. Co., Stephens County, as agricultural land.

"Dec. 30, 1915, the purchase was forfeited for non-payment of interest and the land was classed a mineral and agricultural and placed on the market regularly and on May 1, 1916, V. Griffin purchased this tract as an actual settler, but failed to file in this office his affidavit of settlement, and thereby the land became forfeited to the State, having noted on it "forfeited on account of failure to file affidavit of settlement," that notation of cancellation having been made Feb. 9, 1917.

"On the same date, towit, Feb. 9, 1917, all the accrued interest on the former purchase by J. M. Kidd was tendered and the original sale reinstated. Feb. 26, 1919, T. K. Shuler filed a mineral application with the county clerk and filed in this office on March 27th. It was rejected because of the reinstatement of the former sale.

"The applicant now insists on his rights, on the theory that the award to V. Griffin was an intervening right such as would preclude the reinstatement of the land and minerals in J. M. Kidd. As stated, the application here was rejected on the theory that the V. Griffin was never a completed sale, but inchoate uncompleted right, which could have ripened into a perfected and completed title by the settlement and filing the affidavit of settlement as required by law.

"I will thank you for an opinion stating which theory is correct. That is, did the award to V. Griffin act as an intervening right that would prevent the reinstatement of the sale and the minerals in the original purchaser, or will the mineral application be reinstated?"

In the beginning, for a better understanding of this opinion, and application of the law to a greater portion of the same, we refer you to an opinion addressed to you by this Department on April 10th, 1919, now on file in your Department.

Said purchaser, J. M. Kidd, had the legal right to purchase said quarter section of land October 30, 1899, and become owner thereof by complying with the terms and conditions of Revised Civil Statutes of the State of Texas, Chapter 99, and particularly Articles 5409 et seq. The award by the Land Commissioner to said person and his payment of the one-fortieth cash required, and the execution of his obligation to the State for the remaining unpaid purchase money, established an interest in said land under the statute which J. M. Kidd could transfer by deed. However, such interest was nothing but a right to acquire a title by compliance with the terms of the contract, and performance of the conditions precedent, which were the payment of the interest and the principal according to the terms expressed in the law and the agreement.

Sayles' Revised Statutes, Article 5423, read in part as follows:

"If upon the first day of November of any year any portion of the interest due on any obligation remains unpaid, the Commissioner of the General Land Office shall endorse on such obligation, "Land Forfeited," and shall cause an entry to that effect to be made on the account kept with the purchaser; and thereupon said land shall thereby be forfeited to the State without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of this chapter, or any future law; provided, the purchaser of land prior to August 20, 1897, shall have the right, at any time within six months after such endorsement of "Lands Forfeited," to institute a suit in District Court of Travis County, Texas, against the Commissioner of the General Land Office, for the purpose of contesting such forfeiture and setting aside the same, upon the ground that the facts did not exist authorizing such forfeiture, but, if no such suit has been instituted as above provided, such forfeiture of the Commissioner of the General Land Office shall then become fixed and conclusive."

Therefore, it is held in Fristoe vs. Blum, 45 S. W., 998, as follows:

"We conclude that the eleventh section of the Act of 1887 (which is substantially the above article of the Revised Statutes) was intended by the Legislature to, and properly construed, did, empower the Commissioner of the General Land Offie to rescind the sales made of the free school lands in case the purchasers failed to comply with the terms of the purchase, whether the sale was made before or ofter the enactment of the law, and that the eleventh section of the Act is not subject to the objection that it violates the Constitution in any particular."

This holding is also upheld in the case of Waggoner vs. Flack, 51 S. W., 330, and Lawless vs. Wright, 86 S. W., 1039. The said J. M. Kidd, according to the statement of the Commissioner's letter, failed to carry out the terms of his contract by not paying the interest on the indebtedness that he owed for said land as required by law, and it was the legal duty of the commissioner to forfeit said land and place the same on the market under the laws existing at said time of forfeiture, or any future law governing said lands.

Revised Statutes, Article 5423, reads, in part, as follows:

"In any case where lands have been forfeited to the State for the non-payment of interest, the purchasers, or their vendees, may have their claims reinstated on their written request, by paying into the treasury the

full amount of interest due on such claim up to the date of reinstatement, provided that no rights of third persons may have intervened."

There have been several mineral acts passed by the Legislature of the State of Texas, and I refer to Revised Statutes, 1895, Article 3481, and succeeding articles in the chapter therein contained, also to Revised Statutes, 1911, Article 5904, and succeeding articles in the chapter in which the same is contained. However, the forfeiture of the lands in question was not until December 30, 1915, at which time such of the articles of the Revised Statutes referred to above then in force, and Chapter 173 of the Acts of the Thirty-third Legislature, beginning at page 409, were in force.

Section 1 of said Act reads as follows:

"All public school, University, Asylum and the other public lands, fresh water lakes, islands, bays, marshes, reefs, and salt water lakes, belonging to the State of Texas, and all lands which may hereafter be so owned and all lands which have been heretofore sold or disposed of by the State of Texas, with a reservation of minerals or mineral rights therein, as well as all lands which may hereafter be sold with reservation of minerals or mineral rights therein, and lands purchased with relinquishment of the minerals therein, shall be included within the provisions of this Act and shall be open to mineral prospecting, mineral development and the lease of mineral rights therein in the manner herein provided. Only citizens of the United States and such other persons as have heretofore declared or shall hereafter declare their intention of becoming such shall be entitled to acquire any rights under this Act. It is declared to be the policy of the State to open all such lands to mineral prospecting and development on a system providing for the payment into the State Treasury to the credit of the permanent free school, University, Asylum or other funds, of certain rents and royalties upon the gross output of any mineral or mineral product thereon."

Section 2 of said Act reads as follows:

"Any person or association of persons, corporate or otherwise, desiring to obtain the right to prospect for and decelop petroleum, oil or natural gas that may be in any of the surveyer public free school land, University or Asylum or other public lands of the State, which may be unsold at the time such desire is made known as herein provided, or in any of said land which has heretofore been sold with the reservation of minerals therein to the public free school fund or other fund and such of said land as has heretofore been purchased with the relinquishment of the minerals therein by the purchaser, or in any of said land that may hereafter be sold with the reservation of minerals therein, also in any of the fresh water lakes owned by the State or public free school fund or other fund, and also in any of the islands, bays, marshes, roofs and salt water lakes, may do so under the regulations, terms and conditions of this Act, together with such rules and regulations as may be adopted relative thereto and necessary for the execution of the purpose of this Act by the Commissioner of the General Land Office."

We have seen that the lands were forfeited and of course were returned to the fund to which they originally belonged, which I presume was public free school land. It will be seen in the latter part of Section 1 that it is declared to be the policy of the State to open all such lands to mineral prospecting and development on a system providing for the payment into the State Treasury to the credit of the

permanent school fund, University, Asylum and other funds of said royalties, rents, etc.

The first and last part of Section 2 in substance provides:

"Any person desiring to obtain the right to prospect for, develop petroleum, oil or natural gas that may be in any public free school lands, etc., may do so under the regulations, terms and conditions of this Act, together with such *rules* and *regulations* as may be adopted relative thereto and necessary for the execution of the purpose of this Act by the *Commissioner of the General Land Office.*"

The Commissioner upon the date of the forfeiture of said land, in the beginning reclassified said lands and placed the same on the market as mineral lands and agricultural lands, which he had a right to do under the law and the rulings of said office. This segregated the mineral right from the surface right and of itself was a change from the original status of the land when purchased by J. M. Kidd, as the same at that time had no mineral classification.

According to your letter, on December 30, 1915, said purchase was forfeited for non-payment of interest, and the lands in question were classified by you under the requirements of law as mineral and agricultural lands, and legally placed on the market; and on May 1, 1916, V. Griffin purchased said tract of land as an actual settler, but failed to file in the land office his affidavit of settlement, and thereby the land became forfeited to the State, you having noted on the proper record of said lands "forfeited on account of failure to file affidavit of settlement," which notice of cancellation was made February 9, 1917. As V. Griffin made application to purchase said land as an actual settler after the classification of same as mineral and agriculture, he became the purchaser only of the surface of the soil. the surface and mineral rights having been segregated legally by your re-classification December 30, 1915, and the mineral rights stood open for filing by said purchaser, or any other person, under said Acts of 1913, but which, as I understand, had not been filed upon by any one on February 9, 1917, the date of the second forfeiture.

The said V. Griffin had a right to purchase said tract of land as an actual settler on May 2, 1916, or he, or any other person had a right to file a mineral prospect application on said land on said date under the land and mineral laws then in force, and herein referred to, said land having prior to that time been forfeited by J. M. Kidd, and legally re-classified as mineral and grazing lands prior to said date.

Such a filing constituted an interest in land a sseen by the above citations and decisions, as well as the statutes, and carried with it a right enforcible in law, and said person was a third party as contemplated by Article 5423. The above statutes says:

"In any case where lands have been forfeited to the State for non-payment of interest the purchasers, or their vendees, may have their claims re-instated on their written request by paying into the treasury the full amount of interest due on said claim, up to the date of reinstatement, *provided that no rights of third persons may have intervened.*"

It is well settled that if V. Griffin's claim or title had never been

forfeited thereafter, J. M. Kidd could have no right to reinstate all or any part of said land on his original contract. To support said statement we quote from Lawless vs. Wright, 86 S. W., bottom second column, p. 1040.

"It is the settled law that the State of Texas has the power and authority to forfeit, through a declaration of the Land Commissioner, a sale of its lands, for the non-payment by the vendee of the interest on the purchase money. Fristoe vs. Blum, 92 Tex., 76, 45 S. W. 998; Standifer vs. Wilson, 93 Tex. 232, 54 S. W., 898; Briggton vs. Comanche County, 94 Tex. 599, 63 S. W., 857. Such being the law, the act of the Land Commissioner in forfeiting the purchase of the land by Fancher had the effect of restoring such land to the public domain of the State. When the declaration of forfeiture was made, appellee had been in possession of the land for only seven years, and, of course, had not perfected his title by 10 years' limitation. Statutes of limitation not applying to the sovereign, the moment the forfeiture of Fancher's title went into effect the statute of limitation as to the land was interrupted. After the forfeiture the land assumed the same status that it occupied before the sale to Fancher, and the State clearly had the right, which it exercised, of placing the land on the market again and selling it. It is provided in Article 4218L, Sayles' Ann. Civ. St., 1897, that when a forfeiture takes place the land 'shall revert to the particular fund to which it originally belonged, and be resold under the provisions of this chapter **or any future** law.' It is true that in Article 4218f it is provided that, 'in any case where lands have been forfeited to the State for the non-payment of interest, the purchasers or their vendees may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on such claims up to the date of reinstatement; provided that no rights of third persons may have intervened.' But that provision in no way weakens or affects the proposition that a forfeiture *restores the land to the public domain and reinvests the title in the State.* In this case, after the forfeiture, the state exercised its right to again sell the land; and, had it not been for the voluntary relinquishment of his title by D. Lawless, the purchase made by Fancher could never have been reinstated. The forfeiture destroyed his claim to the land completely and the privilege given to him to have it restored depended on certain payments, and on the rights of others not intervening. That privilege did not limit the rights of the State in the land, no more than if it had been provided that the original purchaser should have the right to purchase again if no one else had purchased, and that credit would be given for the amounts already paid. In other words, the provision as to reinstatement did not have the effect of continuing the title, whether legal or equitable, in the purchaser, after the forfeiture; and, although he may have fully intended to have his claim reinstated at some future time, he could not, until that reinstatement was made, have maintained a suit for possession. He did not have any possession or right of possession to be invaded by appellee after the forfeiture, and limitation could not run against him."

The Court says further:

"It is provided in Revised Statutes, Article 4218L that when a forfeiture takes place the land shall revert to the particular fund to which it originally belonged, and be sold under the provisions of this chapter, or *any future law.* And further, in any case where lands have been forfeited to the State for the nonpayment of interest the purchasers, or their vendees, may have their claims reinstated on their written requests, by paying into the treasury the full amount of interest due on such claim up to the date of reinstatement; provided that no rights of third persons may have intervened."

The Court says further:

"That that provision in no way weakens or affects the proposition that a forfeiture restores the land to the public domain and reinvests the title in the State. In this case after the forfeiture the State exercises its right to sell the land. * * *. The forfeiture destroyed his claim to the land completely, and the privilege given to him to have it restored depended on certain payments, and on the *rights of others not intervening.* * * * In other words, the provision as to reinstatement did not have the effect of continuing the title, whether legal or equitable, in the purchaser after the forfeiture; and, although he may have fully intended to have his claim reinstated at some future time he could not, until that reinstatement was made, have maintained a suit for possession. He did not have any possession or right of possession to be invaded by appellee after the forfeiture."

As to the question as to whether or not the sale to V. Griffin was never a completed sale, but an inchoate uncompleted right which could have ripened into a perfected and completed title by the settlement and filing the affidavit of settlement as required by law, we have to say: * * *

Volume 1, page 1006, Bouvier's Law Dictionary—Inchoate right, is defined to be "that which is not yet completed or finished. Contracts are considered inchoate until they are executed by all the parties, etc."

Under the Texas laws from the beginning of the Republic, where the law guaranteed to a citizen of Texas the right to procure land, said lands to be taken indiscriminately from the public domain of Texas, the same was but an inchoate right to get that quantity of land out of some part of the public domain in the manner to be prescribed by law. But such a right was held as early as the Forty-third Texas Report to be "*A right or interest in lands of such a character as to be the subject of contract.*" Therefore, we see that an inchoate right, where the land is not specifically designated, is an interest in land, and in this case, where the land is surveyed and designated, there can be no question that it is an interest or a right of a third person which may intervene to destroy the title of a prior owner of the lands as contemplated by the above statute.

In support of this the case of Johnson vs. Newman, 43rd Texas, page 639, reads as follows:

"Though at the date of this contract Mitchell had neither a title to the land in controversy nor to the certificate under which it has been acquired, still there was, undoubtedly, guaranteed to him by the constitution the right to this amount of land on his complying with the requirements to be prescribed by law. This right, though neither real nor personal property *in esse*, was nevertheless an inchoate right to get that quantity of land out of some part of the public domain at the time, and in the manner to be afterwards provided and determined by the Government. It was a right or interest of such character as to be the subject of a contract."

It was held on the same question of inchoate rights in the case of Hines vs. Thorn, 57 Texas, p. 102, that inchoate claims to land against the government were the subject matter of sale. These cases refer to unlocated certificates, but at the same time they show that they carry with them an interest in land capable of being transferred, and if the same is capable of being transferred, it could serve as an

intervening right, and particularly so after said certificate had been located on a defined and surveyed tract of land.

The article of the statute under which the commissioner of the land office sought to cancel the claim and location of V. Griffin to the lands in question is part of Article 5416, Sayles' Civil Statutes, which reads as follows:

"At the same time the applicant applies to purchase the land, he shall also deposit in the land office one-fortieth of the aggregate price of the same as the first payment thereon. A purchaser shall not transfer his land prior to his actual settlement thereon, and evidence of that fact filed as herein provided; and any attempt to so transfer by deed, bond for title, or other agreement shall operate as a forfeiture of the land to the fund to which the same belonged, together with all the payments made thereon; and when sufficiently informed of the facts which operate as a forfeiture, the Commissioner shall note the fact of forfeiture upon the application *and proceed to place the land on the market by notice to the proper county clerk and advertisement in the manner provided for cancelled leases.*"

Were it not for the change of the rule, or rather the making of an exception to the rule, by the above quoted statute, the claim of V. Griffin, at all times prior to the date of the forfeiture of his claim, would have been a right assignable at law. This legal right was evidently recognized by the legislature and known by its members at the time of the enactment of said statute, or said clause preventing the sale of such lands by such persons would not have been included in the statute. For all purposes except that of assignment and transfer the claim of V. Griffin was a full and complete claim and enforcible at law against all other persons, and therefore constituted a vested right of claim, and was an intervening right which cut off and destroyed the claim of J. M. Kidd to reinstatement of his former purchase, and the fact that V. Griffin whose application, coming after the mineral classification as above shown, only applied to the surface, would also apply and be true if he or any other person had undertaken to file on the mineral rights reserved by the State in said lands after the forfeiture of J. M. Kidd's purchase to said N. E. 1/4, section 22, block 6, certificate 2/845 T. & P. Ry. Co., Stephens County, Texas.

Inasmuch as we are undertaking to include in this opinion the questions submitted in the above quoted letter and the letter quoted in our opinion to you of April 10, which together effect a filing upon the surface and the mineral rights of land, we are considering both forfeitures and are passing upon the same, therefore, in connection with the above, we will say that the mineral act of 1913, Regular Session, Chapter 173, took effect July 9, 1913. Said act was in effect December 30, 1915, the date of the first forfeiture, and the date of the classification of said lands as mineral and agricultural land, and the date of the same was, as such, placed upon the market after the forfeiture of J. M. Kidd, although he had purchased October 30, 1899. It was also in force on May 2, 1916, the date of purchase by V. Griffin, and on February 9, 1917, the date of the cancellation of the claim of V. Griffin, and on February 9, 1917, the date that J. M. Kidd undertook to pay up all accrued interest under his original purchase. Said Act of 1913 provides in section 1, in part, "all public school * * *

and other lands * * * belonging to the State of Texas, and all lands which may hereafter be so owned, and all lands which have been heretofore sold or disposed of by the State of Texas, with reservation of mineral rights therein, as well as all lands which may hereafter be sold with reservation of mineral rights therein, shall be included within the provisions of this act and shall be open to mineral prospecting, mineral development and a lease of mineral rights therein in the manner herein provided."

Section 22 of this act provides as follows:

"Nothing in this Act contained shall ever be construed to destroy, invalidate or impair any valid claim, right or interest existing in, to or concerning any lands whatsoever *at the date of the passage of this Act*, or of any pre-emptor purchaser, claimant, settler, locator or any other person whatsoever."

This is a quotation of the same law from the statutes of 79 and 95. However, this is merely a validating statute or article and under the case of Cox vs. Robison, 105 Texas, 436, the same merely limits ownership to the time of the enactment, and does not prohibit the State from claiming minerals thereafter. The forfeiture of J. M. Kidd was in 1915, at which time said quieting statute was not effective, and therefore after J. M. Kidd permitted the forfeiture, and the re-classification by the land office of mineral and agriculture, and the purchase by V. Griffin of the surface of said land, he lost his rights and privileges to redeem said lands as both said classification and purchase were intervening rights. Note that above section 22 ends the rights of persons claimed thereunder at the date of the passage of this act. The State had the power, through the declaration of the land commissioner, to forfeit the sale of its lands to both of said purchasers; and when the sale is so forfeited for the non-payment of interest or the principal, the land is thereby restored to the public domain, subject to redemption by the claimant, *if the rights of third persons have not intervened.* In this instance the rights of third persons are held to have intervened, in the first instance by the re-classification of said lands, and carrying from the whole of the same the mineral rights therein which belong to the general public, or fund to which the statute appropriated same, and in the second instance, the intervenor being V. Griffin. This principle is upheld in the case of Houston Oil Company vs. Lumber Co., 181 S. W., 745, and particularly as in the case of Lewless vs. Wright, 86 S. W., p. 1039, from which last named case we refer to above quotation in an opinion by Judge Fly.

Following the above holdings the case of Jones vs. Robison, 133 S. W., page 879, holds substantially, an application for reinstatement made after subsequent purchaser had completed his proofs of claim to land came too late, thus we see that the claim of reinstatement of J. M. Kidd had been interrupted and destroyed by the intervening rights of others, and there being no statute nor law to revive such destroyed claims or rights, J. M. Kidd had no legal right to have his original purchase reinstated February 9, 1917, nor at any other time. Further, said mineral claim has been subject to file since its classification as such by the Land Commissioner,

under the mineral laws either of 1913 or 1917, as the same were in force and effect, respectively.

It evidently was the intention of the Legislature in 1895, when the statutes were recodified, to provide for the mineral classification of all unsold public lands, and the method of reclassification was fixed by title LXXI. Article 3481, Revised Statutes of 1895, reads as follows:

"All the public school, University, asylum and public lands containing valuable mineral deposits are hereby reserved from sale or other disposition, except as herein provided, and are declared free and open to exploration and purchase under regulations prescribed by law by citizens of the United States and those who have declared their intention of becoming such."

Article 3482 reads as follows:

"It shall be the duty of the Commissioner of the General Land Office to have a map made showing the location of all public school, University, asylum and public lands which are unsold; and it shall be the duty of the geological and mineralogical survey to examine all such lands as soon as practicable, and to designate such tracts as are apparently mineral bearing as mineral lands for the purposes of this title. If mineral lands are afterward claimed to exist at other locations than are so designated, they shall also be examined and classified accordingly."

And Article 3495 reads as follows:

"Whenever any application shall be made to buy or obtain title to any of the lands embraced in Article 3481 of this title, except where the application is made under this title, the applicant shall make oath that there is not, to the best of his knowledge and belief, any of the mineral embraced in this title thereon, and when the commissioner has any doubt in relation to the matter he shall forbear action until he is satisfied And any sale or disposition of said lands shall be understood to be with a reservation of the mineral thereon to be subject to location as herein provided."

Article 4218L Revised Statutes 1895, the statute under which Kidd's purchase was made, reads as follows:

"If upon the first day of November of any year the interest due on any obligation remains unpaid, the Commissioner of the General Land Office shall endorse on such obligation "Land Forfeited," and shall cause an entry to that effect to be made on the account kept with the purchaser, and thereupon said land shall thereby be forfeited to the State without the necessity of re-entry or judicial ascertainment, and shall *revert* to the *particular* fund to which it originally belonged, and be resold under the *provisions* of this chapter or any future law;" * * *

Therefore, when Kidd purchased said land, he purchased it under the requirement of the law, that if reforfeited the same reverted to the particular fund to which it originally belonged, and when it so reverted it was subject to being resold under the provisions of the laws then in force, or any future law. The above mineral laws providing for classification were then in force and effect, or were subsequently legislated and put in force, and it was the duty of the commissioner to classify said lands as mineral under the mineral laws, and if such classifications were made after Kidd had forfeited same and before he exercised his right to redeem, then his redemption

would be subject to said classification and he would have no right to redeem as the status of the land had entirely changed. He was compelled in the beginning to make oath, substantially as shown by said Article 5916, that there was not to the best of his knowledge and belief, any of the minerals embraced in said statute, at the time he purchased said land, and it was the duty of the commissioner, if he had any doubt in relation to the question of mineral being under said lands, to refuse to act in making the award, in the beginning, of said lands to Kidd. If Kidd did not know at the time he first purchased said land that minerals did exist, he certainly had notice that the State was claiming minerals thereon when he undertook to redeem, and in either instance if the knowledge existed, or if the commissioner could ascertain that minerals did exist, or thought that they existed, it was his duty to classify them as such and hold the same for the fund to which they properly belonged, as said statute provides that all such sales shall be understood to be with the reservation of the minerals therein, to be subject to location as herein provided.

It would not be fair to the school fund nor the State to permit a land owner to let his lands forfeit, and after the State had reclassified the same as mineral, and thus given notice to him that the lands were probably mineral bearing, then revive a privilege that he could not have embraced in the original purchase as shown by said Article 5916.

Therefore, we will hold, that the reclassification of said land, adding that all mineral to the original classification, after the forfeiture by Kidd, did place the status of the title to said lands in such condition as he could not redeem, although he might have become a purchaser of the service of said lands, or a lessee of said minerals.

Yours very truly,

W. F. SCHENCK,
Assistant Attorney General.

Op. No. 2125, Bk. 53, P. 303.

MINERALS—LANDS.

Penal Code, Article 166, Revised Statutes, Article 4492.

Filing on Mineral Lands By Employees of Department of Insurance, Statistics and History.

Statutes So Changed and Obscure Rights Attached By Filing Should Not Be Disturbed Unless Determined By Courts.

AUSTIN, TEXAS, August 14, 1919.

Hon. J. T. Robison, Land Commissioner, State Office Building.

DEAR SIR: On July 24th you addressed to this Department the following letter:

"Employees in the Department of Insurance and their wives have filed upon lands to secure the mineral rights therein, and other parties who have filed on the same land, called my attention to the fact that applicants who are employed in the Insurance Department are prohibited, under Article 166 of the Penal Code, from acquiring mineral land or rights therein.

"I beg to submit to you, and ask for an early opinion as to whether or not persons employed in the Insurance Department, Banking Department and Agricultural Department are under the law eligible to acquire mineral rights in public land."

The laws now existing by statute, if indeed they do exist as such, affecting the question inquired about, are found in the Penal Code, Article 166, and Revised Statutes of 1911, Article 4492. The first one reads as follows:

"It shall be unlawful for the Commissioner of Agriculture, Insurance, Statistics and History, or any person employed by him or connected with his office, to *purchase* all or any part of any mine or mineral lands, or be in any manner interested in such *purchase*, during the term of his office or employment. Any person violating the provisions of this article shall be punished by fine as provided in the Penal Code."

The second one reads as follows:

"No person who is a director, officer or agent of, or directly or indirectly interested in, any insurance company, except as insured, shall be a commissioner or clerk; and it shall be unlawful for such commissioner, or any person employed by him or in any way connected with his office, to purchase all or any part of any mine or mineral land, to be in any manner interested in such purchase, during the term of his office or employment.'"

By an Act of August 21, 1876, Laws of Texas, Vol. 8, page 1055, the Legislature of the State of Texas created a department of insurance, statistics and history, charged with duties of executing all laws in relation to insurance and insurance companies doing business in Texas, also with the execution of all laws relating to statistics and history, and to do and perform such other duties as may be prescribed by law.

Section 16 of said Act reads in part as follows:

"It shall also be the duty of the Commissioner of Insurance, Statistics and History to obtain from every available source of reliable information and statistics relating to the population, wealth and, general resources of the State; and particularly in regard to agriculture, stock raising, manufacture, *mining*, and other industries; * * *

This appears to be the first enactment relating to or affecting the mining interests of the State, and this law, although it has a great number of provisions in it, is rather obscure as to the purpose and effect on that property right or industry.

By an Act of April 1, 1887, Laws of Texas, Vol. 9, page 896, the Legislature of the State of Texas created a bureau of agriculture for the State of Texas, and attached it to the department of insurance, statistics and history, and designated such department,

when so attached together, as the Department of Agriculture, Insurance, Statistics and History, and designated the head or chief officer of such department as the Commissioner of Agriculture, Insurance, Statistics and History, thereby providing that all of same should be under the same head. Some additional duties were added to the original law by the above mentioned amendment, but none with reference to minerals or mining.

By the Acts approved May 12, 1888, Laws of Texas, Vol. 9, page 1008, an Act was passed authorizing the Commissioner of Agriculture, Insurance, Statistics and History to have a geological and mineralogical survey made of the State of Texas, and making an appropriation therefor.

Section 5 of said Act reads as follows:

"It shall be unlawful for the Commissioner of Agriculture, Insurance, Statistics, and History, or any person employed by him or connected with his office, to purchase all or any part of any *mine or mineral lands*, or be in any manner interested in such purchase, during the term of his office or employment. Any person violating the provisions of this section shall be punished by fine not less than one thousand dollars, and shall be removed from his office, or employment, as the case may be."

It will be seen from this paragraph that the law was passed with the express purpose of placing prohibition on the official then known as the Commissioner of Agriculture, Insurance, Statistics and History, or any person employed by him or connected with his office, from *purchasing* all or any part of any mine or mineral lands, or being in any manner interested in such *purchase*. The reason for this provision is apparent from the fact that said commissioner was then burdened with the duty of making geological and mineral surveys within the State of Texas, and it certainly would have been improper for him or any of his employes to have taken advantage of the information they received in regard to such matters while engaged in their employment and receiving such information by reason of their official trust.

By an Act approved March 12, 1889, Laws of Texas, Vol. 9, page 1081, the last Act referred to was amended for the purpose of properly designating said department, and its head, and to prescribe the duties belonging to it relating to agriculture, therefore we see that this Act did not in any manner affect or change the statute with reference to minerals.

By an Act approved March 29, 1889, being Chapter 100, Laws of Texas, Vol. 9, page 1144, all the public school, university, asylum and public lands containing valuable mineral deposits were reserved from sale or other disposition except as therein provided, and were thereby declared free and open to operation and *purchase* under regulations prescribed by law, etc.

Section 9 of said Act reads as follows:

"Whenever the owners of any mining claim shall desire a patent, they shall, within five years after the filing of the application for survey, file their application for a patent upon their claim with the Commissioner of the General Land Office, accompanied with the receipt of the State Treasurer, showing that twenty-five dollars per acre has been

paid by the applicant for patent to the State Treasurer. No patent shall be issued in any case until the expiration of sixty days from the filing of the application. Upon filing said application, the applicant shall cause to be published for four successive weeks, one insertion each week, in some newspaper published in the county in which the mine is situated, if there be any, ir not, then in some newspaper published in the nearest county to the mine in which a newspaper is published, a notice stating the fact that application has been filed for patent on the claim (or claims), describing them clearly. A copy of the printed notice with affidavit that it has been published as required by this section, and that all the requirements of this Act have been complied with, shall be filed with the Commissioner of the General Land Office before patent shall issue. After the expiration of thirty days after the last insertion of said notice, patent shall issue unless protest has been filed."

It will be seen from said Section 9, in connection with said Act and all previous acts, that the mineral lands were subject to *sale,* and there was no provision for leasing of same. Up to this time evidently oil and gas had not been in contemplation of the law makers. Therefore, the statutes prohibiting the commissioner, or his employes from purchasing mineral rights, or being interested in the purchase of same, evidently contemplated the right of purchase and sale only, and did not contemplate an interest by a lease.

Article 2928, Revised Statutes, 1895, reads identically like said Article 166 of the Penal Code of 1911. This article was dropped from the Revised Statutes of 1911 and evidently placed in the Penal Code without any specific or legal reason for doing so, as there does not appear an act of the Legislature creating or adopting such a criminal statute. Furthermore, this article does not prescribe any penalty, and the Penal Code, in so far as I am able to ascertain, does not in connection therewith prescribe a penalty to make effective the provisions of this article. Furthermore, it will be interesting to note that the origin of this statute is without authority of the Act of the Legislature except as that of a recodification. It was never independently adopted, and was placed in the recodification, not by having been brought forward from some previous act of the Legislature, but the same having been placed therein by the recodifying committee as shown in Senate Journal of 1895, at the bottom of the second column, page 478.

This report being on Senate Bill No. 29, and is a bill to be enacted, —"An Act to adopt and establish the Revised Civil Statutes of the State of Texas,"—therefore, the insertion was made as hereinafter quoted as a civil measure and not a criminal statute. Section 35 of said Senate Committee Report reads as follows:

"Amend Chapter 6, Title 52, by adding next after Article 2928, another article (2928a) to read as follows:

"'Article 2928a. It shall be unlawful for the Commissioner of Agriculture, Insurance, Statistics and History, or any person employed by him or connected with his office, to purchase all or any part of any mine or mineral lands, or be in any manner interested in such purchase, during the term of his office or employment. Any person violating the provisions of this Act shall be punished by fine as provided in the Penal Code."

While there may be some conflict in the opinion of the Supreme Court of Texas and the Court of Criminal Appeals as to whether or not such a provision appearing in the official volumes of the statute

is effective, there is considerable doubt in my mind as to its having any life whatever either as criminal or civil statute.

Evidently said article 4492 is a derivation from and substitute for said Section 5 above quoted, approved May 12, 1888, as said Section 5 is not brought forward in the statutes of 1911, except in this form. Said Section 4492 appears in Chapter 7 of the Revised Statutes and applies to the Commissioner of Insurance and Banking only, said provisions beginning with Article 4435. Therefore all officers and their agents and employes as previously provided for or against by said acts are eliminated and freed from the provisions except the Commissioner of Insurance and Banking, and his employes, as all previous laws on said point were evidently repealed directly or by omission.

Inasmuch as all of these acts relate to the sale of mineral lands and interests therein, we will next consider the enactments controlling mines and mining.

Title LXXI of Revised Statutes 1895, covering mines and mining passed by the Acts of 1889 shown at page 116, etc., is the first general law with reference to the sale and ownership of mineral lands.

Article 3489 of said statute, being a part of said mineral act, reads as follows:

"Whenever the owners of any mining claim shall desire a patent, they shall, within five years other the filing of the application for survey, file their application for a patent upon their claim with the Commissioner of the General Land Office, accompanied with the receipt of the State Treasurer, showing that twenty-five dollars per acre has been paid by the applicant for patent to the State Treasurer. No patent shall be issued in any caes until the expiration of sixty days from the filing of the application."

It will be seen from this statute, which in point of time was concurrent with the enactments of the provisions under question, that it was the intention of the legislature to apply solely to sales of mineral lands, and patenting same to the purchaser, as there was no lease provision set forth in said law.

Further, in Revised Statutes 1911, Title 93, beginning with Article 5904, we find the laws on mines and mining.

Article 5912 of Revised Statutes 1911 reads in part as follows:

"Within twelve months after the filing of the affidavit hereinafter provided for, any person or association of persons, qualified as required by Article 5904, shall have the right to purchase and obtain patent by compliance with this title or any of the lands of the State which are specified or included in Article 5904, containing valuable deposits of kaolin, baryta, salt, marble, fire clay, iron ore, coal, oil, natural gas, gypsum, nitrates, mineral paints, asbestos, marl, natural cement, clay, onyx, mica, precious stones or any other non-metallic mineral and stones valuable for ornamental or building purposes, or other valuable building material, in legal subdivisions, in quantity not exceeding one section; provided, that where any such parties shall have heretofore expended, or shall hereafter expend, five thousand dollars in developing the aforesaid mineral resources of any of said lands, such party shall have the right to buy one additional section and no more, and to include in the purchase any section, or part thereof on which the work may have been done. The land so purchased may be in different sections, and all embraced in one or more obligations, not to exceed the quantity stated. The purchaser shall pay not less than *fifteen dollars per acre* where the land shall be situated ten miles or less of any railroad in operation, and not less than ten dollars per acre where the

land is over ten miles from such railroad, one-tenth of the purchase money to be paid in cash to the State Treasurer on or before the expiration of the twelve months aforesaid; * * *"

It will be seen that the Legislature in its recodification of 1911 still carried forward the idea of sale of said lands.

The provisions of sale remained unchanged until the Acts of 1915, Chapter 173, beginning at page 409 of said Acts. The provision with reference to oil and gas was added in said chapter, and, in addition thereto, provisions were made for the leasings of hard mineral lands as shown fully therein. The Act is too voluminous to copy said provision, hence reference is made thereto.

Section 53 of said Act reads as follows:

"Chapter 1, Title 93 of the Revised Civil Statutes of 1911, relating to mines and mining, and all other laws and parts of laws, relating to the sale of mineral land are hereby repealed."

The fact that the legislature changed from the selling of said mineral lands to that of leasing, and in the same act it repealed all laws and parts of laws in conflict therewith, shows conclusively that the leasing of mineral lands and the sale of mineral lands have always been considered, and still are two different and distinct legal provisions. Therefore we would say that the laws previously passed relating to the sale of mineral lands do not apply technically to the leasing of mineral lands, and although the filing on mineral lands for the purpose of securing the minerals therein by the provisions mentioned in said statutes might be considered, morally, in the same light as that of purchasing said lands, still the Legislature in making this radical change in the mineral laws and repealing all laws in conflict therewith, and in fact on said subject without making provisions against certain officials or their employes from filing on said mineral lands, would have the effect of freeing them to file as they see fit.

The mineral acts of 1917 repeal the act of 1913, and still there is no provision in same forbidding certain officials from filing on mineral lands.

This opinion may be considered more a discussion than an opinion, and is made long for the purpose of showing the general chaos of the law on this point. As advice to you, we would say, that the interests of the persons who have already filed on said lands should not be changed or affected by your action and they should be permitted to stand abiding a final judgment of the courts of Texas.

W. F. SCHENCK,
Assistant Attorney General.

Op. No. 2149, Bk. 53, P. 416.

APPLICATION FOR MINERAL PERMITS—TIME OF FILING WITH THE COUNTY CLERK.

It is the policy of the State that all persons desiring to file an application for a mineral permit on certain land shall have an equal opportunity with all others persons.

The county clerk is the agent of the State in receiving applications for mineral permits and it is the duty of the county clerk to afford all persons, who desire to file applications a fair and equal opportunity to do so. The county clerk, as the agent of the State, can not do this if he also acts as the agent of some individual desiring to file an application. It follows that the county clerk cannot act as the agent of any individual in matters of this kind.

"The State of Texas, County of Palo Pinto.

AUSTIN, TEXAS, November 28, 1919.

Hon. J. T. Robison, Commissioner Genral Land Office, Austin, Texas.

DEAR MR. ROBISON: I have your letter of November 24th, addressed to the Attorney General, wherein you quote a certificate of the County Clerk of Palo Pinto County to the following effect:

State of Texas, County of Palo Pinto.

"I, Flossie White, clerk of the county court, in and for Palo Pinto County, Texas, do hereby certify that on the 17th day of September, A. D. 1919, at 3:07 p. m., a relinquishment of oil and gas permit No. 2627 was received from the General Land Office, given by Mr. P. M. Yell. I also certify that Mr. Thos. A. Hull was in my office after the mail came in that afternoon at about 3:50 p. m.

"I further certify that the application to prospect for oil and gas of Mrs. McNurlin by Mr. P. M. Yell, was left in my office on the 16th to be filed after the mail should come in on the 17th, and was filed by me at 3:10 p. m.

"I further certify that Mr. Howard McDonald filed an application to prospect for oil and gas on 19th at 3:35 p. m. and since the filing of the above relinquishment the above applications are all that have been filed on No. 2627.

"Given under my hand and seal of office, this the 6th day of October, A. D. 1919.

(Seal) "Flossie White,
"County Clerk."

An instrument that is given to the County Clerk in the office of the clerk, and if in the proper time, is "filed" within the meaning of the law.

At the time Mr. Yell, acting as the agent of Mrs. McMurlin, handed the County Clerk the application of Mrs. McNurlin, the records in the county clerk's office showed, or should have shown, that there was a valid permit on the land in question; hence, the land was not subject to be filed on. It follows that the county clerk could not have received the application of Mrs. McNurlin on September 16th.

The county clerk states in her certificate that the application of Mrs. McNurlin "was left in my office on the 16th to be filed after the mail should come in on the 17th." Evidently, it was anticipated by Mrs. McNrlin that the relinquishment of the existing permit would be received by the county clerk from the General Land Office on the 17th. The certificate of the county clerk shows that the relinquishment was in fact received "on the 17th day of September A. D. 1919 at 3:07 p. m." The certificate further states that the application of Mrs. McNurlin "was filed by me at 3:10 p. m." on September 17th, three minutes after the relinquishment was received. Thereafter, on September 19th at 3:35 p. m., the certificate states that "Mr. Howard Mc-

Donald filed an application to prospect for oil and gas" on the land in question.

It is the policy of the State that all persons desiring to file an application for a mineral permit on certain lands shall have an equal opportunity with all other persons. As stated above, this land was not subject to be filed on at the time the application of Mrs. McNurlin was left in the office of the county clerk. The fact that it became subject to be filed on the next day does not change the situation at all; if a person could anticipate the filing of a relinquishment by one day, he could anticipate it by ten days, a month, or three months, and the office of the county clerk would be swamped with applications waiting to be filed when a relinquishment was received. There is no provision of law authorizing the county clerk to receive applications in anticipation of the filing of a relinquishment on certain land.

The county clerk is the agent of the State in receiving applications for mineral permits, and it is the duty of the clerk to afford all persons who desire to file applications a fair and equal opportunity to do so. The county clerk as the agent of the State cannot do this if he also acts as the agent of some individual desiring to file an application. It follows that the county clerk cannot act as the agent of any individual in matters of this kind.

You, are, therefore, advised that for the reasons above set forth, the purported application of Mrs. McNurlin is null and void.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2137, Bk. 53, P. 346.

FILING APPLICATION FOR MINERAL PERMIT—WORDS AND PHRASES—THE TERM "SHALL FILE WITH THE COUNTY CLERK," DEFINED.

The term "shall file with the county clerk" as defined by the American authorities means distinctly that the instrument that is to be filed with the county clerk must be presented for filing to him at his office. It being the general rule that whether the words of the statute in respect to filing be "in the office of the clerk" or "with the clerk" means the same, that is, the instrument must be filed with the clerk in the office of the clerk.

AUSTIN, TEXAS, September 25, 1919.

Hon. J. T. Robison, Commissioner, State Office Building, Austin, Texas.

DEAR MR. ROBISON: I have your letter of recent date addressed to the Attorney General, wherein you state that some days ago your department cancelled a mineral permit in Marion County and notified the county clerk and other parties of such action. You further state that you are now in receipt of an application filed by Ed Meyer, according to the certificate of the clerk, on August 26, 1919, at 12:55 p. m., also application filed by H. H. Shackelford which, according to the county clerk's certificate, was filed with him on August 26, 1919, at 1:09 p. m. You then state that explanatory of the foregoing the county clerk furnished you with a certificate reading as follows:

"I, L. E. Purssell, Clerk of County Court of Marion County, Texas, do hereby certify that I received cancellation of Permit No. 2625 to G. W. Brown, August 26, 1910, at 12:50 o'clock p. m. Immediately after receiving it Ed Meyer filed an application with me August 26th, 1919, at 12:55 p. m. Upon reaching my office Mr. H. M. Schackelford filed an application with me upon same property at 1:09 p. m. H. H. Schackelford's application was the only one filed with me after I reached my office. Ed Meyer's application was filed with me before I reached my office.'

"Given under my hand and seal of office this August 26th, 1919."

You then desire to be advised by this department as to which of these applications should be accepted and to whom the mineral permit should be issued.

Section 3, Chapter 83, Acts of the Thirty-fifth Legislature, passed at its Regular Session, in part reads as follows:

"One desiring to obtain the right to prospect for and develop oil and natural gas that may be in any of the surveyed areas included herein *shall file with the county clerk* an application in writing giving a designation of same sufficient to identify it," etc.

The question to be determined in order to answer your inquiry is whether an applicant may file his application with the county clerk at a place other than the office of the county clerk or whether he must file the application with the county clerk at the office of the county clerk. It was said by the Supreme Court of California that:

"Fling a paper consists in presenting it at the proper office and leaving it there deposited with the papers in such office."

Tregambo vs Comanche, etc., Mining Co., 57 Cal. 501.

This same court in the case of Edwards vs. Grand 121 Cal., 254, said:

"An instrument is filed for record when it is deposited in the proper office with the person in charge thereof with directions to record it. * * * Delivering an instrument to the proper officer at a place other than the office where it is required to be filed is not sufficient, even though the officer endorse it as properly filed."

I also direct your attention to the general registration laws of this State, Article 6791, Revised Civil Statutes, speaking with reference to every instrument of writing authorized to be recorded by the county clerk, says:

"Every such instrument of writing shall be considered as recorded from the time it was deposited for record," etc.

Article 6786 provides that the county clerks "shall provide and keep in their offices well bound books in which they shall record......all instruments of writing authorized or required to be recorded....." An instrument then is to be considered as recorded from the time it is deposited for record. The statute is silent as to where the instrument is to be deposited, but it is reasonable to suppose that the Legislature intended that the instrument was to be deposited at the place where the records are by law required to be kept, to-wit: The office of the county clerk. It will be observed that the Supreme Court of Califor-

nia has consistently held that an instrument is filed when it is deposited in the proper office with the person in charge thereof with directions to record it.

In the case of Hammock vs. May, 38 Tex., 197, the question involved was one with reference to filing a motion for new trial. The Supreme Court of this State, speaking through Mr. Justice Ogden, held that "It is not absolutely necessary that the clerk, when he marks a paper filed, should be in his office in order to perfect the filing, provided the same be done in good faith by the clerk, and not in such a manner or under such circumstances as to work an injury to other parties." In this *case* the attorney had the right at any time within two days to file his motion for new trial. No one could be injured by his filing the motion with the clerk outside the clerk's office and outside of the court room. Therefore Judge Ogden very wisely added the above proviso that it would be all right for the instrument to be filed with the clerk at a place other than the clerk's office or the court room provided no other parties were thereby injured. In the case under consideration there was no time limit. The man who filed his application first was entitled to the permit. For the purpose of receiving such application the county clerk acts as the agent for the State of Texas, and as such agent he has a definite place in which to conduct the business of the State. A person coming into the office of the county clerk when some deputy is in charge, the clerk being absent, he examines the records and files and fails to discover where any one has filed on a certain tract of land, so he tenders to the deputy his application to file on that particular tract of land. His application is accepted and filed. Then the clerk returns and says: "Your filing is too late. Another party filed on this tract of land with me while I was out of the office and I made a memorandum of the time when he filed his application with me and it is ten minutes ahead of yours." Suppose another case: Two men discover a very valuable tract of land subject to filing. It is night when the discovery is made. One of the men is acquainted with the clerk, the other is not. The first man knows where the clerk lives; the other does not. The first man goes to the home of the clerk at night and requests him to accept his application for the land and the clerk does so in perfect good faith, knowing nothing about the other man. The second man awaits the coming of morning and goes to the office of the county clerk, knowing that to be the place where the State of Texas, through its agent, transacts its business, and there he attempts to file on the land. He is told that he is too late; the land was filed on the night before. Here we have a case where an instruments filed with the clerk outside his office has worked an injury to another party. The first man and the second man under the laws of this State, were entitled to an equal chance to secure this land. The State of Texas is expected to conduct its business with the citizens of this State in a dignified and an absolutely impartial manner. The State has certain known officers to act for it. These officers have for the most part offices in which to transact the business of the State. It is not to be expected that the business of the State is to be transacted on the street corners.

In the case of In Re Norton, 53 New York Supplement, the Supreme Court of New York, speaking through Mr. Justice Gaynor, said:

"By Section 59 of the Election Law the last day for the petitioner to file his ceitificate of nominatnon was October 14th. Section 58 says (to use its exact words) that it '*shall be filed with the clerk* of such *county*' * * * The petitioner offered it to the deputy clerk at his residence at about 11 o'clock on the night of October 14th, but he declined to receive it on the ground that the office of the county clerk was closed and that he could not receive it at his house. It is contended that as the statute did not in so many words require the certificate *to be filed in the office of the clerk*, but only '*with the clerk*,' a delivery of it to the clerk anywhere on October 14th would be a filing of it with the clerk under the statute * * * Under the liberal construction which is given to the Election Law in aid of the franchise, I was inclined upon the argument to think that the words of the statute, '*shall be filed with the clerk*' of the county, might be construed to mean that the certificate might be delivered to the clerk anywhere. But the difficulty in the way of this interpretation is the word 'file.' In order to be 'filed' with the clerk, a paper *must be delivered to him in his office*, where the law requires him to keep his books and files and to receive and file papers. That this is the rule whether the words of the statute in respect of filing be '*in the office of the clerk*' or '*with the clerk*,' is beyond doubt (Hathaway vs. Howell, 54 N. Y., 97), and to hold otherwise would only unsettle a thing well understood and open the door to looseness. It does not seem that any one could think of 'filing' *a paper on the street, for* instance."

The underlinings are mine. Section 940 of the Code of Civil Procedure of California requires a filing "with the clerk of the court in which the judgment or order appealed from is entered." The Supreme Court of California in construing this language in the case of Hoyt vs. Stark, 134 Cal., 178, said:

"Regardless of the varying phracology of the statutes, in contemplation of law a paper whole filing carries notice, or affects private rights, **is filed only when deposited with the proper officer at his office for this especial purpose * * * But the profer means more than a mere presentation to the office. It means a presentation to him at the proper place, and within the proper time. * * * When Section 940 of the Code of Civil Procedure speaks of filing the undertaking with the clerk it means distinctly that it is to be presened for filing to hi mat his office.**"

The underlinings are mine. In the California case last quoted and in the New York case, the California Supreme Court and the Supreme Court of New York were construing a statute almost identical with the one we have under consideration so far as they relate to filing an instrument with the county clerk. The Texas statute which we have under consideration says, "shall file with the county clerk." The New York statute provides "shall be filed with the clerk of such court." The California statute requires "a filing with the clerk of the court." It will be observed that neither the New York nor the California statute requires the instrument to be filed with the clerk at the office of the clerk, yet, in both states the Supreme Court has declared the requirement "filing with the clerk" must be construed as requiring the instrument to be filed with the clerk in the office of the clerk.

The County Clerk of Marion County in his certificate, which is hereinabove quoted, states that immediately after receiving the cancellation of permit No. 2625, "Ed Meyer filed an application with me

August 26, 1919, at 12:55 p. m."; continuing he says, "Ed Meyer's application was filed with me before I reached my office." He also says, "Mr. Schackleford filed an application with me upon same property at 1:09 p. m. H. H. Schackleford's application was the only one filed with me after I reached my office." In other words the County Clerk at the request of Mr. Meyer attempted to file his application with the clerk at some place (Mr. Meyer says, "at the postoffice,") other than the office of the County Clerk. The attempted filing of Mr. Meyer's application is in the opinion of this department null and void and of no force nor effect whatsoever.

You are therefore respectfully advised that the term "shall file with the county clerk" as the same is used in section 3 of Chapter 83, Acts of the Thirty-fifth Legislature at its regular session, is, according to the American authorities, to be defined as distinctly meaning that the application is to be filed with the county clerk in the office of the county clerk, or with a deputy county clerk in the office of the county clerk. It being the general rule that whether the words of the statute in respect to filing be "in the office of the clerk" or "with the clerk" means the same, that is, the instrument must be filed with the county clerk or a deputy county clerk in the office of the county clerk.

And you are further advised, since, according to the certificate of the county clerk, Mr. H. H. Schackleford was the first person to file an application with the county clerk in the office of the county clerk, after the clerk had received notice of the cancellation of permit No. 2625, he is entitled to be granted a permit to prospect for and develop oil and natural gas on the land covered by said permit No. 2625, provided, of course, that his application is regular and proper in every other respect.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2157, Bk. 53, P. 453.

MINERAL PERMITS—FORFEITURES.

Where a mineral permit was issued under the Law of 1913 and the permittee failed to meet the requirements of the law in doing development work and making reports to the Land Commissioner, the land covered by such permit was not subject to be filed on by other parties until the Land Commissioner had officially cancelled the permit first issued.

AUSTIN, TEXAS, December 9, 1919.

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

DEAR MR. ROBISON: I have your letter of December 5th addressed to the Attorney General, wherein you state that J. C. Haynes on the 14th day of June, 1917, filed an application for a mineral permit on 521 acres of land in what is known as the Goose Creek Oil Field. On July 17th, 1917, a permit was issued to Haynes upon his application:

"No development work was evtr done on this permit and no report ever

made to this Department as required in the Act of 1913, Sections 6 and 7, which sections, I believe, control the feature involved and the question therein propounded."

The permit issued to Haynes was cancelled on August 8th, 1919. A. B. Crocker filed an application for a mineral permit on this land on July 17th, 1919. You desire to be advised as to whether or not a permit should be issued to Crocker on his application of July 17th, 1919.

The application of Haynes was filed prior to the time when the mineral permit law of 1917 went into effect. The permit was not issued until after the law of 1917 was in effect. We are of the opinion, however, that the Haynes permit was issued under and was subject to the provisions of Chapter 173, Acts of 1913. Sections 6 and 7 of this law provided for the forfeiture or termination of permits issued under this law and read as follows:

"Sec. 6. Before the issuance of the permit provided for in the preceding section the applicant shall pay to the Commissioner of the General Land Office ten cents per acre for each acre embraced in the application and field notes. Thereupon a permit shall be issued to the applicant conferring upon him an exclusive right to prospect for and develop petroleum oil or natural gas within the designated area for a term not to exceed two years. Within thirty days after the expiration of the first year the owner of the permit shall pay another ten cents per acre as in the first instance. Upon the termination of the period for which the original permit was granted and the receipt of satisfactory evidence of the compliance with the conditions prescribed in Section 7 of this Act, and such compliance shall not have led to the discovery of petroleum oil or natural gas in commercial quantities, then the Commissioner may grant an extension of the permit for a term not to exceed one year upon the payment by the applicant or his successors in interest of an additional fee of twenty-five cents per acre. No extension, however, shall be granted unless satisfactory proof of an effort towards the development of the area included in the permit has been made in good faith and the expenditure of the sum required and duly submitted as set forth in Section 7 of this Act.

"Sec. 7. Before the expiration of six months after the date of the permit the owner of said permit shall in good faith commence actual work necessary to the physical development of said area, and if petroleum oil or natural gas is not developed the owner or manager shall, on or before the thirty days after the expiration of twelve months from the date of the permit, file in the General Land Office a sworn statement supported by two disinterested, credible witnesses that such actual work was begun within the six months aforesaid, and that petroleum oil or natural gas has not been discovered in commercial quantities and that a bona fide effort to develop said area was made during the six months preceding the filing of said statement. During the two years covered by said permit the owner thereof shall expend not less than four thousand dollars in a bona fide effort for the development of such area, unless such area has sooner been developed or abandoned. The owner or manager shall, within thirty days after the expiration of the two years from the date of the permit, file with the Commissioner of the General Land Office a sworn statement supported by two disinterested, credible witnesses that such bona fide effort for the development of the area has been made, stating in what condition, and showing the expenditure thereof. A failure to file either of the sworn statements herein provided for and within the time specified, or the filing of a statement untrue or false in material matters, or the failure to expend the sum named in a bona fide effort toward the development of the area or areas, shall work a revocation of said permit and the termination of the rights of the owner. Such termination shall be endorsed by the Commissioner of the General Land Office upon a duplicate copy of the permit retained in the General Land Office. Upon the termination of such permit the area shall again be subject to location by another than the forfeit-

ing owner. The expenditure herein required for development purposes may be made upon one or more contiguous tracts embraced in a permit and shall be sufficient for the entire area embraced in one such permit. The amount herein required to be expended in development purposes shall be required on each and every non-contiguous area. A separate permit shall be issued for each non-contiguous area, but may contain an entire contiguous area of two or more adjacent tracts of land. An application may embrace contiguous portions of different tracts or surveys. An assignment by deed or other form of transfer and also a lien of any form may be executed upon any claim to any person, association of persons, corporate or otherwise, that may be qualified to obtain a permit or lease in the first instance; provided, that deed or other evidence of sale, assignment or lien shall be recorded in the county where the property or a part thereof is situated and shall be filed in the Land Office within sixty days after the date thereof, accompanied by a filing fee of one dollar. If such instrument shall not be filed in the Land Office within the time required such deed or evidence of transfer or evidence of lien shall not have the effect to convey the property nor shall the obligations incurred therein be enforceable."

Haynes failed to comply with the law, and thereby forfeited his rights under the permit.

The question to be determined is whether the failure of Haynes to comply with the law ipso facto terminated his rights and caused the land covered by his permit to be again subject to be filed on by other parties, or was it necessary before the land could be filed on by other parties for the Land Commissioner to do some official act in connection with the termination of the Haynes permit.

If the failure of Haynes to comply with the law ipso facto terminated his permit and made the land again subject to be filed on, Crocker is entitled to a permit on his application filed July 17th, 1919, but if it was necessary for the Land Commissioner to officially cancel or terminate the permit before the land could again be filed on by other parties. Crocker is not entitled to a permit under his application filed July 17th, 1919, for the reason that the permit was not cancelled by the Land Commissioner until August 8th, 1919. At that time Chapter 19 Acts of the First and Called Sessions of the Thirty-sixth Legislature was in effect, which provides that such land as that covered by the Haynes permit shall be sold to the highest bidder.

In considering the question presented by you, it is well to remember that "a forfeiture of rights of property is not favored by the courts, and laws will be construed to prevent rather than to cause such forfeiture." Shepard vs. Avery, 89 Texas, 301.

Article 4218g Revised Statutes of 1895 provided that where land was forfeited by the Land Commissioner for non-payment of interest, notice of such forfeiture must be sent to the county clerk of the county where the land was situated. The Supreme Court has held that an application to purchase such forfeited land, even though the land had been advertised for sale by the Land Commissioner, could not be considered unless the notice required by the statute had first been sent to the county clerk.

Willoughby vs. Townsend, 93 Tex., 70.
Ford vs. Brown, 96 Tex., 537.
Boswell vs. Terrell, Land Commissioner, 97 Tex., 259.

These decisions clearly indicate that where a person's interest in a

tract of land awarded him by the State has been forfeited, that before the land is again subject to be filed on or purchased by other parties, every statutory requirement must be strictly complied with.

In Adams vs. Terrell, Land Commissioner, 101 Tex., 331, it was held:

"The question then arises: Upon the non-occupancy of free school land by a purchaser, does the land ipso facto become subject to sale without any action on part of the Commissioner of the General Land Office? The Act of the 4th of April, 1895, contains this provision: 'If any purchaser shall fail to reside upon and improve in good faith the land purchased by him, he shall forfeit said land and all payments made thereon to the State in the same manner as for non-payment of interest, and such land shall be again for sale as if no such sale and forfeiture had occurred.' Laws 1895, p. 67, c. 47, Sec. 11. The Act of April 19, 1901, provides that, 'if any purchaser shall fail to reside upon and improve in good faith the land purchased by him as required by law, he shall forfeit said land, and all payments made thereon to the State, to the same extent as for non-payment of interest, and such land shall be again upon the market as if no such sale and forfeiture had occurred, and all forfeitures for non-occupancy shall have the effect of placing the land upon the market without any action whatever on the part of the Commissioner of the General Land Office.' Laws 1901, p. 294, c. 125, Sec. 3. The law of 1895 provides for a forfeiture for non-occupancy 'in the same manner as for non-payment of interest.' That is, the Commissioner shall declare the forfeiture and enter the declaration upon the records in his office. Under the law of 1901, the forfeiture is to be 'to the same extent as for non-payment of interest.' The expression is unusual and somewhat obscure. 'Extent' does not ordinarily mean 'manner.' But is a forfeiture ipso facto and a forfeiture by the Commissioner by entry upon his records a forfeiture to the same extent? We think not. The former, which becomes immediately effective upon the happening of the event, is more extensive in its operation than a forfeiture which does not become operative until the Commissioner has acted. The words, 'all forfeitures for non-occupancy shall have the effect of placing the land upon the market without any action whatever on the part of the Commissioner of the General Land Office,' gives rise to some difficulty. This merely tells us what is to be the effect of the forfeiture; but throws no light upon the question, how is the forfeiture to accrue? If, as we have seen, by the written declaration of the Commissioner, then the consequence is to follow. So that we think the words should be construed as if they read, 'all forfeitures when declared by the Commissioner shall have the effect,' etc.

"Does any reason suggest itself why it should be necessary to a forfeiture for non-payment of interest that the Commissioner should enter on the account and why a like method should not be adopted in case of a forfeiture for non-occupancy? None presents itself to our minds. On the contrary, it would seem since the accounts with the purchaser are kept in the Land Office, and since they will necessarily show the fact in case the interest is not paid, there is less reason for declaring the forfeiture in that case than in case of non-occupancy, where there is no public records to show the fact."

It will be observed that in the case last cited that the non-occupancy of free school land by a purchaser did not ipso facto cause the land to again become subject to sale without any action on the part of the Commissioner of the General Land Office and the writ of mandamus was refused "because the Commissioner had not declared the land forfeited when relator filed his application." In other words, all the statutory requirements had not been complied with, hence the land was not subject to be filed on.

A certain tract of land was awarded to Chambers & Schmitz; they failed to occupy the same as required by law; an application was filed

by W. F. Erp on February 8th, 1905, to purchase the land originally awarded to Chambers & Schmitz. The Land Commissioner sold the land to Erp on his application of February 8th, 1905; the award of Chambers & Schmitz was not cancelled by the Land Commissioner until March 25th, 1905. Later the Land Commissioner on the advice of the Attorney General cancelled the sale to Erp on the ground that it was illegally made. Mandamus proceedings were brought in the Supreme Court against the Land Commissioner to compel a recognition of the original sale by the State to Erp. The Supreme Court in Erp vs. Robison, Land Commissioner, 155 S. W., 180, refused the writ, and in doing so said in part:

"(1) In order to grant such relief, the court must be warranted in holding that, in virtue of the sale, the relators have acquired such legal rights as entitle them to enforce it, as a mandamus must be founded upon a clear legal right and otherwise does not lie. Railway Co. vs. Jarvis, 80 Texas., 456, 15 S. W., 1089; Teat vs. McGaughey, 85 Tex., 478, 22 S. W., 302.

"(2) It is evident from the petition that there had been no official cancellation of the previous Chambers-Schmitz sale of this land when Erp filed his application to purchase on February 8, 1905. It was not officially canceled until March 25, 1905. The land was therefore not subject to purchase when Erp's application was filed, and the sale made upon the premature application was unauthorized and conferred no right."

The two cases last quoted from hold that failure on the part of the purchasers of land to comply with the provisions of the statute under which they purchased is not sufficient to permit other parties to file an application to purchase the land and have the same awarded them upon such application. In addition to the failure on the part on the purchaser to comply with the provisions of the law, the Commissioner of the General Land Office must officially declare a forfeiture. The same principle of law decided in these cases is applicable to the question under consideration.

The Law of 1913, under which Haynes was granted his mineral permit provides that a failure on the part of the permittee to do a certain amount of development work, to make certain reports, etc., "shall work a revocation of said permit and the termination of the rights of the owner." The rights of the permittee are terminated by his failure to comply with the law, but the land is not subject to be filed on by other parties until "such termination shall be endorsed by the Commissioner of the General Land Office upon a duplicate copy of the permit retained in the General Land Office."

In the case of Underwood vs. Robison, 204 S. W., 314, the Supreme Court said that the question raised was this:

"The question raised is this: Does the Act of 1913, c. 173, p. 409 et seq., relating to the prospecting of school lands and the development of minerals thereon, provide for ipso facto forfeitures of mineral rights acquired under said statute, because of failure to comply with its requirements, or does the extinguishment of such rights, for such causes, await the action of the Commissioner of the General Land office in making, upon the duplicate copy of the permit retained in the General Land Office, an indorsement of such forfeiture?"

Continuing, the court said:

"We hold to the latter view. Said Act of 1913 does, indeed, declare that failure of the owner of the permit to comply with certain requirements 'shall work a revocation of said permit and the termination of the rights of the owner'; but that declaration is followed, immediately, by the provision:

" 'Such determination shall be indorsed by the Commissioner of the General Land Office upon a duplicate of the permit retained in the General Land Office.'

"The policy of our laws, as expressed in various earlier statutes relating to public lands, and as worked out and declared in several decisions of this court construing them, has been against ipso facto forfeitures and in harmony with the theory that affirmative action by the Commissioner in expressly declaring a forfeiture, upon statutory grounds, and in duly making a statutory record thereof, must precede filings by other applicants. The legislative purpose seems to have been to require an official ascertainment and record of such forfeiture rather than to leave open, indefinitely, the issue of forfeiture vel non, thereby perhaps placing upon holders of subsequently accruing rights the burden of proof."

The Supreme Court has construed the law in question and has held that non-compliance with the law did not ipso facto work a forfeiture, but that before the land was subject to be again filed on, the Land Commissioner must make the endorsement of such termination in the manner prescribed by the statute.

Yo uare, therefore, respectfully advised that at the time Mr. A. B. Crocker filed his application for a mineral permit on the land in question that the land was not subject to be filed on. Therefore, a permit should not be issued to Mr. Crocker on his application of July 17th, 1919.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2220, Bk. 54, P. 225.

MINING CLAIMS—OIL AND GAS PERMITS.

The fact that an oil and gas permit has been issued by the Land Commissioner embracing certain lands does not prevent that official from also issuing a permit for the purpose of prospecting for coal on the same land; provided, the person owning the oil and gas permit has not, while prospecting for oil and gas, discovered coal.

. Chapter 83, Acts of the Thirty-fifth Legislature, Regular Session.

May 5, 1920.

Hon. J. T. Robison, Commissioner General Land Office, Capitol.

DEAR MR. ROBISON: I have your letter of May 1st, addressed to the Attorney General, reading as follows:

"On the 27th day of April, this year, Walter Ackers, Jr., filed in this Office his application for a permit to prospect the following sections of land for coal; Sections 56, 66, 68 and 80, Block 3, D. & P. R. R. Co., each containing 640 acres, and situated in Presidio County. The application shows that the claim was posted April 12, 1920, and the application filed with the county clerk of said county April 24, 1920, and to it is attached his affidavits showing that he has no permits leases, or mineral patents

issued by the State. He paid the filing fee of one dollar and the acreage charges of $256.00.

"The application appears to be regular in all respects, but the same was rejected on the 28th of April for the reason that the area was included in three valid outstanding permits to prospect for oil and gas; Section 56 being included in Permit No. 4753 issued to Henry Malloch, Section 68 in Permit No. 4752 issued to Luther S. Foss, and Sections 66 and 80 in Permit No. 4755 issued to Favett A. Jones; all having been issued August 23, 1919, and each appearing to now be in good standing on the records of this office.

"The applicant insists that the Department is in error in its construction of the law and that he is entitled to have a permit issued to him to prospect for coal. I will thank you to advise me whether this Department should reconsider Mr. Acker's application and issue a permit."

The question submitted to us may be summed us as follows. Mr. Ackers has filed his application for a permit to prospect for and mine coal on certain sections of land upon which your department previously had issued an oil and gas permit; and you want to know if the application of Mr. Ackers should be accepted or rejected by your department.

I have great respect for your opinion concerning the construction to be given any law relating in any way to land matters; therefore, after receiving the above letter, I visited you in your office for the purpose of ascertaining your reasons for rejecting the application of Mr. Ackers. You stated that you rejected the application on account of the provisions contained in Section 23, Chapter 83, Acts of the Thirty-fifth Legislature, Regular Session. Said Section 23 reads as follows:

"Section 23. Should any mineral or substance within the provisions of this Act, other than those included in the permit or lease under which one is operating, be discovered while the area is being worked for the minerals and substances embraced in such permit or lease, the owner thereof shall have a preference right for sixty days after such discovery in which to file on the area allowed one for such mineral or other substance by complying with the provisions of this Act relating to the mineral or substance so discovered but shall not be required to pay either of the additional ten cents per acre to the State or the owner of the surface, and the remaining portion of said area shall be subject to the application of others in the same manner as if there were no pre-existing file thereon."

The provisions of Section 23 apply in precisely the same manner to a permit to prospect for coal as they do to one to prospect for oil and gas—that is to say, that a person holding a mineral permit of any kind, and, while prospecting for the kind of mineral authorized to be prospected for by his permit, he discovers a character of mineral other than that authorized to be prospected for by him by his permit, and provided the mineral so discovered is one of the minerals enumerated in Section One of said Chapter 83, the owner of the permit would have the preference right given by the provisions of said Section 23.

The provisions relative to oil and gas permits and the provisions with reference to the right to prospect for and mine coal, lignite or sulphur are all embraced within the same Act and Section 23, above quoted, is a part of this Act and all of these provisions must be con-

sidered together and in construing them they must, if possible, be made to harmonize.

The Legislature by the provisions of said Chapter 83 has authorized and empowered the Commissioner of the General Land Office to issue permits authorizing the holder thereof to prospect for and develop oil and gas and by the provisions of this same chapter has authorized and empowered the Commissioner of the General Land Office to issue permits authorizing the owner thereof to prospect for and mine coal on lands owned by the State or on lands which the State has sold and in which the State reserved to itself the minerals therein and nowhere in this chapter has the Legislature even indicated that the Commissioner of the General Land Office could not issue an oil and gas permit and a coal permit on the same land.

The provisions of said Section 23 clearly indicate that the Commissioner has the power to issue to one person a permit to prospect for coal and to another person a permit to prospect for oil and gas, all on the same land.

This is shown by the fact that if a person owning an oil and gas permit, and while prospecting for oil and gas, discovers coal, he is given the preference right against all the world to secure a permit for the purpose of prospecting for and mining coal and this preference right is good for sixty days. If the owner of the oil and gas permit fails to take advantage of the preference right given him by said Section 23, then any citizen, after the expiration of sixty days from the date of the discovery of coal, may by complying with the law secure a permit for the purpose of prospecting for and mining coal.

We know that the conclusions that we have reached are contrary to what you conceive the law to be; and it is possible that we are in error, but, after careful consideration, this Department is of the opinion, taking in consideration all of the provisions of said Chapter 83, that the only reasonable construction to be given the provisions of Section 23 is that if the owner of the oil and gas permit, while actually engaged in prospecting for oil and gas, discovers coal, he has a preference right for sixty days after such discovery of coal in which to file on not to exceed 2560 acres, or four sections of 640 acres each, more or less, but this preference right does not attach until the owner of the oil and gas permit has made the discovery of coal. Prior to a discovery of coal made by the owner of the oil and gas permit, while engaged in prospecting for oil and gas, any other citizen has the right, by complying with the provisions of Section 10 et seq of said Chapter 83, to file on the land embraced in the oil and gas permit for the purpose of prospecting for and mining coal and lignite.

There is nothing in the Act to indicate that the Legislature intended that when an oil and gas permit had been issued on certain land that no other mineral permit could be issued on the same land during the life of the oil and gas permit.

The oil and gas permittee has no preference right until he discovers some other mineral while prospecting for oil and gas, and

if, before he makes the discovery, an application is filed for a permit to prospect for and mine coal, such application should be accepted.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2227, Bk. 54, P. 237.

MINERAL PERMITS—COUNTY SURVEYOR CAN NOT BE INTERESTED IN—WORDS AND PHRASES—THE WORD "CONCERNED" DEFINED.

Under the law a county surveyor is prohibited from being directly or indirectly "concerned" in acquiring any right, title or interest in any mineral permit, either in his own name or in the name of another.

The word "concerned" as used in Article 164, Penal Code of Texas, is defined as prohibiting a county surveyor from having connection with, being interested in or solicitous about securing any right, title or interest in any public land in his own name or in the name of another. A mineral permit is a right or interest in land.

A person can not secure a mineral permit on more than one thousand acres of land, all of which is within one mile of a well producing petroleum, but may secure a permit on an area of more than one thousand acres where less than one thousand acres in the area permitted is within one mile of a producing oil well.

Article 164, Penal Code, Section 3, Chapter 83, Acts Thirty-fifth Legislature, Regular Session.

May 11, 1920.

Hon. J. T. Robison, Land Commissioner, State Office Building.

DEAR MR. ROBISON: Your letter of May 8th, addressed to the Attorney General, has been received and reads as follows:

"While J. W. Robinson was county surveyor of Young County, he signed an application for his mother to acquire a mineral permit to prospect in land in the bed of the Brazos River. He says he acted under a power of attorney from his mother.

"Some parties are attacking this permit, which was issued without the knowledge of this fact, and alleging that he as county surveyor was prohibited, under the law, from having any dealings, or any connection whatever in the matter of acquiring any public land for any other person. They allege that this permit is void, because this party as county surveyor signed the application of his mother, and he admits such to be so. It is also alleged that he paid the money for the surveying. (See Art. 164, Penal Code, and Art. 5388, R. S.)

"This permit embraces 1057 acres, but covers an area of the river bed extending up and down the river for several miles; and it is alleged that there is a producing oil well within one mile of the area at one point. The parties are attacking the validity of this permit on the ground that the law does not authorize a person to acquire a permit for more than 1000 acres within a mile of a producing well. And in this connection I will make this suggestion: It occurs to me that inhibition is against the granting of a permit for more than 1000 acres to one person where all the land is within one mile of a producing well, and does not inhibit the issuance of a permit on more than 1000 acres when only a portion of that acreage, say a few acres, is within a mile of a producing well, the acreage being the unit and not the permit. I know of only one case that might

have bearing on this; that is the case of Bradford vs. Robison, 141 S. W., 769. In that case the unit has been the section and not the acre; in the permit case I think the acre is the unit and not the permit.

"I would thank you for your opinion on this."

In reply thereto, your attention is first directed to Article 164, Penal Code of Texas, which provides that:

"If any * * * county surveyor or his deputy shall, directly or indirectly, be concerned in the purchase of any right, title or interest in any public land in his own name or in the name of any other person * * * he shall be fined in a sum not exceeding $500.00."

In the case of State vs. Thompson, 64 Texas, 690, the Supreme Court held that a deputy county surveyor could not, directly or indirectly, purchase any public land.

In Wills vs. Abbey, 27 Texas, 204, the court said:

"Public policy required that the officers chosen to locate and survey the public lands should not be permitted to speculate in them" * * *

And, continuing, the court said:

"The policy of the State in relation to the location and survey of the public lands, and especially the policy of prohibiting surveyors from purchasing or acquiring an interest in the public lands, is the same today as at the time of the statute of 1836, to which reference has been made, was enacted."

There are other cases bearing on the question, but it is unnecessary to cite them for the language of the above article is not ambiguous. It is clear and definite, and means what it says; that is, that a county surveyor shall not, directly or indirectly, be concerned in the purchase of any right, title or interest in any public land in his own name or in the name of another person.

A permit to prospect for and develop minerals carries with it a right and an interest in land, and the above statute prohibits a county surveyor from being interested, either directly or indirectly, in securing such a permit from the State, either for himself or for another person. In the instant case, it appears that the county surveyor was not interested in securing a mineral permit for himself —was he interested in securing a permit for another person? You state in your letter that "he says he acted under a power of attorney for his mother." The statute says that a county surveyor shall not "be concerned" in the purchase or in acquiring any right, title or interest "in his own name or in the name of any other person."

Webster defines the word "concerned" as follows:

"Having connection with; interested, anxious or solicitous."

Section 885 of the Code of Iowa is as follows:

"If any county treasurer or auditor shall hereafter be, either directly or indirectly, concerned in the purchase of any real property sold for the payment of taxes, he shall be liable to a penalty of not more than one thousand dollars, * * * and all such sales shall be void."

Certain property was sold for taxes. A deputy county treasurer requested a friend to buy in the property for a minor son of the deputy county treasurer. The Supreme Court of Iowa, in the case of Kirk vs. St. Thomas Church, 70 Iowa, 287, in passing on the question of whether or not the deputy county treasurer was "concerned" in the purchase of the property, said, in part:

"The important question in the case is whether the deputy treasurer was concerned in the purchase within the meaning of this statute * * * The object of the Legislature in enacting the statute undoubtedly was to secure perfect fairness in the conduct of the sale. The public officers who are charged with the duty of conducting or aiding in the sale are not only prohibited from acquiring any interest in the property sold, but are forbidden to be in any manner *concerned* in the purchase of such property. *That an officer may be concerned in the purchase, without himself acquiring any interest in the property sold,* is very clear. * * * Perhaps it could be said that no unfairness attended this particular sale and that the irregularity affected no substantial right of the owner of the property or of the public. But we think, upon the facts, the deputy treasurer was *concerned* in the purchase of the property within the meaning of the statute, and the rule created by it is imperative and universal, 'all such sales shall be void.' "

Referring again to Webster's definition, it certainly cannot be said that the county surveyor, while acting under a power of attorney from his mother, signed his mother's name to the aplication for a mineral permit, that he was not "concerned" or that he had no "connection with" the effort being made by his mother to secure an interest or right in certain public land. Mr. Robinson, in his effort to secure a mineral permit for his mother, acted under a power of attorney from her and was the agent of his mother.

Black's Law Dictionary defines "agent" as follows:

"The terms 'agent' and 'attorney' are often used synonymously. Thus, a letter of power of attorney is constantly spoken of as the formal instrument by which an agency is created."

An agent is always presumed to be "concerned" in the business intrusted to him by his principal. Unquestionably the relationship existing between Mr. Robinson and his mother was one of principal and agent.

It has always been the policy of the State to afford an equal opportunity to all citizens to obtain the public lands belonging to the State. Manifestly this could not be done if the county surveyor was to be permitted to purchase land for himself or to act as the agent or representative of other persons desiring to purchase or obtain a right in public land. A county surveyor is an officer charged with certain responsible duties, and in order for him to properly function he must not be a partisan; instead, he must be impartial, rendering to each and every citizen the same disinterested service. This he cannot do if he is acting for and in behalf of some person in an effort to acquire for that person rights in public land. A county surveyor as an officer and agent of the State has knowledge and information concerning the public lands that the average citizen does not possess. It would be contrary to public

policy for him to be interested, concerned or in any way connected with the purchase of any public land except in his official capacity as the agent of the State.

Recognizing these self-evident truths, the Legislature has made it unlawful for the county surveyor to "be concerned" in the purchase of public land either in his own name or in the name of another. Not only is such action unlawful, but a sale of any public land brought about by such unlawful acts is void. It follows from what we have said that we are of the opinion that the mother of Mr. J. W. Robinson is not entitled to the permit on the land in question for the reason that her son, while county surveyor of Young County, was "concerned" and connected with the efforts made to secure such a permit.

In answering your second inquiry your attention is directed to Section 3 of Chapter 83, Acts of the Thirty-fifth Legislature, Regular Session, wherein it is provided that "one shall not obtain more than one thousand acres *within* one mile of a well producing petroleum." This means that no one can secure more than a thousand acres *within* one mile of a producing well and does not mean that a person cannot secure more than one thousand acres a part of which may be within one mile of a producing well. In other words, a person cannot secure more than a thousand acres *all* of which is *within* one mile of a producing well, but can secure more than a thousand acres in one permit where less than one thousand acres embraced within the area covered by the permit is within one mile of a producing well.

Section 6-D, Chapter 20, Acts of the Thirtieth Legislature, provided that a purchaser of public land could sell to another purchaser of public land his home tract or one or more additional tracts provided the tract so sold was within five miles of the home section of the person purchasing the land. The Supreme Court in the case of Bradford vs. Robison, 141 S. W., 769, held that a person might become a substitute purchaser under the above statute of a tract of land a part only of which was within five miles of the substitute purchaser's home section.

The statute considered by the Supreme Court in the above case provided that the land should be within five miles of the home section of the would-be purchaser. The statute that we are considering provides that a person cannot acquire a permit on more than a thousand acres if the area is within one mile of a producing oil well.

As stated by you in your letter the effect of the Bradford case was to make the section the unit; that is, the would-be purchaser could buy the entire section if a part was within five miles of his home section. In the matter that we are considering the acre is the unit. If the area contained in a permit is not in excess of one thousand acres it can all be within one mile of a producing well and if the permit covers more than one thousand acres the statute is not violated, provided that of all the acreage contained in the permit, only a thousand acres or less is within one mile of a producing well. What the Legislature intended to prevent was one person securing a permit on all the land immediately surrounding a producing well,

and to carry out their intention they limited the permit of any one person to not to exceed one thousand acres within a mile of such well, but certainly they did not intend to prevent one person from securing more than a thousand acres only a part of which was within one mile of a producing well. At least, they used no language that remotely indicates an intention on their part to prevent one person from securing a permit on more than a thousand acres of land a part only of which is within one mile of a producing oil well.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

Op. No. 2273, Bk. 55, P. ——.

MINERAL PERMITS—FORFEITURES.

A mineral permit issued on unsold school land which is afterwards grouped with other permits is not subject to forfeiture under Section 6 of Chapter 83, Acts of the Regular Session of the 35th Legislature, for failure to file statement that actual development work was commenced within six months after the date of the permit.

A purchaser of the surface, after a permit has been issued, has no right to oil and gas that may be in the land until the rights of the permittee have terminated and the rights of the surface owner will only accrue by his acting as the agent of the State.

Section 6, Chapter 83, Acts of the Regular Session, 35th Legislature.

Sections 11, 12 and 13 of Chapter 81, Acts of the Second Called Session, 36th Legislature.

AUSTIN, TEXAS, January 21, 1921.

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR MR. ROBISON: I have your letter of January 19th, addressed to the Attorney General, reading as follows:

"Permit No. 4421 was issued July 26th, 1919, to prospect a section of unsold school land situated in Pecos County for oil and gas. September 2nd the land was sold to another person. The owner of the permit has not filed in this office an affidavit or any other evidence of the beginning of operations to develop oil and gas on said section, but has filed papers to combine his permit with other permits and has filed an affidavit showing drilling operations on another section, which is included in the combination or group as shown by the Clerk's certificate.

"The owner of the permit has paid to the County Clerk for the benefit of the owner of the land the correct amount and within the time required by Section 15, Chapter 81, Acts 36th Legislature, Second Called Session, to extend or combine permits. He has also made the required payments to the State for such purpose.

"The owner of the land is asking for the cancellation of the permit on the ground that the development required by Chapter 83, 35th Legislature, Regular Session, has not been perfected and that, under his contract to purchase, as expressed in the laws in force at the time made, the permit is not subject to extension or grouping in accordance with Chapter 81 cited, which became effective after the sale to him. He calls particular attention to Sections 5, 6, 19, and 21 of said Chapter 83 and Sections 11, 12, 13, 15, and 18 of said Chapter 81.

"Under the foregoing statement of facts, is said permit subject to cancellation?"

In reply, you are advised that before your letter of inquiry was received Honorable J. H. Walker, Chief Clerk in the General Land

Office, had in a conversation with the writer called attention to the facts stated in your letter. At that time, without any investigation of the law, I suggested that perhaps the permit was subject to cancellation, but at the same time advised that it would be necessary to make an investigation of the law before I could advise him definitely.

Since receiving the above letter, an investigation of the law has been made.

The permit was issued July 26th, 1919, on a section of unsold school land. At the time the permit was issued the State owned both the surface and the mineral. On the second day of September, 1919, the surface of this same section was sold. I assume that the surface was sold to a person other than the person who secured the mineral permit.

The permittee has not made the development work on this section required by Section 6 of Chapter 83, Acts of the Regular Session, 35th Legislature. He has, however, grouped this permit with other permits, as provided by Sections 12 and 13 of Chapter 81, Acts of the Second Called Session of the 36th Legislature, and has complied with the law by commencing development work on another section included in the group.

Chapter 81, above referred to, makes the owner of the surface the agent of the State in making oil and gas leases and gives to the surface owner fifteen-sixteenths of said minerals as compensation for acting as the agent of the State; provided, that if a person has acquired "any valid right to oil and gas in any unsold public free school land under any other law, a subsequent purchaser of such land shall not acquire any rights to any of the oil and gas that may be therein." Section 11 of said Chapter 81.

This same Section 11 provides that in the event the rights of the person having an interest in the oil and gas in such land shall be terminated "in the manner provided by law under which such rights were obtained," then the State becomes the owner of such oil and gas rights and the owner of the surface may become the agent of the State in making future leases, and for his services, as such agent, he is to receive a fifteen-sixteenth interest in the oil and gas that may be in such land.

This permit was granted by authority of and under the provisions of Chapter 83, Acts of the 35th Legislature, Regular Session. Section 6 of that Act provides that "within thirty days after the expiration of one year from the date of the permit" the owner of the permit shall "file in the General Land Office a sworn statement" that actual bona fide development work was commenced on said land within six months from the date of the permit. If this is not done, the permit is subject to forfeiture "and the termination of the rights of the owner." In your letter you state that this sworn statement has not been filed at the General Land Office.

The owner of the surface is apparently of the opinion that the permit should be cancelled or forfeited under the provisions of the law "under which such rights were obtained."

Chapter 81, above referred to, did not become effective until October 31st, 1919; the permit was issued July 26, 1919, more than

three months before said Chapter 81 went into effect. The surface was sold September 2, 1919, nearly two months before said Chapter 81 went into effect, and more than a month after the owner of the permit had acquired his rights to any oil or gas that might be in the land. When the State sold the surface the purchaser acquired no rights to any oil or gas that might be therein. Nearly two months later a law went into effect wherein it was provided that in the event the oil and gas rights previously acquired were terminated, then, in that event, the owner of the permit might acquire a fifteen-sixteenth interest in said oil and gas rights by acting as the agent of the State in making future leases.

This same law that went into effect nearly two months after the State sold the surface of this land provided that permits previously issued, as well as the ones thereafter issued, might be grouped into one or more groups, not to exceed sixteen sections in any one group. Section 12, Chapter 81. This same law also provided that the owner or owners of a group of permits shall have eighteen months from the average dates of the permits included therein in which to begin the drilling of a well for oil or gas "on some portion of the land included therein, and the drilling on one permit shall be sufficient for the protection against forfeiture of all the permits included in such combination." Section 13, Chapter 81.

You state in your letter that permit No. 4421 has been grouped with other permits and that an affidavit has been filed showing drilling operations on another section which is included in the same group as permit No. 4421.

The State had the right to provide for the grouping of mineral permits. The owner of permit No. 4421 had the legal right, if he so desired, to group his permit, as in said Chapter 81 provided. The owner of the surface had no rights, contractional or otherwise, in the oil and gas that might be in the lease. He purchased the surface with full knowledge that he was not acquiring any right or title of the oil and gas that might be in the land. His rights are in no way disturbed or interfered with by a subsequent change in the contract between the State and the permittee. The same law that authorized a change in the contract between the State and the permittee also provided in effect that when the rights of the permittee are terminated, the owner of the permit may, if he desires to do so, act as the agent of the State in making another lease. The owner of the surface acquires no rights to the oil and gas in the land until the rights of the permittee are terminated, and he, the owner of the surface, accepts the offer made by the State to employ him as its agent; and it is very doubtful if any rights are acquired by the surface owner until he, in fact, does act as the agent of the State and secures for the State a person to do actual development work on the land.

It follows, that we are of the opinion, under the facts submitted in your letter, that permit No. 4421 is not subject to cancellation, and you are so advised.

I am, with respect,

Yours very truly,

Assistant Attorney General.

Op. No. 2223, Bk. 5, P. 252.

GROUPING MINERAL PERMITS AND STATUTORY CONSTRUCTION.

Chapter 81, Acts of the Thirty-sixth Legislature, Second Called Session, provides that oil and gas permits may be grouped into one organization, not to exceed sixteen sections. Makes no provision as to the location of the land that may be grouped.

The language used in said Act, in so far as the same relates to the grouping of mineral permits, is free from ambiguity, indefiniteness, or obscurity. Such language needs no interpretation. It is presumed to mean what it says and no more.

Oil and gas permits may be grouped into one combination not to exceed sixteen sections regardless of the location of the land.

AUSTIN, TEXAS, May 15, 1920.

Hon. J. T. Robison, Land Commissioner, State Office Building.

DEAR MR. ROBISON: I have your letter of May 11th addressed to the Attorney General, reading as follows:

"Under Chapter 81, Act approved July 31, 1919, Section 12, it is provided permits for oil and gas purposes, which permits cannot exceed four sections, may be combined or grouped by the owners of them into combinations not to exceed sixteen sections.

"The question has become very pertinent as to whether or not the lands in those permits should be within a reasonable proximity of each other as that oil and gas development of one tract or permit would reasonably affect the land in another permit, or whether or not the land in the permits may be, say, one permit in Brewster County, another in Reeves County, another in Duval County and another in Panola County, for illustration and another in Stephens County, provided the several permits did not aggregate more than sixteen sections.

"The point is whether or not the land in so widely scattered portions of the State may be grouped into permits for development purposes or whether the law contemplates the tracts of land should be within a reasonable proximity of each other so that each tract or the land in each permit would be affected by the discovery or failure to discover oil and gas in any permit tract in a permit that might be developed."

In reply thereto, your attention is directed to Section 12 of the Act referred to in your letter, which reads as follows:

"Permits issued, or to be issued upon applications heretofore filed, or hereafter filed upon any land included in this Act, may be assigned as a whole into one ownership or may be grouped or combined into one organization, upon such terms as the owners may agree, and in one or more groups or combinations not to exceed sixteen sections of 640 acres each, more or less, in one group, for the purpose of developing oil or gas. All such assignments and agreements shall be recorded in the county or counties in which the land or part hereof is situated and shall be filed in the General Land Office within sixty days after the execution of the same, accompanied by one dollar as a filing fee."

It will be observed from a reading of the above that oil and gas permits may be grouped into combinations not to exceed sixteen sections, but is absolutely silent as to the location of the tracts that are to be grouped into such combinations.

A careful reading of the entire act fails to disclose any language that, by any reasonable construction, could be construed as indicating an intention on the part of the Legislature to limit the permits to be grouped into one combination to those embracing tracts of land that are contiguous to each other or that are in reasonable proximity to each other.

Had the Legislature intended to limit the permits that can be grouped to those permits which covered tracts of land contiguous to each other, or near to each other, undoubtedly they would have used language clearly indicating such an intention. No such language is used.

The language of the act as relates to the matter of grouping permits into a combination not to exceed sixteen sections is free from ambiguity, indefiniteness or obscurity. Black on Interpretation of Laws, second edition, page 45, says:

"If the language of the statute is plain and free from ambiguity, and expresses a single, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended to convey."

The Legislature has said that these oil and gas permits might be grouped. They placed no limit on the grouping except as to the number of sections. There is no proviso, no exception and no saving clause silent as to the tracts of land to be grouped.

Section 12 of the Act being considered needs no interpretation. "When the intention of the Legislature is so apparent from the face of a statute that there can be no question as to the meaning, there is no room for construction." (People vs. Sands, 102 Cal., 12.) "It is not allowable to interpret what has no need of interpretation." (Gilbert vs. Dutuit, 91 Wis., 661.) "To attempt to do so would be a palpable exercise of legislative functions." (McKay vs. Fairhaven Ry. Co., 54 Atl., 923.) "There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses." (Schwartz vs. Siegel, 117 Fed., 13.)

A plausible argument might be made against the policy of permitting a combination of oil and gas permits, one of which might be on a section of land in Duval County, another in Reeves County, another in Stephens County, etc., but this is a matter for the consideration of the Legislature.

Suppose the consequences of thus permitting combinations of oil and gas permits are evil, it cannot be remedied by reading into the law something the Legislature never said. "When the meaning of a statute is clear, its consequences, if evil, can only be remedied by a change of the law itself, to be effected by the Legislature and not by judicial construction." (Sutherland's Statutory Construction, Vol. 2, page 702.)

When a law is ambiguous, or when from a reading of the entire law it clearly appears that the Legislature intended to do or not to do a certain thing, rules of statutory construction are to be considered, and if possible the true intent of the legislative mind discovered and followed. Under such conditions it has sometimes been held that something might be read into the law—that is, added to what the Legislature said.

The weight of authority, however, is to the effect that anything omitted from a statute is to be considered as intentionally omitted. A great authority says: "If the statute is sought to be applied to a case or object which is omitted from its terms, but which appears to

be within the obvious purpose or plan of the statute, and so to have been omitted merely by inadvertence or accident, still the courts are not at liberty to add to the language of the law; and it must be held that the Legislature intended to omit the specific case, however improbable that may appear in connection with the general policy of the statute." (Black Interpretation of Laws.) Under the old law Mr. Black says: "It was a maxim that 'casus omissus pro omisso habendus est'; that is, that a case omitted is to be held as intentionally omitted."

The statute we are considering is free from ambiguity, is clear, definite and certain. "If we depart from the plain and obvious meaning, we would not in truth construe the act but alter it." (Lord Brougham in Gwynne vs. Burrell, 7 CL. & F., 696.) This the courts have no right or authority to do.

The true function and purpose of the courts in construing any statute is to ascertain the meaning of the Legislature, or to use a different phrase, to ascertain the true intention of the Legislature at the time they enacted the statute under consideration.

The courts may consider a statute unwise, even harmful, yet they are powerless. They must take the law as the Legislature made it. Under our system of government the judicial, executive and legislative branches of the government are equal. Each supreme in its own field. One cannot infringe upon the other.

The law in question omits any provision concerning the location of the tracts of land that may be grouped in a combination of mineral permits and "we are bound to take the act of parliament as they have made it; a casus omissus can in no case be supplied by a court of law, for that would be to make law." (Justice Buller in Jones vs. Smart, 1 T. R., 44.)

In a matter as important as this, it may be assumed with a strong degree of certainty, that the legislature for good and sufficient reasons deliberately and intentionally failed to limit the grouping of oil and gas permits to tracts of land contiguous to each other, or in near proximity to each other. In any event the law is bound to be so construed.

Yours very truly,

E. F. SMITH,

Assistant Attorney General.

Op. No. 2165, Bk. 53, P. 485.

MINES AND MINING—OIL AND GAS PERMITS—SALE OF—"INSTRUMENT" DEFINED—FILING FEES—GENERAL LAND OFFICE.

A filing fee of only one dollar is required to be paid on each instrument evidencing the sale of permits under the provisions of section 18 of Chapter 81 of the published Acts of the Regular Session of the Thirty-fifth Legislature, irrespective of the number of permits the sale of which is evidenced by such instrument.

AUSTIN, TEXAS, December 17, 1919.

Hon. J. T. Robison, Commissioner General Land Office, Austin, Texas.

DEAR SIR: We have yours of the 6th inst., stating that our opinion

to you of the 3rd inst. was written upon the erroneous assumption that the matter came under the grouping privilege provided for by Section 12 of Chapter 81 of the published Acts of the first and second called sessions of the Thirty-sixth Legislature, approved July 31, 1919, while the question submitted by you is one that arises under Section 18 of Chapter 81 of the published Acts of the regular session of the Thirty-fifth Legislature, approved March 16, 1917.

The question is resubmitted by you in yours of the 6th inst., as follows:

"One owns 49 permits. The land is in five different counties. The seller puts all 49 permits in one deed and then executes four more deeds just like the first one. Then one of said five deeds is recorded in one each of the five counties instead of executing one deed only and having it recorded in each of the five counties. Then all five deeds are offered here for filing with the tender of $49.00, thereby apparently recognizing the fact that the law fixes a fee of one dollar for each permit in a deed.

"Evidently one of these deeds alone would not be eligible to be filed in the Land Office for the purpose of conveying any of the permits except those permits which include land in the county in which the deed is recorded, hence it was necessary that all five deeds would have to be filed and as each deed embraced 49 permits, does the law require $49.00 for each of these deeds or should the five be considered as one deed and therefore only $49.00 should be charged?"

For the purpose of this opinion it is assumed that the case before you comes under the provisions of Section 18 of Chapter 81 of the published Acts of the Regular Session of the Thirty-fifth Legislature, approved March 16, 1917, which reads as follows:

"The owner of a file or permit or lease under any provision of this Act may sell same and the rights secured thereby at any time, also fix a lien of any kind thereon to any person, association of persons, corporate or otherwise, who may be qualified to receive a permit or lease in the first instance; provided, the instrument evidencing the sale or lien shall be recorded in the county where the area or part thereof is situated or in the county to which such county may be attached for judicial purposes and same shall be filed in the General Land Office within sixty days after the date thereof accompanied with a filing fee of one dollar, and if not so filed the contract evidenced by said instrument shall be void and the obligations therein assumed shall not be enforceable; provided, further, a sub-lease contract need not be filed in the General Land Office."

As there is no law except this section, either in this Act or elsewhere, relating to what is required to be filed under this section, or fixing or governing the filing fee here provided for, this section, and this section alone, must be looked to in determining what is required to be filed, and the amount of the filing fee to be charged.

From the plain wording of this section, it is evident that it is "the instrument evidencing the sale" provided for and authorized by the first part of the section, that is required to be filed in the General Land Office, and that it is for the filing of such instrument in the General Land Office that the fee of one dollar is required to be paid. In order, therefore, to answer your inquiry, it is only necessary to determine what is meant by the word "instrument" as here used.

It is well understood that a word used in a statute, unless specially defined, or unless the context or subject matter in reference to which it is used necessitates a different construction, is to be taken and construed in the sense in which it is understood in common language.

Neither this section nor any other law specially defines the word "instrument" as here used, nor does the context or subject matter in reference to which it is used necessitate that it be given a construction, as here used, different from the sense in which it is used in common language. Hence the word "instrument" as used in this section must be construed in the sense in which it it understood in common language.

Then what is the sense in which the word "instrument" is understood in common language? The most authoritative answer to this question is found in the standard lexicographers. Black's Law Dictionary defines the word as "A written document; a formal or legal document in writing, such as a contract, deed, will, bond or lease." The Century Dictionary and Encyclopædia define the word as "A writing given as the means of creating, securing, modifying or terminating a right, or affording evidence, as a writing containing the terms of a contract, a deed of conveyance, a grant, a patent, an indenture, etc." Other definitions by standard authorities are to the same effect. We have found no case nor authority holding or intimating that a written document constitutes or should be construed to be as many separate instruments as the number of objects or things constituting the subject matter of the contract. Neither can any good reason be adduced for so holding, nor does this section necessitate or require such a construction in this case. It is true that this section uses the words "owner of a permit," etc., using the singu lar number but it certainly could not be seriously contended that one owning a number of permits and having agreed upon a sale of two or more of them to one person would be required by this wording to execute a separate instrument of conveyance for each permit sold.

It is therefore our opinion that the word "instrument" as used in this section has reference to and means the written document by which the sale provided for in the first part of this section is evidenced, and that irrespective of the number of permits evidenced by such instrument to have been sold, and that the proper filing fee to be charged by you under this section is one dollar for each such instrument regardless of the number of permits evidenced by such instrument to have been sold.

However, the fact that the five instruments tendered for filing in this case are in certain respects identical, quintuplicates, does not make them, under the facts stated, any the less five separate instruments. No such instrument is entitled to be filed in the General Land Office unless a record of it has been previously made in the proper county or counties. In this case no one of the five instruments was recorded in all, nor in any two or more, of the five counties, but on the contrary one of the instruments was recorded in one of the five counties, another instrument was recorded in another county, and so on, each separate instrument having been recorded in a separate county. Each instrument, therefore, is only entitled to be filed, as pertaining to the land in the county in which it has been recorded.

It is our opinion, therefore, that the facts in this case show the tender of five separate instruments for filing, and that the proper

filing fee to be charged by you in this case, it being taken for granted that the instruments are entitled to be filed, is one dollar for each such instrument, making a total filing fee of five dollars for the five instruments.

W. W. CAVES,
Assistant Attorney General.

Op. No. 2079, Bk. 53, P. 65.

UNIVERSITY LANDS—LARGE SURVEYS—MINERAL FILING.

1. Lands originally surveyed for the University in large blocks, the outside boundaries containing many thousands of acres, the interior of which has never been surveyed nor subdivided into smaller survey, are not surveyed lands.

2. Persons desiring to file mineral prospect application on part of said lands should file same with surveyor.

AUSTIN, TEXAS, June 2, 1919.

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

DEAR SIR: On May 13th, 1919, you addressed to Honorable C. M. Cureton, Attorney General of Texas, the following inquiry:

"After the grant of one million acres of land to the State University by the Act of 1883, a surveyor was sent out to segregate it from the mass of public domain that remained unsurveyed. Field notes were returned to the Land Office in blocks of varying sizes by simply running the exterior lines of such blocks. When the blocks were platted on the maps of the Land Office, the draughtsmen proceeded to draw right angle lines each way across those blocks and thus giving the area the appearance of having been surveyed into sections, and while there were no field notes for such squares, they were given numbers as if they were sections and were listed on the books of the office as section so and so, block number so and so, and have uniformly been leased for grazing purposes by such designation.

"The records of the office indicate these blocks contain an excess acreage. Some mineral applications have been filed on these sections, as section so and so, block number so and so, 640 acres, with county clerks, as if they were surveyed land, while others have been filed with the county surveyer on the area within the blocks as if it were unsurveyed land. On which of these applications shall mineral permits be issued and be in compliance with the following provisions of Section 16, Mineral Act of 1917?

" 'Surveyed land within the meaning of this Act shall include all tracts for which there are approved field notes on file in the General Land Office, and eighty-acre tracts and multiples thereof of such surveys.'

" 'Unsurveyed areas within the meaning of this Act include all areas for which there are no approved field notes on file in the General Land Office.'

"The importance of this is such that I would thank you for your earliest possible consideration."

From the statements in your letter, it would appear that the lands in question are lands belonging to the State University, they having been segregated by a survey of the University lands under the Acts of 1883, each survey being in large quantities of possibly 20, 30 or 40,000 acres each. I have made some investigation at the Land Office and also find that the lands spoken of are shown in your office to be the above mentioned characters of lands.

Acts of the Eighteenth Legislature, passed in 1883, p. 85, provided that all lands heretofore or hereafter surveyed and set apart for the benefit of the common school, university, or lunatic, blind, deaf and dumb, and orphan asylum funds may be leased as hereinafter provided. Section 3 of said Act provides in substance that the State Land Board shall, under such regulations as may be prescribed, cause said lands to be classified, and tabulated in the county in which the same is situated, showing the number of survey, block and quantity in each survey, and providing for the lease and sale of same. Section 6 provides that such lands when placed upon the market shall be sold in the county or land district in which it is situated, by such authority and under such a system of competition as may be prescribed by the Land Board, and provides that no person shall purchase from the State more than one section of land classified as agricultural lands, or as water lands, and seven sections of unwatered pasture land, etc.

The Act of the Twenty-sixth Legislature passed in 1900, p. 31, segregates from the public domain all of the lands belonging to the public free school fund, consisting of 4,444,195 acres, or all of the unappropriated public domain remaining in the State of Texas of whatever character from wheresoever located, etc..

Under the statement of your letter, one million acres of the public domain was set apart to the University under said Act of 1883, as belonging to said institution, and part of which is the land in question. Acts 1900, Sec. 3, p. 31, provide said lands may be leased without being sectionized, classified and surveyed.

It will be seen that said Act of 1900 does not change the attitude or interfere with said University lands in any way. The Land Act of the Twenty-ninth Legislature passed in 1905, p. 159, also leaves said University lands intact, as it provides that the Commissioner of the General Land Office may from time to time, as the public interest may require, classify or re-classify, value or re-value, any of the lands set apart for the public free school, lunatic asylum, the blind asylum, the deaf and dumb asylum and the orphans' asylum, etc.

Section 8 of said Acts of 1905 reads as follows:

"Sec. 8. Any person desiring to purchase any portion of the unsurveyed school lands shall first make a written application to the surveyor of the proper county or district in which the land, or a portion thereof, is situated, signed and sworn to by the applicant, giving his postoffice address, and designating the land he desires by metes and bounds, as nearly as practicable, and stating that he desires to have the land surveyed with the intention of buying it, and that he is not acting in collusion with, or attempting to acquire said land for another person or corporation. It shall be the duty of the surveyor to file and record such application, and to survey the land and file the application and field notes in the Land Office within ninety days from the date of the filing of the application, together with a properly prepared and certified sketch of the survey, with the variations at which all lines were run. The land shall be surveyed under the instructions of the Commissioner of the General Land Office, and where practicable, into sections of six hundred and forty acres each, and of a regular form. The applicant shall pay to the surveyor one dollar as a filing fee, and his further lawful fees for surveying the land. When the surveyor returns the application and field notes to the Land Office, he shall report under oath the classification and market value of the land, and also the timber thereon and its value, which may be considered in connection with such other evidence as may be required in determining

the class and price to be given the land or timber. If upon inspection of the papers, the Commissioner is satisfied from the report of the surveyor and the records of the Land Office, that the land is vacant and belongs to the school fund, and the survey has been made according to law, he shall approve same and notify the applicant that the land is subject to sale to him, stating the classification, price and terms, which shall be the same as that for surveyed lands, except as herein provided;"

It will be seen that Section 8 is the first statute passed by the Legislature providing the method and manner of making surveys of unsurveyed schools lands. It is evident from this Section that what is meant by vacant lands are lands that have not been properly surveyed and have not been sold or occupied by other persons under the laws of Texas. Inasmuch as one person could by said acts buy only a certain number of sections of said land, ranging from one to eight, that if said school lands had been surveyed in large surveys including 30 or 40,000 acres in the outside boundary of said large survey, said lands within said boundary in so far as this Act is concerned, and the purchase of lands under same are concerned, would be held to be unsurveyed lands. In other words, said lands are unappropriated, and they can be appropriated by private persons only by complying with the terms and requirements of said statute.

In the case of Bacon vs. State, it is held substantially that any person desiring to purchase any unappropriated lands may do so by causing the tract which such person desires to purchase to be surveyed by the authorized public surveyor of the county in which the land is situated; and a survey not actually made in the field, but copied from field notes of a prior survey on file in surveyor's office, is not such a survey as is contemplated by law. The subject matter of the litigation in said cause involved about 298,000 acres of land situated in Scurry, Borden, and adjoining counties. The lands in question had been previously surveyed and field notes thereof filed in the surveyor's office in the proper county, and I presume in the Land Office, but the right to said lands in the name of Houston & Texas Central Railway Company failed on account of said lands being in Texas & Pacific Railway reservation. The surveyor undertook to copy or adopt the original surveys. This was held illegal and improper. It would seem that the clerks in the Land Office would have no more authority, if as much, to sub-divide the University blocks as suggested by your letter, by simply running lines across the plat, than the county surveyor had to undertake to adopt original surveys that had been previously made. In fact, the running of the lines by the draftsmen in the Land Office could be no survey at all, as the actual survey on the ground is the only evidence of the survey of lands or the appropriation of same.

Parish vs. Weatherford, 19 Tex., 902.

The statutes as early as 1879 contained Article 3908, which is Article 4144 of the statutes of 1895 and Article 5336 of the statutes of 1911. There are nine requirements under said Article to the field notes of a survey to make it legal.

In discussing the survey of the lands set forth in the above case of Bacon vs. State, and in discussing said Article, the court said as follows:

"The Act under which Bacon and Graves were attempting to acquire this land provides that 'any person, firm or corporation desiring to purchase any of the unappropriated land herein set apart and reserved for sale may do so by causing the tract or tracts which said person, firm, or corporation desire to purchase to be surveyed by the authorized public surveyor of the county or district in which said land is situated;' and the question as to whether or not the obtaining of the field notes in the manner above set forth should be considered as their having had the land surveyed, within the meaning of this Act, constitutes the most important question for our decision in this case.

"Prior to the adoption of our Revised Statutes, in prescribing the manner in which surveys were to be made, our law provided that 'the courses of the lines shall be determined by the magnetic needle, and care shall be taken to determine its variation from the pole in the district where the surveys are made. The surveys shall be made with great caution, with metallic chains made for the purpose, and care shall be taken that the place of beginning the survey of each parcel of land be established with certainty, taking the bearings and distances of two permanent objects at least.' Under this law, at an early day, the practice became so common among surveyors to disregard its provisions by making out field notes in their offices from data obtained otherwise than by work done upon the ground that the courts, in a great number of cases, have felt constrained to hold that where the question was raised by subsequent locaters, or other parties adversely interested, such acts of the part of the surveyor would constitute a valid appropriation of the land as against such claims Horton vs. Pace, 9 Tex., 84; Jenkins vs. Chambers, Id. 231; Jones vs. Burgett, 46 Tex., 293; Styles vs. Gray, 10 Tex., 506. And in Thomson vs. Railway Co., 68 Tex., 392, 44 S. W., 629, strong language is used recognizing the adoption of field notes previously surveyed as being a legal survey, within the spirit of our law as it stood previous to the adoption of our Revised Statutes. At the same time, it is not to be denied that, to constitute a survey strictly within the terms of our law as it has always been, it would be necessary for the work to be done upon the ground in the manner prescribed by the statute. In Stafford v. King, 30 Tex. 269, it is said: 'It is the duty of the surveyor to run round the land located and intended to be embraced by the survey and patent; to see that such objects are designated on it as will clearly point out and identify the locality and boundaries of the tract; and to extend a correct description of these objects, natural and artificial, with courses and distances, into the field notes of the survey, in order that they may be inserted in the patent, which will afford the owner as well as other persons the means of identifying the land that was in fact located and surveyed for the owner.' And in Sanborn v. Gunter, (Tex. Sup.) 17 S. W. Rep. 121, it is said: 'Actual surveys by which lands granted by the state shall be specifically described and distinguished have always been contemplated and prescribed by our law. It is true that, under the laws in force when the surveys in controversy were made for the railway company, it was not always regarded as indispensable, however desirable, that the line of the survey should be actually run and measured on the ground.' Recognizing the great inaccuracies that had frequently resulted from the practices of the different surveyors in attempting to make out field notes in their offices without surveying the land upon the ground, our Legislature, in adopting the Revised Statutes, inserted this provision, (article 3908:) 'The field notes of each survey shall state: (1) The county or district in which the land is situated. (2) The certificate or other authority under or by virtue of which it is made, giving a true description of same, by numbers, date, when and where issued, name of original grantee, and quantity. (3) The land by proper field notes, with the necessary calls and connections for identification, (observing the Spanish measurement by varas.) (4) A diagram of the survey. (5) The variation in which the running was made. (6) It shall show the names of the chain carriers. (7) It shall be dated and signed by the surveyor. (8) The correctness of the survey, and that it was made according to law, shall be certified to officially by the surveyor who made the same; *and also that*

such survey was actually made in the field, and that the field notes have been duly recorded, giving book and page. (9) When the survey has been made by a deputy, the county or district surveyor should certify officially that he has examined the field notes, has found them correct, and that they are duly recorded, giving book and page of record.'

"We think the principal object of the Legislature in requiring such strictness in the certificate to be made by the surveyor was to correct the abuse to which the previous law had been subjected as above indicated, and we think it must be conceded if the Legislature has the power to condemn what is commonly known as an 'office survey' or 'office work,' and to require its officers, before parting with the public land of the state, to have the surveying actually done in the field, it has done so by the passage of this statute. We know of no case in which the question has been raised as to the validity of an office survey or the adoption of previous field notes for a survey which should have been made in the field, since the adoption of our Revised Statutes; but our Supreme Court in several cases, has given strong intimations that its ruling under previous laws would not apply to such surveys. In Thomson v. Railway Co., 68 Tex. 392, 4 S. W. Rep. 629, cited above, in which the very strongest language is used in upholding such surveys under previous laws, it is said: 'The manner of making surveys was not so specifically prescribed, nor the requirements so exacting, in the year 1874, as are they by the law now in force,' etc.

"It will be borne in mind that the question presented for decision in this case is not whether the field notes, made out as indicated in the first part of this opinion, constitute such survey as the officers of this state could adopt, should they see proper to do so, nor whether it is such an absolute nullity as could be taken advantage of by a third party, but the question is, does it constitute such a survey, within the meaning of the law, as the state can be compelled to adopt in opposition to its wishes? The appellants are seeking to enforce against the state an executory contract, and base their right to do this upon the ground that they have complied with their part of such contract. In such case, we think, they should show that they have obtained the field notes in the manner the state said they should be obtained in its proposition, and not that they have got as good field notes in some other way as would have been obtained had they complied with the state's offer."

The statute of 1895 in Article 3836 provides as follows:

"The following shall constitute a permanent fund for the University of Texas, to be used for the benefit of said University. Section 1 of said Article provides all lands and other property heretofore set apart and appropriated for the establishment and maintenance of the University of Texas under any previous law; Section 2, one million acres of the unappropriated public domain of he State set apart for that purpose by the present Constitution, and one million acres of land set apart by Acts of April 10, 1883."

Article 2626, Revised Statutes 1911, contains the same Article.

It will be seen from this that one million acres of the University lands came from the public domain by the enactment of the Constitution of 1776, as well as previous laws, and that one million acres of land was set apart by said Act of 1883. It is not very clear from you letter as to which of these lands are involved in this inquiry, neither does it appear from your letter that all of said University lands have been previously surveyed in large blocks or in sections of 640 acres, each. However, it is immaterial as to this opinion. It is evident from your letter that the lands in question have not been sold or disposed of but are still held and owned by Texas University, and possibly used by it only in the way of leasing same for grazing purposes.

Article 2633, Revised Statutes of 1911, reads as follows:

"Art. 2633. (4263a) Control of University lands confided to regents. —The board of regents of the University of Texas are invested with the sole and exclusive management and control of the lands which have heretofore been, or which may hereafter be, set aside and appropriated to, or acquired by, the University of Texas, with the right to *sell, lease* and *otherwise manage*, control and use the same in any manner, and at such prices and under such terms and conditions as may to them seem best for the interest of the University, not in conflict with the Constitution of this State; provided, that such land shall not be sold at a less price per acre than the same class of land of other funds may be sold at under the statutes."

Article 2634, Revised Statutes of 1911, reads as follows:

"Art. 2634. Control of mineral lands confided to regents.—Said board of regents are invested with the sole and exclusive management and control of all mineral lands within the domain which has been, or may hereafter be, appropriated, set aside or acquired by the University of Texas; and said board of regents are hereby empowered and authorized to sell, lease, manage and control said mineral lands belonging to said University as may seem best to them for the interest of the University; and they are further empowered with authority to explore and have explored and develop said mineral lands and to make any contract with any persons whomsoever for the exploration and development of said mineral lands, and pay the expenses for such exploration or development out of the proceeds of the lease or sale of said land.

Article 2635, Revised Statutes of 1911, reads as follows:

"Art. 2635. (4263b) Duty of commissioner of land office.—The commissioner of the general land office is hereby directed to furnish to the said board of regents complete and accurate maps, and all other data necessary, to show the location and condition of every tract of said University lands, and shall at all times furnish to said board such additional information as they may require, and shall at all times render to said board such assistance as may be possible and as they shall request in the discharge of the duties hereby imposed on said board. (Act 1895, p. 19.)"

It will be seen from said Article 2633 that the University of Texas has the sole right to sell, lease and otherwise manage and control said lands, and up to this time the Legislature has not interfered with this right in any manner, and said University for all of said purposes is still in possession of said land. Said article 2634 provides in substance that the board of regents of said University are vested with the sole and exclusive management and control of all mineral lands and rights belonging to it in said land. As I understand it, these rights have not been curtailed nor changed in any manner by the Legislature until the Acts of 1913, Chapter 173, when by the provisions of said chapter it is provided among other things that all public school, university, asylum and other public lands (meaning for mineral purposes) ......shall be included within the provisions of said Act, and shall be opened to mineral prospect, mineral development and the lease of mineral rights therein in the manner herein provided. Section 33 of said Act provides in substance that all other laws and parts of laws relating to the sale of mineral lands are hereby repealed. It would seem from this clause that that part of Article 2634 referred to, relating to the sale of mineral lands belonging to the University, are thereby repealed, but the right to lease same does not seem to have

been specifically repealed by said Act. Chapter 18 of the First Called Session of Thirty-third Legislature, 1913, does not change this condition, as it attempts to amend only Sections 3, 4, 10 and 35 of said Acts of 1913 Regular Session.

Chapter 83 of the Regular Session of the Thirty-fifth Legislature, 1917, carries forward in Section 1 the mineral provisions with reference to university, public school and asylum lands above referred to and provided in said Acts of 1913. Section 28 of said Acts of 1917 provides as follows:

"Chapter 173, approved April 9, 1913, and all other laws and parts of laws in conflict with this act are hereby repealed."

Therefore, it would seem that beginning with said Act of 1917 that the Commissioner of the General Land Office has the superior right to manage, control, lease and dispose of the minerals, oils and gas in the university lands that are unsold, and that said Texas University, nor its board of regents have no further control over same, as their former rights were repealed by said statutes on this point. However, the regents of the University still have the management and control of said lands and the right to lease the same for all other purposes, and to dispose of them for all other purposes.

Said Act of 1917 states that surveyed lands within the meaning of this Act "shall include all tracts for which there are approved field notes on file in the General Land Office, and eighty-acre tracts and multiples thereof of such surveys."

It further provides that "unsurveyed areas within the meaning of this Act include all areas for which there are no approved field notes on file in the General Land Office."

It is evident that it was the intention of the Legislature that the word "land" used in the first article referring to surveyed lands means the same thing as the word "areas" used in the clause defining unsurveyed areas. In speaking of lands and areas in Section 2, which reads as follows:

"Any person or association of persons, corporate or otherwise, being a citizen of the United States or having declared an intention of becoming such, desiring to obtain the right to prospect for and develop the minerals and substances named there that may be in any of the *areas* included herein may do so under the provisions of this Act, together with such rules and regulations as may be adopted by the Commissioner of the General Land Office relative thereto and necessary for the execution of the purposes of this act."

Further in Section 3, the Legislature used the expression 'surveyed areas" and in Section 4 it used the expression "unsurveyed areas."

Now, if it were possible under the Mineral Act of 1917, Chapter 83, for a person to file a mineral prospect application covering the entire survey in question, then we would conclude that said survey would be a surveyed area, or surveyed lands, and therefore such application should be filed with the county clerk under said section.

However, it is not possible under the law for any one person to file his prospect application covering the entire survey, or to receive a permit to prospect for or develop petroleum oil or natural gas on said

lands, as the survey is shown by its outside boundaries in the Land Office. In Section 3 of the said Act, latter part of same, it states:

"When one has obtained four sections or that equivalent eligible to be embraced in one permit, such applicant shall not obtain any more land within two miles thereof, but if one obtains less than four sections eligible to be embraced in one permit, such one may obtain such additional area within two miles of the other area as will equal four sections. One shall not obtain more than one thousand acres within one mile of a well producing petroleum."

We are not advised as to whether or not there is a well producing petroleum within one mile of the land desired to be filed upon, but whether there is or not the greatest amount that could be filed upon by any one person in contiguous tracts is four sections, or that equivalent, the same to be embraced in one permit.

Further, it appears under Section 4, when the application is filed with the surveyor instead of the county clerk, and a survey of said lands required, that such applicant cannot procure over 2560 acres. Therefore, under no circumstances could the applicant cover the entire tract of land mentioned in your inquiry.

As many questions and a great deal of trouble have arisen as to the question of excess in large surveys made at an early date in Texas, it would seem further in keeping with the interests of the State and general public policy to require these large surveys of land to be resurveyed when the same are to be taken over by purchase or lease under any of the existing laws of Texas. Now, if said large survey contains within its boundaries a very material excess of lands to that shown by course and distance as indicated by the field notes, or the marks upon the ground, if any were made and designated at the time of the original survey, then it cannot be possible for the subdivisions created and made by the draftsmen in the Land Office to contain only 640 acres of land each. If they contain less, it would not be fair to the purchaser or lessee to let him take the lands without survey, and if there should be more, then it would not be fair to the State nor the University fund to permit them to take it without survey.

As we have seen from the above discussion that there has been no interior survey of said land upon which the Land Commissioner would be authorized or warranted in selling or disposing of the State's lands or interests therein, then same should be surveyed and the same marked and designated upon the ground and field notes and plat thereof returned as required by law. Therefore, for the purposes herein discussed, the person desiring to file a prospect application on said lands or any portion thereof should file the same with the proper surveyor under Section 4 of said Chapter 83.

Yours very truly,

W. F. SCHENCK,
Assistant Attorney General.

OPINIONS—PUBLIC OFFICERS.

Op. No. 2006, Bk. 52, P. 180.

OFFICERS, HOLDING TWO OFFICES.

A physician who is a county health officer is a public official and cannot hold another civil office of emolument and retain the office of county health officer.

A county health officer who is appointed a member of the Texas Board of Medical Examiners, his qualifying as a member of that board will operate ipso facto as a resignation of the office of county health officer.

Section 40, Article 16, Texas Constitution,
Articles 4539-5740 Revised Statutes,
Article 5739 Vernon's Sayles' Civil Statutes, 1918 Supplement.

AUSTIN, TEXAS, March 22, 1919.

Hon. M. F. Bettencourt, M. D., Sec'y and Treas. Texas State Board of Medical Examiners, Mart, Texas.

DEAR SIR: I have your letter of March 20, addressed to the Attorney General, reading as follows:

"Please advise me whether the holding of the following offices would, according to the law, render one ineligible to serve on the Texas State Board of Medical Examiners without resigning from such offices:
(1) County Health Officer.
(2) President Lunacy Commission (County).
(3) Member Board of Health (City).
One of the new appointees on the above named board is said to hold all of the three offices mentioned and this office has been asked whether, under the law, he can continue to do so and also serve as a member of the Board of Medical Examiners of this State."

In reply your attention is directed to Article 4539, Revised Statutes, wherein it is provided that the commissioners court in each organized county shall appoint a county health officer:

"said county health officer shall take and subscribe to the constitutional oath of office and shall file a copy of such oath of office and a copy of his appointment with the Texas State Board of Health. . . . . compensation of said county health officer shall be fixed by the commissioners court. . . ."

It will be seen from the provisions of the above article that a physician who is appointed to the office of county health officer must take and subscribe to the constitutional oath of office. In many other articles of our statutes the term office is used in connection with the term "county health officer" and it is also provided in the provisions of the Article quoted from above that the county health officer shall receive a compensation, the same to be fixed by the commissioners' court. It is, therefore, clearly evident that a physician who is county health officer holds a civil office of emolument.

Article 5739, Vernon's Sayles' Civil Statutes, 1918 Supplement, provides that any person desiring to practice medicine in this State

must successfully pass an examination before the Board of Medical Examiners and that:

"application for examination must be made in writing under affidavit to the secretary of the board on forms prepared by the board, accompanied by a fee of $25.00; except when an applicant desires to practice obstetrics alone, the fee shall be $5.00."

Article 5740 Revised Statutes provides that:

"The fund realized from the aforesaid fees shall be applied first to the payment of necessary expenses of the Board of Examiners; any remaining funds shall be applied by the order of the Board to compensate members of the Board in proportion to their labors."

Article 5733 Revised Statutes provides that there shall be a Board of Medical Examiners for the State of Texas consisting of eleven men learned in medicine and that said Board shall be appointed by the Governor of this State and Article 5734 provides that the members of said Board shall qualify by taking the oath of office before a notary public or other officer empowered to administer oaths in the county in which each shall respectively reside.

We find, therefore, that the members of the Texas Board of Medical Examiners are required to take an oath of office the same as other public officials in this State and that provision is made whereby they may receive compensation for their labors as members of said Board. It, therefore, follows that a physician who is a member of the Texas Board of Medical Examiners holds a civil office of emolument.

Section 40, Article 16, of the Constitution of the State of Texas provides:

"No person shall hold or exercise, at the same time, more than one civil office of emolument, except that of justice of the peace, county commissioner, notary public, and postmaster, unless otherwise specially provided herein."

You are, therefore, respectfully advised that a physician who is county health officer is a public official and cannot hold another civil office of emolument and retain the office of county health officer.

Having reached this conclusion it now remains to be determined what is the status of a physician who is appointed and qualifies as a member of the Texas State Board of Medical Examiners and at the time of his appointment and qualification was a county health officer.

In the case of the State vs. Brinkerhoff, 66 Tex., 45, the facts were that Brinkerhoff was elected secretary of the city of Waco and qualified as such; that on the day of his qualification he was appointed recorder of the city and on the following day he qualified as such recorder. In passing upon the question as to whether the acceptance of one office had vacated the other office, Judge Stayton, expressing the opinion of the Court, said:

"The respondent became city secretary on April 13, for on that day he qualified and on the next day he accepted the office of recorder, which of itself operated an abandonment of the former office, if he cannot hold both, this we understand to be the rule."

Judge Stayton further said:

"His qualification as recorder operated ipso facto as a resignation of the other office, if incompatible with that to which he qualified."

In the case of Allsop vs. Jordan. 6 S. W., 832, the facts were that Mrs. Jordan had obtained the decree of divorce from her husband in the District Court of Harrison County. The case being tried before a special judge who was at the time of his selection county judge of Harrison County, it was contended that the judgment of the district court was void, because a judge of the county court could not act as special judge in the district court. The Supreme Court held that even if the two offices were incompatible the judgment was not void because the position of special judge had been taken while such special judge occupied the office of county judge, the acceptance of the special judgeship vacated the county judgeship. Judge Stayton wrote the opinion and said:

"If a special judge within the meaning of the Constitution be such an officer as is forbidden to hold another office, then the acceptance and exercise of this office would operate as an abandonment and the office to which he had formerly qualified, an act of the special judge would be valid."

In the case of Biencourt vs. Parker, 27 Tex., 562, the Supreme Court of the State says:

"The Constitution declares that 'no person shall hold or exercise at the same time more than one civil office of emolument except that of justice of the peace. (Article 7, Section 26, of the Constitution of 1845.) On the acceptance and qualification of a person to a second office incompatible with the one he is then holding, the first office is ipso facto vacated. . . . and resignation by implication will take place by being appointed to an office, and accepting a new office incompatible with the former one. It is said to be an absolute termination of the original office and leaves no shadow of title to the possession, so that neither quo warranto nor a motion is necessary before another may be elected."

Other cases that may be cited are Ex parte Call. vs. 2 Tex., Court of Appeals, 497; The People vs. Carrique, 2 Hill, 97; Stuggs vs. Lee, 64 Me., 195; Cotton vs. Phillips, 56 N. H., 223; People vs. Whitman, 10 Cal., 38; Kerr vs. Jones, 19 Ind., 353; Creighton vs. Piper, 14 Ind., 182; the State vs. Hutt, 2 Ark., 282; Rex vs. Trelawney, 3 Burr, 1616; Milward vs. Thatcher, 2 Tex., 87.

Therefore a physician who is a county health officer and is appointed a member of the Texas Board of Medical Examiners his qualification as a member of that Board will operate ipso facto as a resignation of the office of county health officer.

You mention in your letter that one of the new appointees on the Board of Medical Examiners is not only a county health officer, but is also President of the County Lunacy Commission, also a member of the City Board of Health. It is not necessary to discuss his holding all these offices, for a person cannot hold two civil offices of emolument in Texas at the same time, except that of justice of the peace, county commissioner, and notary public.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2024, Bk. 52, P. 304.

COUNTY OFFICES—CONTRACTS WITH THE COUNTY.

A county officer cannot act as the agent for the county depository, for a person who acts as agent for the county depository is interested in a contract with the county and county officers are prohibited from being pecuniarily interested in contracts with the county.
Article 376, Penal Code;
Articles 1732, 2239, 6030 and 6033, Revised Civil Statutes.

AUSTIN, TEXAS, April 7, 1919.

Hon. T. M. Jordan, County Attorney, Kountze, Texas.

DEAR SIR: I have your recent letter, addressed to the Attorney General, reading as follows:

"Article 2448 R. S. 1911 provides that if any depository be selected by the commissioners court be not located at the county seat of such county, said depository shall file with the county treasurer of such county a statement designating the place at said county seat where, and the person by whom, all deposits may be received from the treasurer for such depository, and pay out moneys, etc. Please advise whether the county clerk, or any other county official, is eligible to act as such person designated to receive deposits and pay all check for the depository."

A county depository has a very important contract with the county. It is to handle not only the funds of the county but also funds belonging to the State. A county officer who acts as agent for the county depository would have an interest in a contract with the county.

Your attention is directed to Article 376 of the Penal Code which provides that:

"If any officer of any county in this state, or of any city or town therein, shall become in any manner pecuniarily interested in any contracts made by such county, city or town, through its agents or otherwise, for the construction or repair of any bridge, road, street, alley or house, or any other work undertaken by such county, city or town, or shall become interested in any bid or proposal for such work or in the purchase or sale of anything made for or on account of such county, city or town, or who shall contract for or receive any money or property, or the representative of either, or any emolument or advantage whatsoever in consideration of such bid, proposal, contract, purchase or sale, he shall be fined in a sum not less than fifty nor more than five hundred dollars."

In the case of Rigby vs. State, 10 S. W., 760, the Court of Criminal Appeals, speaking through Judge Wilson, said that:

"Manifestly, the Legislature in enacting the statute (Art. 376) intended to protect counties, cities and towns from official peculation. Such peculation was the evil sought to be suppressed; and the statute strikes at the very root of the evil by making it an offense for any officer of a county, city or town to become interested pecuniarily in matters wherein such corporations are pecuniarily interested. . . . . Our construction of the statute is that it inhibits every officer of a county, city or town from selling to or purchasing from such corporation any property whatever. This construction does not, we think, do violence to the language of the statute and is the only construction which will agree with what we believe to be the intent and purpose of the statute."

In enacting this statute, it was clearly the intention of the Legis-

lature to prohibit the county and city officials from being interested in a financial way in any contracts of any kind with the county or city.

If the courts should hold that a county officer, who acted as agent for the county depository, did not violate the provisions of the above article, county officials would still be prohibited from being interested in contracts with the county for the following reasons:

First: The county judge and commissioners are forbidden by statute from being interested in any contract with the county. Article 1732, Revised Statutes, provides that the county judge shall take the oath of office prescribed in the Constitution and the further oath required of the several members of the commissioners' court, and Article 2239 provides that:

> "Before entering upon the duties of his office the county judge and each commissioner shall take the oath of office prescribed by the Constitution and shall also take an oath that he will not be directly or indirectly interested in any contract with or claim against the county in which he resides except such warrants as may issue to him as fees of office. . . ."

The county attorney cannot act as the agent for the county depository, for the reason that it is a part of his official duties to furnish legal advice to the commissioners' court. The commissioners' court might think it necessary to bring suit against the county depository, and the county attorney, if acting as the agent for the county depository, would find himself in a position where he could not comply with his official duties in furnishing legal advice to the commissioners' court.

The county clerk is the clerk of the commissioners' court, keeps the minutes of their meetings and is cognizant of all the deliberations and proceedings of the commissioners' court. For him to act as the agent of the county depository would be incompatible with his duties as clerk of the commissioners' court.

In addition to the reasons already given, it would be contrary to public policy for any county official to be interested either directly or indirectly in any way in a contract with the county. A county officer owes to the county and State an undivided allegiance, and he must not permit himself to be placed in the position where his interests might be contrary or antagonistic to that of the county and State.

> "Agreements which tend to official corruption or injury of the public service may be entered into either directly with the official or with a third person who is to bring improper influences to bear upon such official. The courts will unhesitatingly pronounce illegal and void, as being contrary to public policy, those contracts entered into by an officer or agent of the public which naturally tend to induce such officer or agent to become remiss in his duty to the public. Nor is it necessary for the officer or agent to bind himself to violate his duty to the public in order to bring such an agreement within the operation of the rule. Any agreement by which he places himself or is placed in a position which is inconsistent with his duty to the public and has a tendency to induce him to violate such duties is clearly illegal and void."
>
> Section 706, Volume 2, Elliott on Contracts.

This Department is, therefore, of the opinion, and you are so advised, that the county clerk and all other county officers are prohibited, either by statute or by public policy, from acting as the agent of the county depository.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

Op. No. 1965, Bk. 51, P 466.

OFFICERS—APPOINTMENT OF DEPUTIES OR ASSISTANTS.

No officer included within the provisions of Chapter 55, of the General Laws passed by the Thirty-fifth Legislature at its Regular Session, can appoint deputies or assistants as therein provided without first securing an order from the county judge authorizing same.

The county judge is prohibited by the provisions of said Chapter 65 from attempting to control the personnel of the appointments by officers referred to therein.

Chapter 55, General Laws Thirty-fifth Legislature in its Regular Seston, (Article 3903, Vernon's Sayles' Civil Statutes, 1918 Supplement.)

AUSTIN, TEXAS, January 18, 1919.

Hon. D. A. McAskill, District Attorney, San Antonio, Texas.

DEAR SIR: I have your letter of January 14th, addressed to the Attorney General, reading as follows:

"Will you kindly advise me whether under provisions of Chapter 55 of the General Laws passed by the Thirty-fifth Legislature at its Regular Session, the county judge is given any authority to control the personnel of the appointment by officers referred to therein (including district attorneys) of deputies or assistants, or whether the power of the county judge is limited to fixing the number of deputies and assistants that may be appointed.

"I desire this opinion for official use."

Chapter 55 of the General Laws passed by the Thirty-fifth Legislature at its Regular Session (being Article 3903, Vernon's Sayles' Civil Statutes, 1918 Supplement), provides in part that:

"Whenever any officer named in Article 3881 to 3886 shall require the services of deputies or assistants in the performance of his duties, he shall apply to the county judge of his county for authority to appoint same; and the county judge shall issue an order authorizing the appointment of such a number of deputies or assistants as in his opinion may be necessary for the efficient performance of the duties of said office. . . . . and in no case shall the county judge attempt to influence the appointment in any office."

and continuing it is:

"Provided, that in all counties having a population in excess of 100,000 inhabitants, the district attorney of any district, or the county attorney of any county where there is no district atorney, is authorized, with the consent of the county judge of the county for which such appointment is intended, to appoint not to exceed two (2) assistants, in addition to his regular deputies or assistants."

From the first part of the quotation given above it is required of the officer desiring deputies or assistants to make application to the county judge for authority to appoint same and it is discretionary with the county judge as to the number, if any, that are to be appointed.

The second clause of the above quotation prohibits the county judge from attempting to influence the appointment of any person as such deputy or assistant. The last clause quoted above applies to the appointment of two assistants by the district attorney in addition to his regular assistants and the appointment is to be made with the consent of the county judge.

It now remains to be determined as to what the Legislature meant when it said "with the consent of the county judge." Did the Legislature intend that the district attorney should submit the names of the two persons that he desired to appoint to the county judge and that the county judge must consent that these particular men be appointed and if he should refuse to give his consent the district attorney must submit other names until he secured the consent of the county judge as to two particular men, or did the Legislature intend that the district attorney secure the consent of the county judge to appoint two additional assistants, leaving it optional with the district attorney as to whom he should appoint?

Black on Interpretation of Laws, page 166, lays down this general rule applicable to the construction of statutes, wherein the meaning of certain clauses may not be entirely clear.

"In the construction of a statute, in order to determine the true intention of the Legislature, the particular clauses and phrases should not be studied as detached and isolated expressions, but the whole and every part of the statute must be considered in fixing the meaning of any of its parts. . . . For the general meaning of the Legislature, as gathered from the entire act, may often prevail over that construction which would appear to be the most natural and obvious on the face of a particular clause."

In the first part of said Chapter 55, it is provided that the officers named in Article 3881 to 3886, when they require assistants or deputies they may appoint such number as the county judge will authorize, that is, they may appoint such deputies and assistants as the county judge will consent for them to appoint. The county judge being governed by his own opinion as to the number needed to efficiently perform the duties of the office, then comes the clause prohibiting the county judge from attempting to "influence" the appointment of any person as deputy or assistant in any office. Does the clause just quoted apply only to the preceding part of the statute or does it apply with equal force to that part which follows? We think, taking into consideration the rules of statutory construction, that it applies with equal force to the entire chapter or statute. Especially in view of the similarity of the language used in the two clauses. In the first clause it is provided that certain officers may appoint deputies or assistants by seeking an order from the county judge "authorizing," etc. In the other clause it is provided

thad district attorneys may appoint two assistants in addition to their regular assistants with "the consent of the county judge." In each instance the officer desiring deputies or assistants must secure the consent of the county judge before making the appointment, but the county judge is prohibited from attempting to influence the appointment after his consent is given.

You are, therefore, respectfully advised that in the opinion of this Department, the county judge is prohibited for attempting to control the personnel of the appointment by officers referred to in Chapter 55, of the Regular Laws passed by the Thirty-fifth Legislature at its Regular Session, including the two assistants provided for the district attorneys, in certain districts, in addition to their regular assistants, but no officer included in the provisions of said Chapter shall appoint such deputy or assistant as in said chapter provided until he first secures an order from the county judge authorizing the appointment of deputies or assistants, and after securing such order, the officer may appoint any legally qualified person he may choose, without in any way consulting the county judge.

Yours very truly,

E. F. SMITH,
Acting Attorney General.

Op. No. 2191, Bk. 54, P. 19.

COUNTY OFFICERS—REPORTS.

All officers mentioned in Articles 3881 to 3886, Revised Civil Statutes, 1911, are required to make the reports provided for in Article 3895, and to keep the statement provided for in Article 3894; and to make this report regardless of the population of the county.

In counties of less than 25,000 inhabitants according to the last United States Census, all officers whose fees are affected by the provisions of Chapter 4, Title 58, Revised Statutes, 1911, must make the report required by Article 3895 for that portion of the fiscal year 1919 beginning June 18, 1919, and ending November 30, 1919.

Officers in making their report for that portion of the fiscal year beginning June 18, 1919, and ending November 30, 1919, are entitled to retain such proportional part of the maximum fees allowed as the time from June 18 to November 30 bears to the entire year.

Chapter 4, Title 58, Revised Civil Statutes; Chapter 158, Acts Thirty-sixth Legislature.

ATTORNEY GENERAL'S DEPARTMENT, March 11, 1920.

Hon. C. P. Shepherd, County Attorney, Ballinger, Texas.

DEAR SIR: Your letter of the sixth instant, addressed to the Attorney General, has been received. You enclose a letter addressed to you from O. L. Parish, County Judge, Runnels County, propounding certain questions to you. Judge Parish's letter reads:

"Art. 3898, R. S., 1911, as amended by Acts 1913, page 246, provided that officer named in Arts. 3881 to 3886, in those counties having twenty-five thousand inhabitants or less, shall not be required to make the report as provided in Art. 3895, or keep the statement provided for in Art. 3894.

This article was repealed by the Thirty-sixth Legislature, Regular Session, 1919. I desire to know if an officer in a county of less than twenty-five thousand inhabitants would be required to make the report as provided in Art. 3895, December 1, 1919.

"If you answer the above in the affirmative, then I desire to know if the report should be made from December 1, 1918, to December 1, 1919, or should it be made from the time of the repeal of said Art. 3898 to December 1, 1919."

We will answer these inquiries in the order in which they come. Prior to the repeal of Article 3898 of the Revised Statutes 1911, the officers named in Articles 3881 to 3886, in those counties having a population of twenty-five thousand inhabitants or less, were not required to make a report of the fees collected by them as is provided in Article 3895, and were not required to keep the statements provided for in Article 3894. At the Regular Session of the Thirty-sixth Legislature, this article was repealed. Article 3898 was an exception to Article 3895, which required all officers mentioned in Articles 3881 to 3886 to make certain sworn statements showing the amount of fees collected during the fiscal year. When this article was repealed, then Article 3895 stood alone, and its provisions must be complied with by the officers affected by it.

It is the opinion of this Department, and you are so advised, that all officers mentioned in Articles 3881 to 3886 must now make the report, as provided for in Article 3895. This report must be made regardless of the population of the county.

Article 3896 of the Revised Statutes of 1911 reads:

"A fiscal year, within the meaning of this chapater, shall begin on December the first of each year; and each officer named in Articles 3881 to 3886, and also the sheriff, shall file the reports and make the settlement required in this chapter on December the first of each year. Whenever such officer serves for a fractional part of a fiscal year, he shall, nevertheless, file his report and make a settlement for such part of a year as he serves, and shall be entitled to such proportional part of the maximum allowed as the time of his services bears to the entire year. However, an incoming officer elected at the general election who qualifies prior to December the first next following shall not be required to file any report or make any settlement before December the first of the following year; but his report and settlement shall embrace the entire period dated from his qualification."

Article 3898, Revised Civil Statutes 1911, was repealed by Chapter 158 of the Acts of the Regular Session of the Thirty-sixth Legislature. By the repeal of this article it was made evident that it was the intention of the Legislature to place *all* counties of this State under the provisions of the "Fee Bill." Before the repeal of Article 3898 there was some question as to whether counties with a population of less than twenty-five thousand were affected by the provisions of the "Fee Bill." It was certain that in counties of less than twenty-five thousand inhabitants, the county officers did not have to make the report or keep the account that the county officers were required to make and keep in the larger counties. Chapter 158 did not pass the Legislature with emergency clause; therefore, did not become effective until ninety days after adjournment, which was June 18, 1919.

It is the opinion of this Department, and you are so advised, that

the officers mentioned in Articles 3881 to 3886 in those counties which have a population of less than twenty-five thousand, according to the last United States Census, should make their report for that portion of the year from June 18 to November 30, inclusive, 1919. This report should have been filed on December 1, 1919. The report should be only for that portion of the year as remained after the law became effective. The officers in making this report should be governed by the general provisions of Chapter 4, Title 58 of the Revised Civil Statutes, and should retain such proportional part of the maximum fees allowed as the time from June 18 to November 30, inclusive, bears to the entire year. This is the same rule as laid down in Article 3896 as a basis of settlement for an officer who only serves part of the year.

Yours very truly,

BRUCE W. BRYANT,
Assistant Attorney General.

PUBLIC OFFICES—COUNTY AUDITORS.

Commissioners courts in the counties having county auditors have not the authority to contract with private parties for auditing the books of the county. Commissioners court has authority to audit county auditor's office in order to ascertain the honesty and accuracy of the county auditor's work.

Article 1460-1498 Vernon's Sayles' Revised Civil Statute, 1918 Supplement.

Article 2141, Section 8, Revised Statutes, 1911.

December 1, 1919.

Hon. Chas. E. Gross, County Attorney, Dallas, Texas.

MY DEAR SIR: We have your communication of November 26, addressed to this Department, in which you ask for an opinion from this office as to whether or not the county commissioners in counties having auditors under the statutes have the right to employ private auditors to examine into the books of the county and in which you further inquire whether or not, if such private auditors are authorized by law, should you in your official capacity proceed to examine the various books of the county.

In reply thereto will state that on February 6, 1913, this office advised through an opinion to the County Auditor of Bexar County that counties could employ special auditors to audit the county books. I am sending you herewith a copy of this opinion. However, this opinion was prepared by reason of a special state of facts existing at that time in Bexar County and does not apply to counties generally over the State. The county auditors law, as first passed and subsequently amended, is included in Article 1460 to 1498, inclusive, with amendments thereto as found in Vernon's Sayles' Revised Civil Statutes and Supplement. With this law, I am sure you are familiar.

The precise question asked by you has not been passed upon so far as I can find in the courts of the State, though the county auditors law itself has been sustained. The first case which I will call to your

attention is the case of Stringer et al. vs. Franklin, 123 S. W., 1168, in which the court lays down the well accepted rule that as a general proposition when the law imposes upon an officer the performance of certain acts as a part of his official duty, the commissioners court of the different counties are without authority to contract with any other person to perform those services, or to in any manner transfer that official duty to any other person other than that named in the law. The rule laid down in the above case is fundamental as a general proposition and is not anywhere, so far as I know, denied.

The articles above referred to by me creating the office of county auditor make it distinctively an office and give its term, salary and qualifications, require him to give bond and to take the oath of office, and fix all his duties as any other officer, therefore, under the authority of the Stringer case above, the county commissioners would not have the right to contract with any other person to perform the duties of county auditor. In addition to this authority, it is also universally held that the duty placed upon county commissioners in Article 2241, Section 8, to audit and settle all accounts against the county and direct their payment is purely a judicial power and cannot be delegated to any person. In the case of Padgett vs. Young County, 204 S. W., 1046, this rule was laid down. Edmondson vs. Cummings, 203 S. W., 428, also lays down the same rule, both of which cases are based upon the case of Anderson vs. Ashe, 90 S. W., 872. This and all other cases, so far as I have been able to find, relating to the powers of commissioners courts to audit and settle accounts, declare that such powers are judicial in their nature, that the orders entered thereon are not subject to collateral attack and are final unless appealed from, unless they are void in the beginning, and that such powers cannot be delegated. This being true, under this Article of the Statutes, the commissioners court would not have power to hire some one else to do that which was their own duty to do and could not be delegated to some one else.

Further, in the Anderson case above referred to, the court held that the action of the auditor under his statutory powers of refusing to allow a claim, was a condition precedent to the filing of suit against the county and that if the auditor should reject a claim, it was not necessary thereafter to file same with the commissioners court, but that same could be sued upon forthwith in spite of the statutes which require all claims to be filed with the commissioners court, and rejected by them before suit could be filed thereon. This opinion is from the Supreme Court of the State. Of course in counties where there is no auditor under the statutes, it is the duty of the commissioners court by virtue of their general powers to examine into the books of all county officers as to all funds due or owing to the county. However, they would have no jurisdiction as to funds due or owing to the State or State officers.

It is now the duty of the grand jury under proper charge from the court to examine into and see whether or not all the officers have made their proper reports and remitted to the county according to same and it is your duty, of course, to see that these reports are ready and on

hand, as is by statute provided, and the county commissioners and the grand jury should come to your office for such information as they may desire.

I, therefore, advise you that the county commissioners in counties where there is an auditor under the provisions of Article 1460 to 1498 inclusive, of the Revised Statutes, have not the authority to contract with private parties for the auditing of the books of the county, unless it should appear upon reasonable grounds that the work of the county auditor's office was improperly done, in which event they would have a right to audit the work of the county auditor's office to see that his work was both honestly and accurately performed as is by statute provided, in which event, it would be your duty to proceed in the inspection of the county books and reports of officers as if no auditors were employed and as is by statute required.

Yours very truly,

JOHN MAXWELL,
Assistant Attorney General.

Op. No. 2098, Bk. 53, P. 158.

PUBLIC WEIGHERS—COMPRESS COMPANIES.

A compress company which is not engaged in weighing for the public for hire and issues no weight sheet or weight certificate to be accepted as the accurate weight from which the purchase or sale of a bale of cotton is based does not come within the provisions of Article 1 of Chapter 76 of the Acts of the Thirty-sixth Legislature passed at its Regular Session.

A compress company may weigh cotton and issue to the owner of the cotton a weight receipt for the purpose of limiting the liability of the compress company as the holder of the cotton for compression by stating in the receipt that it is not issued for the purpose of establishing an accurate weight upon which the purchase or sale of the cotton is to be based.

AUSTIN, TEXAS, June 23, 1919.

Hon. F. C. Weinert, Commissioner Markets and Warehouse Department, State Office Building.

DEAR SIR:

ATTENTION, JUDGE GREGG.

I have your letter of June 20th addressed to the Attorney General, reading as follows:

"I am in receipt of the enclosed letter from Mr. E. A. Warren, attorney for the Cameron Compress Company, Cameron, Texas, propounding two questions to this Department.

"The Department desires your construction of the law on the two questions propounded by Mr. Wallace. Will you kindly answer these questions at your earliest convenience, and oblige,"

Also the letter addressed to you from Mr. E. A. Warren of Cameron, Texas, together with copy of a form of receipt which the Cameron Compress Company desires to use. What the Compress Company wants to know is whether or not by the use of this receipt it would be brought within the terms of Article 1 of the Public Weigher's Law. Article 1 of Chapter 76 of the Acts of the Thirty-sixth Legislature passed at its Regular Session reads as follows:

"All persons, firms, corporations, co-partnerships, or individuals, engaged in the business of public weighing for hire, or any person, firm, or corporation who shall weigh or measure any commodity, produce or article, and issue therefor a weight certificate or weight sheet, which shall be accepted as the accurate weight upon which the purchase or sale of such commodity, produce, or article is based, shall be known as a public weigher, and shall comply with the terms and provisions of this Act."

The form of the receipt which the Cameron Compress Company proposes to use is as follows:

"(Season 1919-1920.) CAMERON COMPRESS COMPANY (Not a Public Warehouse.) (Not a Public Weigher.)	No. .... Marks. ....
Received of .... ONE BALE OF COTTON described as shown on margin for account of	Public Weigher's Weight. ....
FOR COMPRESSION. This Company binds itself to redeliver said cotton to legal holder hereof or to pay market value thereof based upon weight of this company as shown on margin, loss by act of God or fire damage excepted (unless insured by this Company) and subject to compress and storage charges thereon. This Company IS NOT A PUBLIC WEIGHER OR WAREHOUSE, and the weight made by it is to limit its liability as holder of cotton for compression, and not for purpose of sale, and any other weight shown on margin shall not bind this company."	This Company's .... Bale No. ....

By the provisions of Article 1, which we have hereinabove quoted, it is necessary that any person, firm, corporation, etc., engaged in the business of public weighing for hire or who issue a weight sheet or weight certificate which shall be accepted as accurate weight upon which the purchase or sale of any commodity, etc., is based, shall be known as a public weigher and must comply with the terms of said Chapter 76. The receipt which the Cameron Compress Company proposes to use is not issued as a weight certificate or weight sheet to be accepted as the accurate rate on which the purchase or sale of cotton is based, instead it states in clear, concise language that the company is not a public weigher and that the weights made by it are to limit its liability as a honder of cotton for compression and not for the purpose of sale.

However, I advise that the last paragraph of the receipt be changed so as to read as follows:

"This company is not a public weigher or warehouse and the weight made by it is to limit its liability as holder of cotton for compression, and this receipt is not issued for the purpose of establishing an accurate weight upon which the purchase or sale of this bale of cotton is to be based, and any other weight shown on the margin shall not bind this company."

I enclose herewith the letter from Mr. Warren and the copy of the receipt which the Cameron Compress Company proposes to use in the conduct of its business.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2135, Bk. 53, P. 367.

PUBLIC WEIGHERS' LAW—WAREHOUSES AND COMPRESSES.

A warehouse receipt or a compress receipt may become a public weigher's receipt or certificate if the principal object in issuing the receipt is that of establishing the weight of the article for the purpose of sale or exchange.

Each individual case arising where there is an apparent violation of the Public Weighers' Law will have to be judged upon the merits of that individual case.

The insertion in a compress receipt of a clause to the effect that the weight shown therein is for comparison purposes only and must not be used in adjustment or settlement between buyer and seller will not relieve the owner, or agent of the compress company from prosecution for violating the provisions of the Public Weighers' Law where he knew at the time that it was the purpose of the party receiving the receipt to use it for such purposes.

AUSTIN, TEXAS, October 11, 1919.

Hon. W. A. Tarver, County Attorney, Corsicana, Texas.

DEAR SIR: Your letter of the 3rd inst. addressed to the Attorney General has been received. It reads as follows:

"I wish to lay before you a situation that we are up against here with reference to the Public Weighers Law.

"The OIL CITY COMPRESS COMPANY of this city sought to have one of their employes appointed by the Governor as public weigher for the city. This was after they had been unable to reach an agreement with the public weigher for the precinct, appointed by the commissioners court as to the amount to be charged by the public weigher for the weighing of cotton at the compress. Failing to secure the appointment of their employe at the hands of the Governor, they have nevertheless installed the said employe as a weigher, and he is weighing cotton every day for the cotton buyers here, and as this office is informed said weight sheets are being used every day as a basis of sale. These weight sheets give the number of the bale, the point from which the cotton was shipped and the weight of the bale. Our information is that these weight sheets are paid for by the man for whom the cotton is weighed. The compress people claim they make no charge for weighing the cotton, but they do charge for these weight sheets, which they say they are obliged to keep for their own information.

"The weight sheets issued by them contain in small printed type these words:

" 'These weights are for comparison purposes only and must not be used in adjustment or settlement between buyer and seller.'

"The public weigher of this precinct has sought advice from this office as to whether this constituted a violation of the Public Weighers' Law. In the opinion of this office it does. But it would seem that perhaps your Department has held to the contrary and that this OIL CITY COMPRESS COMPANY here has been advised by the MARKETS AND WAREHOUSE

DEPARTMENT at Austin that a weight sheet showing on its face the above statement met the opinion of your Department and the issuance of such receipts did not constitute a violation of the law.

"I quote below from a letter to the OIL CITY COMPRESS COMPANY from the MARKETS AND WAREHOUSE DEPARTMENT dated September 22nd the following:

" 'We note from the weight sheet that "These weights are for comparison purposes only and must not be used in adjustment or settlement between buyer and seller." This clause we presume is taken from the ruling of the Attorney General covering weighing at compresses, and we are of the opinion that it is admissible and the sheet you are now using is in keeping therewith.

" '(Signed) MARKETS AND WAREHOUSE DEPT.,
" 'By Pat Daniel.'

"It would seem that these sheets are being used by the compresses everywhere. As stated, in the opinion of this office the use of these sheets, under these circumstances, is not only a clear evasion of the statute, but operates really to nullify the law. And yet it would seem that this company here has sought and obtained approval of the kind of weight sheets it is using from the MARKETS AND WAREHOUSE DEPARTMENT before using the same, and puts this office in the attitude, if it insists on the prosecution, of placing a different construction on the law to that which the MARKETS AND WAREHOUSE DEPARTMENT has adopted.

"One complaint has been filed here by the public weigher here and a great many are ready to be filed by him. We would, therefore, be pleased for you to advise us at once if you feel that these sheets with this provision in them, notwithstanding they may and are in fact being used as a basis of sale, do not constitute a violation of the law.

"I do not wish to take further action until I receive your definite view of this matter.

"Thanking you in advance for prompt response, I am."

In reply to the same beg to advise that this Department has held it unlawful for any person to engage in the business of public weighing for hire, or to weigh or measure any commodity, produce or article, and issue therefor a weight certificate or weight sheet, which shall be accepted as the accurate weight upon which the purchase or sale of such commodity, produce or article is based, unless such person shall first have been elected or appointed and qualified as a public weigher, or has been appointed and qualified as a deputy public weigher.

This Department has held in an opinion prepared by Hon. E. F. Smith, Assistant Attorney General, under date of June 23, 1919, and addressed to Hon. F. C. Weinert, Commissioner of Markets and Warehouse Department, that: A compress company which is not engaged in weighing for the public for hire and issues no weight certificate or weight sheet to be accepted as the accurate weight from which the purchase or sale of a bale of cotton is based does not come within the provisions of Article 1, Chapter 76, of the Acts of the Thirty-sixth Legislature, passed at its Regular Session.

A compress company may weigh cotton and issue to the owner of the cotton a weight certificate or weight sheet for the purpose of limiting the liability of the compress company as the holder of the cotton for compression, but stating in the receipt that it is not issued for the purpose of establishing an accurate weight upon which the purchase or sale of the cotton is to be based.

I am enclosing you a copy of this opinion for your information.

The Markets and Warehouse Department has lefined what consti-

tutes a public weigher's certificate, or weight sheet, a warehouse receipt, and compress receipt as follows:

"This Department has defined a public weigher's certificate as being one the principal object of which is to give the true weight of any article or commodity, usually, for the purpose of sale or exchange. Such certificate in all instances is negotiable, and should be delivered to the purchaser of the article or commodity.

"A weight sheet is a certificate of a public weigher giving the weight of a number of articles or commodities under one certificate.

"A warehouse receipt is a receipt by the warehousemen which is negotiable either by delivery or endorsement, carrying full title to the property, giving a complete description to the article or commodity, together with a statement showing nature of liens or incumbrances against such article or commodity, if any, and in the description of the article or commodity, as a rule, it is necessary to give the weight of same. The weight, however, being only an incident to the issuance of the receipt, and sometimes not necessary.

"A compress receipt is a receipt given by a compress company or association for an article or commodity, or a group of articles or commodities, mainly cotton, for the purpose of storage and compression. The weight is necessary to be given in order that the cotton be fully described, and the liability of the compress fully established.

"A compress receipt may become a public weigher's receipt or certificate if the principal object in issuing the receipt is that of establishing the weight of the article for the purpose of sale or exchange. The same thing is true of a warehouse receipt. Each individual case arising where there is an apparent violation of the public weighers' law, according to our opinion, will have to be judged upon the merits of that individual case."

It appears from your letter that the Oil City Compress Company is weighing cotton that is brought to them in wagons by the farmers and that they are weighing the same and issuing a compress receipt for the same for the farmer to take this receipt up town and sell the cotton to the cotton buyer, who accepts this weight certificate or weight sheet as showing the correct weight and as a basis for the purchase and sale. We think this is a clear violation of the public weighers' law, and that the compress company is trying to do, and is doing indirectly, what the law prohibits them from doing directly. The weight sheet issued by the compress company is not a weight certificate issued for the purpose of storage and compression, but its primary object is for the purpose of becoming the basis for a future purchase and sale. It is a subterfuge and such a one as we do not believe the courts will tolerate.

While it is true that this Department has held that compresses who are doing a bona fide compress business are entitled to issue a receipt for cotton consigned to them for the purpose of storage and compression, and has advised the owners of compresses that they had a right to issue such a receipt and to state the weight of each bale of cotton therein, it has also advised that they must contain a clause similar to the following:

"This company is not a public weigher or warehouse and the weight made by it is to limit its liability as holder of cotton for compression, and this receipt is not issued for the purpose of establishing an accurate weight upon which the purchase or sale of this bale of cotton is to be based, and any other weight shown on the margin shall not bind this company."

This Department has never held that the putting of this clause upon a compress receipt would serve to give the owners and operators of compresses immunity from prosecution for the violation of the public weighers' law should they issue a weight certificate or weight sheet primarily for that purpose, as it appears the Oil City Compress Company is doing, of becoming the basis for the purchase and sale of said cotton. This Department had in mind at the time the enclosed opinion was written to provide a way whereby the owners of compresses could issue to the owners of cotton consigned to them for the purpose of storage and compression a receipt which they could issue without violating the provisions of the public weighers' law. We did not have in mind a condition such as is stated in your letter. The fact that the Oil City Compress Company put upon its receipts the clause "These weights are for comparison purposes only and must not be used in adjustment or settlement between buyer and seller" does not relieve them of liability when they knowingly issue this receipt for the purpose of becoming the basis of a purchase and sale between the owner of the cotton and the buyer. They evidently are thoroughly cognizant of these facts each time they issue such a receipt.

It makes no difference that they do not charge for the weighing of the cotton, but do make a charge for the weight certificate. The charging for the receipt does not constitute a violation of the law, but the fact that they do issue a weight certificate or weight sheet which is accepted as the accurate weight upon which the purchase or sale of cotton is based brings them within the terms of the provisions of this Act, and they violate the law each time they issue a weight certificate or weight sheet under these circumstances. As stated above, each individual case will have to be judged upon the facts of that case.

If it is clear that compress companies and warehouse companies are issuing receipts primarily for the purpose of becoming the basis of sale or purchase, and not for the purpose of storage and compression, they violate the law.

Hoping this information will be of some service to you, I am

BRUCE W. BRYANT,
Very truly yours,
Assistant Attorney General.

Op. No. 2122, Bk. 53, P. 288.

PUBLIC WEIGHERS' LAW—STOCK YARDS, WHOLESALE PRODUCE AND COMMISSION MERCHANTS.

The Public Weighers' Law enacted by the Thirty-sixth Legislature at its Regular Session does not prohibit stock yards, wholesale produce and commission merchants, or anyone else from making private contracts with the buyer or seller, as the case may be, whereby the dealer is to weigh the commodity, produce, or article that is bought or sold.

However, this law does prohibit any firm, corporation, or individual from weighing any commodity, produce, or article for hire or from issuing a weight certificate or weight sheet to be used as the accurate weight upon which a future purchase or sale of such commodity, produce, or

article is to be based, unless the provisions of the public weighers' law have first been complied with.

Chapter 76, Acts of the Thirty-sixth Legislature, at its Regular Session.

AUSTIN, TEXAS, July 30, 1919.

Hon. F. C. Weinert, Commissioner Markets and Warehouse Department, Austin, Texas.

DEAR SIR: I have your letter of July 22nd addressed to this Department, enclosing a letter from Chas. A. Troilo, a public weigher of San Antonio, asking three questions. The questions asked by Mr. Troilo are as follows:

"If the stockyards in Texas, such as San Antonio, weigh livestock free of charge only for the persons having livestock in their yards and issue a weight certificate upon which a sale of such livestock may be based, does such transaction make the stockyards a public weigher, or covering them within the public weighers' law?

"Whether a wholesale produce or commission merchant can send or receive ten or more sacks of commodity, produce or article on which a bill or weight sheet is issued specifying the accurate weight on any commodity, produce or article where a purchase or sale is made, comes under this law.

"I would also like to have the same ruling in regard to grain and feed merchants, and any other rulings that you may have pertaining to this law."

In reply we call your attention to a portion of an opinion of this Department, of date June 25th, addressed to you wherein we said:

"It was evidently the intention of the Legislature, in enacting House Bill No. 248, which is now Chapter 76, Acts of the Thirty-sixth Legislature, passed at its Regular Session, to provide a public weigher who should weigh the various commodities, products, and articles bought and sold in this State. The purpose being to furnish a disinterested person with proper qualifications and who should be required to give bond to protect the public from carelessness and inaccuracy on his part. However, this law does not prohibit individuals from entering into a contract to purchase and sell and from providing in this contract that either the buyer or the one who sells shall weigh the grain, cotton, wool, or other produce, and that such weight shall govern both parties to the contract. By the provisions of this law, a public weigher has been provided for and no person can engage in weighing for the public for hire or issuing a weight sheet or weight certificate without complying with the provisions of this law. However, it is not sought by the provisions of this law to compel any person, firm, or corporation to have their produce or other articles weighed by the public weigher.

"A farmer, if he desires to do so, may bring his cotton into town and sell same to the ginner, permit the ginner to weigh the cotton and accept such weight as accurate and accept payment for his cotton according to the weight of the cotton, as weighed by the ginner. A farmer may bring grain into town and sell same to a grain dealer and permit the grain dealer to weigh same and to accept payment for such grain according to the weight thereof as weighed by the grain dealer.

"The same principle of law may be applied to any other article of produce bought and sold. The Legislature has only provided a means by which the general public may be protected from false and inaccurate weights, but it has not sought to compel any part of the general public to accept the benefits of this law."

The opinion from which the above is an extract, as it seems to us,

answers the questions asked by Mr. Troilo. However, we have no objection to answering his particular questions.

In reply to the first question you are advised that the stock yards located at San Antonio can weigh livestock free of charge and the law is not violated. An agreement can be made between the stock yards and the person buying or selling cattle whereby the stock yards are to weigh the cattle or other livestock and the same will be purchased in accordance with these weights. However, the stock yards could not issue a weight sheet or weight certificate to be used as the accurate weight upon which a future purchase or sale of such cattle or other livestock is to be based, unless they first comply with the provisions of the public weighers' law by being either elected or appointed a public weigher. The stock yard, as a corporation, of course, could not be elected or appointed a public weigher, but some individual connected with the corporation possibly could be elected or appointed a public weigher in the manner provided for in the public weighers' law.

In reply to the second question you are advised that a wholesale produce or commission merchant can enter into an agreement with the person to whom they are selling goods or from whom they are buying goods whereby the wholesale produce or commission merchant is to weigh the commodity, produce, or article that is bought or sold. However, as has been said above, the wholesale produce or commission merchant can not issue a weight certificate or weight sheet to be used as an accurate weight upon which a future purchase or sale of such commodity, produce, or article is to be based, unless the provisions of the public weighers' law have first been complied with.

We suggest that when any public weigher, or any other person, is convinced that some firm, corporation, partnership, or individual is violating the public weighers' law that they report the same to the local officers, for it is made a misdemeanor for any person to engage in the business of weighing for the public for hire or to issue a weight sheet or weight certificate which shall be accepted as accurate weight upon which the sale of any produce, commodity, or article is based, unless the provisions of the public weighers' law have first been complied with.

E. F. SMITH,
Assistant Attorney General.

Op. No. 2106, Bk. 53, P. 205.

PUBLIC WEIGHERS' LAW.

A public weigher, as defined by Chapter 76, Acts of the Thirty-sixth Legislature, passed at its Regular Session, is any person, firm, corporation, co-partnership, or individual who is engaged in the business of public weighing for hire or who issues a weight certificate or weight sheet which shall be accepted as the accurate weight upon which the purchase or sale of any produce or article is based.

The commissioners court has the authority to combine two or more justice precincts for the purpose of electing public weighers.

The Public Weighers' Law, enacted by the Thirty-sixth Legislature, does

not abolish the office of the public weigher who has been elected or appointed under the former law governing public weighers, but such public weigher must, within sixty days from June 18, 1919, file a bond with the commissioners court of the county in which he resides in the penal sum of $2,500.00.

The Public Weighers' Law, as enacted by the Thirty-sixth Legislature. authorized the Governor to appoint public weighers in certain cities under certain conditions.

This law does not deny a grain dealer, a ginner, or any other dealer in agriculural products the right to make a private contract with the farmer or seller whereby he is to weigh all grain, cotton, or other agricultural products, bought from such farmer or seller.

Chapter 76, Acts of the Thirty-sixth Legislature, passed at its Regular Session.

ATTORNEY GENERAL'S DEPARTMENT, AUSTIN, TEXAS, June 25, 1919.

Hon. F. C. Weinert, Commissioner, Market and Warehouse Department, State Office Building, Austin, Texas.

DEAR SIR: I have your letter of June 20th, addressed to the Attorney General, in which you propound to this Department five questions relative to House Bill No. 248.

First: "Who are public weighers within the full meaning of H. B. 248 and of the Revised Civil Statutes, 1911, in so far as same is not repealed by H. B. 248?"

By the provisions of Chapter 78, Acts of the Thirty-sixth Legislature, passed at its Regular Session, all persons, firms, corporations, co-partnerships, or individuals, engaged in the business of public weighing for hire or who shall weigh or measure any commodity, produce, or article, and issue therefor a weight certificate or sheet which shall be accepted as the accurate weight upon which the purchase or sale of any produce or article is based is a public weigher and must comply with the provisions of said Chapter 76.

Your second question reads as follows: "Has the Commissioners Court the authority to combine all precincts in the County and elect a public weigher for the entire county? Can the Commissioners Court authorize the election of more than one public weigher for the entire county?"

Within sixty days from June 18, 1919, it is the duty of the Commissioners' Court to appoint one public weigher for each Justice Precinct in the county when in their judgment it is necessary and when no public weigher has previously been elected. See Section 2 of said Chapter 76. There is no authority conferred by the provisions of this law to the Commissioners' Court authorizing it to combine all precincts in the county and to appoint a public weigher for the entire county; however, by the provisions of Article 7828, Revised Civil Statute, it is provided that the commissioners' court may unite two or more justice precincts for the purpose of electing public weighers. This provision was not repealed by the provisions of said Chapter 76, for the reason that it is not in conflict with any provision of said Chapter 76.

Your third question reads as follows: "Where a public weigher has been authorized by city ordinance, and he has been appointed to serve under such city ordinance, does H. B. 248 abolish the office of city weigher where such city or town comprises one justice precinct, or

where the city or town is situated in more than one justice precinct?"

"All laws and parts of laws in conflict with this Act are hereby repealed." Section 19, of said Chapter 76.

It is made a misdemeanor for any person, firm, corporation, or agent or representative of such corporation, to engage in the business of weighing for the public or to grant or issue a certificate or weight sheet upon which a purchase or sale is made without complying with the terms of this Act. See Section 13, of said Chapter 76.

Section 2 of this Act provides for the appointment of a public weigher in each justice precinct, when in their judgment it is necessary "and when no public weigher has previously been elected."

Then, again, Section 4 of this Act provides that in all cases where a public weigher has been elected or appointed under the present law governing public weighers, "he shall be permitted to continue in office," but he must within sixty days after this Act goes into effect file a bond with the commissioners' court, payable to the State of Texas, in the penal sum of $2,500.00, as provided for in Section 2 of this Act.

You are, therefore, advised that the office of city weigher is not abolished by the provisions of said Chapter 76, but he must, in order to continue to perform the duties of his office, comply with the provisions of said Chapter 76.

Your fourth question reads as follows: "Has the Governor the authority, under H. B. 248, to appoint public weighers in cities and towns or shipping points where a precinct public weigher has already been elected?"

The Governor has the authority to appoint public weighers in cities and towns in this State which receive "as much as fifty thousand bales of cotton, twenty-five thousand tons of cotton seed; one hundred thousand bushels of grain or rice, or one hundred thousand pounds of wool; five thousand barrels of sugar or any other commodity in large quantities." See Section 5 of said Chapter 76.

Your fifth question reads as follows: "Has a grain dealer, or any other dealer in agricultural products, the right to make a private contract with the farmer or seller, whereby he is to weigh all produce bought from such farmer or seller? Also, will the ginner who buys cotton seed and cotton from the farmer be compelled to have same weighed by public weigher before paying for same?"

It was evidently the intention of the Legislature, in enacting House Bill No. 248, which is now Chapter 76, Acts of the Thirty-sixth Legislature, passed at its Regular Session, to provide a public weigher who should weigh the various commodities, products, and articles bought and sold in this State. The purpose being to furnish a disinterested person with proper qualifications and who should be required to give bond to protect the public from carelessness and inaccuracy on his part. However, this law does not prohibit individuals from entering into a contract to purchase and sell and from providing in this contract that either the buyer or the one who sells shall weigh the grain, cotton, wool, or other produce, and that such weight shall govern both parties to the contract. By the provisions of this law, a public weigher has been provided for and no person can engage in weighing for the public for hire or issuing a weight sheet or weight certificate without complying with the provisions of this law. However, it is not sought

by the provisions of this law to compel any person, firm or corporation to have their produce or other articles weighed by the public weigher.

A farmer, if he desires to do so, may bring his cotton into town and sell same to the ginner, permit the ginner to weigh the cotton and accept such weight as accurate and accept payment for his cotton according to the weight of the cotton, as weighed by the ginner. A farmer may bring grain into town and sell same to a grain dealer and permit the grain dealer to weigh same and to accept payment for such grain according to the weight thereof as weighed by the grain dealer.

The same principle of law may be applied to any other article of produce bought and sold. The Legislature has only provided a means by which the general public may be protected from false and inaccurate weights, but it has not sought to compel any part of the general public to accept the benefits of this law.

In order that we may not be misunderstood, we again desire to call your attention to the fact that it is unlawful for any person, firm, corporation, or individual to engage in the business of weighing for the public for hire or to issue a weight sheet or weight certificate which shall be accepted as the accurate sheet upon which the purchase or sale of any commodity, produce or article is based. A ginner or grain dealer, buying cotton or grain from the farmer direct, would not be engaged in weighing for the public for hire and neither would it be necessary that he issue to any person a weight certificate or weight sheet to be accepted as the accurate weight upon which the purchase or sale of such cotton or grain would be based.

A weight sheet or weight certificate such as is contemplated by section 1 of this law is an instrument in writing delivered by the person who weighs the cotton or grain or other commodity to the person having same weighed and is issued for the specific purpose of furnishing not only to the owner of the cotton or grain, or other commodity, but to the general public an accurate weight upon which a purchase or sale of same could be based. There would be no necessity for a ginner or grain dealer who purchased direct from the farmer his cotton or grain and who weighed the same himself to issue to the farmer a weight sheet or weight certificate such as is contemplated by Section 1 of this law.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2072, Bk. 53, P. 26.

WEIGHTS AND MEASURES, PUBLIC WEIGHERS.

After June 18, 1919, when the law known as the "Public Weighers' Law" becomes effective, it will be unlawful for any person to engage in the business of public weighing for hire, or to weigh or measure any commodity, produce, or article, and issue therefor a weight certificate or weight sheet, which shall be accepted as the accurate weight upon which the purchase or sale of such commodity, produce, or article is based, unless such person shall first have been elected or have been appointed and qualified as a deputy public weigher.

Chapter 76, Acts of the Thirty-sixth Legislature, passed at its Regular Session.

AUSTIN, TEXAS, May 23, 1919.

Hon. F. C. Weinert, Commissioner Markets and Warehouse Department, State Office Building.

DEAR SIR: I have your letter of May 20th addressed to the Attorney General reading as follows:

"I will be pleased to obtain an official ruling from you on the questions hereinafter set out.

"Section 2 of House Bill No. 248, passed at the Regular Session of the Thirty-sixth Legislature, provides for the election or appointment of public weighers, as provided therein. Sections 1, 13 and 14 indicate that others than persons so appointed or elected may perform the functions of a public weigher by complying with the terms of the Act. The law seems to differentiate between "public weighers" and "weighers for the public," therefore, I desire to know.

"First: Can persons other than those duly elected or appointed public weighers weigh for the public?

"Second: If persons other than those duly elected or appointed public weighers can perform the functions of a public weigher, what are the necessary prerequisites to enable such a person to perform the functions of a public weigher, or a weigher for the public?

"Third. Can a public warehouseman act in the dual capacity of a public warehouseman and a weigher for the public?

"If you answer the third question in the affirmative, then please answer: if such a person must give a bond as a weigher for the public also, in addition to his bond as a public warehouseman?"

In order to answer the three questions which you propound, it will be necessary to consider all the provisions of House Bill No. 248, knows as the "Public Weighers Law," passed at the Regular Session of the Thirty-sixth Legislature.

Section 1 of said Bill reads as follows:

"All persons, firms, corporations, co-partnerships, or individuals, engaged in the business of public weighing for hire, or any person, firm or corporation who shall weigh or measure any commodity, produce or article, and issue therefor a weight certificate or weight sheet, which shall be accepted as the accurate weight upon which the purchase or sale of such commodity, produce, or article is based, shall be known as a public weigher, and shall comply with the terms and provisions of this Act."

Section 2 provides that the Commissioners' Court of the various counties of Texas shall appoint one public weigher for each justice precinct within each county in this State within 60 days after the taking effect of this Act, when, in their judgment, it is necessary and when no public weigher has previously been elected. Such public weigher is required to give a bond payable to the State of Texas in the penal sum of Twenty-five Hundred ($2500.00) Dollars, conditioned upon the faithful performance of his duty as a public weigher.

Section 3 of said law provides that such public weigher so appointed by the Commissioners' Court, or elected, shall have the right and it is his duty to appoint a sufficient number of deputies in his precinct, such deputies so appointed to file a bond in the penal sum of $1,000.00,

payable to the State of Texas, subject to the approval of the Commissioners' Court of the county in which he resides, conditioned the same as the bond filed by the public weigher himself.

Section 4 provides that where a public weigher has been elected or appointed under the present law governing public weighers, he shall be permitted to continue in office, but he must file a bond within 60 days after the taking effect of this Act with the Commissioners' Court of the county in which he resides, the bond to be the same as that outlined in Section 2, above referred to.

Section 5 of said Act relates to the appointment of the public weighers by the Governor in certain cities and towns in this State.

Section 6 relates to the qualifications of a public weigher.

Section 7 of said law reads as follows:

"All public weighers, or deputy public weighers, appointed or elected, under the terms and provisions of this Act, shall file their bonds, as required herein, with the commissioners court of the county in which they reside. and shall obtain from the Commissioner of Markets and Warehouses a certificate of authority to carry on the business of public weigher or deputy public weigher, within the city, village, place or shipping point, for which he was elected or appointed, and no one shall be allowed to pursue the business of weighing for the public, or grant a certificate or weight sheet upon which a purchase or sale is made, unless he shall comply with the terms and conditions of this Act."

Sections 8, 9, and 10 of said law relate to the matter of the certificate to be used by public weighers; provide for the seal which shall be impressed upon each weight certificate issued by such public weigher, or deputy public weigher; and provide that the Commissioner of Markets and Warehouses of Texas prescribe rules and regulations for the government of such weighers throughout the State, which rules and regulations shall be uniform and shall be of the same force and effect when promulgated as if they were enacted into law; provide for the keeping of a correct and accurate record of all weights made by the public weighers, or their deputies, which record shall be open for the inspection of the Commissioner of Markets and Warehouses, his deputies or inspectors, at any and all times, and to the public, such records to be uniform throughout the State and the form of such records shall be prescribed by the Commissioner of Markets and Warehouses.

Section 11 of said law provides the penalty for any public weigher or deputy public weigher who shall issue any certificate of weights and measures giving false weights or measures of any article or commodity weighed or measured by him.

Section 12 provides a penalty for any person, firm or corporation who shall request a public weigher, deputy public weigher, or any person employed by him, or pay to him any money, or give him anything to weigh any produce, commodity or article, falsely or incorrectly, or who shall request a false or incorrect certificate of weights and measures.

Section 13 reads as follows:

"Any person, firm, or corporation, or agent or representative of such corporation, who shall engage in the business of weighing for the public, or shall grant or issue a certificate or weight sheet upon which a pur-

chase or sale is made, without complying with the terms of this Act, shall be guilty of a misdemeanor, and shall be fined in any sum not less than twenty-five ($25.00) dollars, nor more than two hundred ($200.00) dollars, and each and every certificate so granted by him, or weight sheet issued by him, shall constitute a separate offense."

Section 14 makes it unlawful for any person, firm or corporation to ship to anyone in this State any commodity, produce or thing, on which the weight is necessary to be given, at any other than the true weight of such commodity.

Section 15 provides for the testing of the scales, weights, beams and measures used by public weighers by the Commissioner of Markets and Warehouses, fixing the fees for such service, providing for the issuance of a certificate of authority to all persons engaged in the business of weighing for the public.

It will not be necessary for the purpose of this opinion to discuss sections 16, 17, 18, 19, and 20 of said law.

In your letter, you propound to this Department three questions, the first one reading as follows:

"Can persons other than those duly elected or appointed public weighers weigh for the public?"

Section 1 of said law, which we have hereinbefore quoted, provides that persons engaged in the business of public weighing for hire, or who shall issue a weight certificate or weight sheet which shall be accepted as accurate weight upon which the purchase or sale of such commodity, produce, or article is based shall be known as a public weigher and "shall comply with the terms and provisions of this Act." Section 13 of said law, which we have hereinbefore quoted, makes it unlawful for any person, firm, or corporation to engage in the business of weighing for the public without complying with the terms of this Act. Section 7 of said law, which we have hereinbefore quoted, provides for the filing of bonds of all public weighers or deputy public weighers, and for the obtaining from the Commissioner of Markets and Warehouses a certificate of authority to carry on the business of public weigher or deputy public weigher; also, provides that

"and no one shall be allowed to pursue the business of weighing for the public, or grant a certificate or weight sheet upon which a purchase or sale is made, unless he shall comply with the terms and conditions of this Act."

You are, therefore, respectfully advised that before any person, firm, corporation, co-partnership, or individual can engage in the business of public weighing for hire, or who shall weigh or measure any commodity, produce or article and issue therefor a weight certificate or weight sheet, which shall be accepted as the accurate weight upon which the purchase or sale of such commodity, produce, or article is based, must first comply with the terms and conditions of this law; and by the terms and conditions of this Act, a person must be appointed or elected public weigher or else be a deputy weigher before he can weigh for the public for hire or before he can weigh or measure any commodity, produce, or article for the public and issue

therefor a weight sheet or weight certificate which shall be accepted as an accurate weight upon which the purchase or sale of such commodity, produce, or article is based. Your first question is, therefore, answered in the negative.

In answering your first question in the way we have, it is not necessary to answer your second question; and it is clearly evident that no person, other than those duly elected or appointed public weighers or deputy public weighers, can perform the functions of a public weigher.

The third question which you ask reads as follows:

"Can a public warehouseman act in the dual capacity of a public warehouseman and a weigher for the public?"

We have already determined that a weigher for the public must be a public weigher or deputy public weigher. He must file a bond, and it is required of the public weigher by section 6 of said law that he shall, before entering upon the duties of his office, take the constitutional oath of office prescribed for all officers in this State. Therefore, the public weigher is unquestionably a public officer, and we think that it would be contrary to public policy for the public warehouse men to act in the dual capacity of a public warehouse man a public weigher. We also think that the duty of the public warehouseman is incompatible with the duty to be performed by a public weigher.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2187, Bk. 54, P. 7.

PUBLIC WEIGHERS—ELECTIONS—APPOINTMENTS—
COMMISSIONERS' COURTS.

Commissioners courts have only the authority to appoint public weighers in justice precincts where no public weigher had previously been elected prior to the adoption of Chapter 76, Acts of the Thirty-sixth Legislature.

Chapter 76, Acts of the Regular Session of the Thirty-sixth Legislature, does not repeal the provisions of Title 132, Revised Civil Statutes, with reference to election of public weighers.

Justice precincts or consolidated justice precincts may continue to elect public weighers in accordance with the provisions of Article 7926, Revised Civil Statutes, where such precincts were regularly electing public weighers prior to the adoption of Chapter 76 of the Acts of the Regular Session of the Thirty-sixth Legislature.

Title 132, Revised Civil Statutes, Chapter 76, Acts of the Regular Session, Thirty-sixth Legilature.

AUSTIN, TEXAS, March 5, 1920.

Hon. Fred L. Blundell, County Attorney, Lockhart, Texas.

DEAR SIR: Further replying to your letter of the second ultimo in which you make the following inquiries relative to public weighers:

"Are public weighers for justice precincts still to be elected by the people? Has the elective office of public weigher been abolished or is the

public weigher still in office to be filled by an election by the people every two years, and, if so, how many are to be elected for each justice precinct?"

The above inquiries call for a construction of Chapter 76 of the Acts of the Regular Session of the Thirty-sixth Legislature. Prior to the enactment of this chapter, the law dealing with the appointment, election, duties, etc., of public weighers, was Title 132 of the Revised Civil Statutes.

By the provisions of Article 7828, the Governor was authorized and required to appoint five persons as public weighers in every city which received annually one hundred thousand bales of cotton on sale or for shipment; and in all the counties of this State in which there were no city or cities in which the Governor was authorized to appoint public weighers, the commissioners' court of said county had the authority to appoint a public weigher or to order an election to be held at a general election for the election of one or more suitable persons for public weigher in the same justice precinct. The initiative was taken by a majority of the qualified voters in said justice precinct, presenting a petition for such appointment or election, and it was left entirely optional with the commissioners court as to the number of public weighers they might appoint or order an election for. A public weigher, so appointed or elected, held his office until the next general election, when an election was held in said justice precinct for the election of his successor. This Article fixes the term of office of all public weighers elected or appointed by the Governor at two years and until the successors are appointed or elected and qualified.

There is no provision made whatever in Chapter 76 of the Acts of the Thirty-sixth Legislature for the election of a public weigher, but frequent references are had throughout the chapter to elections. For instance, in Section 3, it is provided:

"Such public weigher, so appointed by the commissioners court, or elected, shall have the right and it should be his duty to appoint a sufficient number of deputies in each precinct to weigh all produce tendered for the purpose of weighing at any and all points wihin each precinct."

Again, in Section 6, we find in the first paragraph this language:

"No person shall be appointed or elected in this State unless he shall be at least twenty-one years of age * * *"

Again in Section 7:

"All public weighers, or deputy public weighers appointed or elected under the terms and provisions of this Act * * *"

Again, in the first paragraph of Section 17 we find this expression:

"Whenever any public weigher, or deputy public weigher, appointed or elected under the terms and provisions of this Act * * *"

Title 132 of the Revised Civil Statutes and Chapter 76 of the Acts

of the Thirty-sixth Legislature are in pari materia and the two must be construed together in order to ascertain the intention of the Legislature. These laws will hereafter be referred to as the "new law" and the "old law." If the new law is taken by itself, it would be very hard to ascertain what the Legislature intended should be the procedure after the appointment had once been made under the provisions of Section 2 of the act. The act does not fix the term of office, but under the Constitution it could not be possibly more than two years.

It does not provide how public weighers are to be provided for after the expiration of the term of office of those appointed under the provisions of Section 2. While this act attempts to repeal all laws and parts of laws in conflict with it, it does not refer specifically to any of the provisions of the old law; therefore, all the provisions of the old law not directly in conflict with the provisions of this particular act are not repealed.

It will be observed by a careful reading of Section 2 that the commissioners' courts of the various counties of the State are only authorized to appoint one public weigher for each justice precinct within each county in this State, when in their judgment it is necessary, *and when no public weigher has previously been elected.* This is clearly a limitation upon the authority of commissioners' courts to appoint public weighers and limits the power to appoint public weighers in only those justice precincts which had not previously elected a public weigher. This section provides that the public weigher, so appointed, shall file a bond, which shall be good for the term of two years from the date given.

Chapter 76 of the Acts of the Thirty-sixth Legislature was passed by that body to meet a contingency or emergency. It deals only with the selection of public weighers by appointment and, as stated above, limits these appointments to justice precincts where no public weigher had previously been elected. It in no wise disturbs the provisions of Title 132, Revised Statutes, with reference to the mode of electing public weighers. Public weighers are to be elected in the same manner as heretofore.

Those provisions of Article 7828 which deal with the mode and manner of electing public weighers are undisturbed by the new law, but the provisions of said Article which deal with the appointment of public weighers are, in so far as they are in conflict with the new law, repealed.

For instance, in all justice precincts which had not, at the time of the adoption of the new law, been electing public weighers but now desire to appoint public weighers can only appoint one public weigher in each justice precinct. Two or more justice precincts cannot now be united and one weigher appointed in the consolidated district. It is no longer necessary to petition the commissioners' court to appoint public weighers. In all justice precincts and in all consolidated justice precincts where public weighers were being regularly elected every two years prior to the adoption of the new law, these weighers are to be continued to be elected, unless the office is abolished in accordance with the provisions of Article 7828.

If more than one public weigher has regularly been elected in the same justice precinct, the same number should continue to be elected, or if two or more justice precincts have heretofore been consolidated in one public weigher's district, then such territory should continue to elect its public weigher or public weighers as heretofore.

The above are the conclusions of this Department and you are so advised.

Yours very truly,
BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 2020, Bk. 52, P. 294.

SPECIAL POLICEMAN—WATCHMAN, PISTOLS.

A person appointed by the city commissioners as special policeman who acts as night watchman for industrial or mercantile establishments, and whose salary is paid by such industrial or mercantile establishments, does not come within the exception to Article 476, Penal Code, as amended by the Thirty-fifth Legislature, and is therefore not entitled to carry a pistol.

Such special policemen, confining their activities strictly to the premises of their employers, would be entitled to carry arms during such time, under the provision of the statutes which excepts from the penalties of the statutes the carrying of arms on one's own premises or place of business.

Chapter 91, Fourth Called Session of the Thirty-fifth Legislature;
Article 43, Code of Criminal Procedure;
Article 476, Penal Code.

AUSTIN, TEXAS, April 5, 1919.

Hon. Jesse M. Brown, County Attorney, Fort Worth, Texas.

DEAR SIR: We have yours of April 1, addressed to this Department, in which you ask for a construction of Article 476, Penal Code, as amended by the Thirty-fifth Legislature, with particular reference to the meaning of this clause:

"This exception shall not apply to any deputy constable or special policeman who does not receive a compensation of $40.00 or more per month for his services as such officer and who is not appointed in conformity with the statutes of this State authorizing such appointment."

The special inquiry you make is whether or not watchmen and special policemen properly commissioned by the city government as special policemen who draw their salaries from railroad companies, grain elevator companies and other business enterprises of the city, and whose duty is to guard the premises of their employees at night, are empowered to carry arms or whether they come within the group set out in the above quotation.

The careful reading of Article 476 of the Penal Code, as amended, together with the original article before amendment, compels me to believe that it was the purpose to confine the right to carry arms

to those officers only named therein, to-wit, peace officers. And if the special policeman and night watchman, appointed by the city is not a peace officer or does not come within some other one of the exceptions, to-wit, State Militia or a person traveling, then such special policeman or watchman does not have the right to carry arms, under the provisions of this statute.

By reference to Article 43, Code of Criminal Procedure, it will be found that "peace officers" are defined as follows:

"The sheriff and his deputy, constable, the marshal, or policemen of an incorporated city or town, and any private person specially appointed to execute criminal process."

Inasmuch as special policemen and night watchmen are not included in this definition, and inasmuch as, by the amendment to Article 476, special policemen not receiving as much as $40.00 per month are specifically excluded, it seems to be conclusive to me that such persons would not be authorized to carry arms, and, in doing so, would be violating the law. However, it would appear that, if such special policemen confined their activities strictly to the premises of their employers, they would be entitled to carry arms during such time, under another provision, which excepts from the penalties of the statute the carrying of arms on one's own premises or place of business.

Kirby vs. State, 133, S. W. 682;
Smith vs. State, 100 S. W., 155;
Barker vs. Satterfield, 111 S. W., 438;
Williams vs. State, 72 S. W., 380.

Yours very truly,
JOHN W. MAXWELL,
Assistant Attorney General.

Op. No. 2153, Bk. 53, P. 432.

STATUTORY CONSTRUCTION—ARTICLE 3897 RELATING TO STAMP ACCOUNT OF COUNTY OFFICERS CONSTRUED.

The stamp account of the tax collector for mailing notices to delinquent owners should be paid out of the general fund of the county.

AUSTIN, TEXAS, December 1, 1919.

Hon. H. A. Hodges, County Auditor, Georgetown, Texas.

DEAR SIR: We have a letter from you containing the following question:

"Will you kindly give me an opinion as to the payment of the stamp account of the tax collector for stamps used in mailing delinquent tax notices and for mailing cards notifying tax payers of the amount of taxes due for the current year. That is, will it be legal for me to allow this account paid out of the general fund or should it be included in the expense account of the collector?"

Replying thereto we call attention to Article 3897 R. S., which is in part as follows:

"At the close of each month of his tenure of such office each officer whose fees are affected by the provisions of this Act shall make, as a part of the report now required by law, an itemized and sworn statement of all the actual and necessary expenses incurred by him in the conduct of his said office, such as stationery, stamps, telephone, traveling expenses and other necessary expenses. * * * The amount of such expenses referred to in this paragraph shall not be taken to include the salaries of assistants or deputies *which are elsewhere herein provided for.* The amount of such expense shall be deducted by the officer in making up such report from the amount, if any, due by him to the county under the provisions of this Act."

We think that by the use of such words "The amount of such expenses referred to in this paragraph shall not be taken to include the salaries of assistants or deputies which are elsewhere herein provided for" the Legislature intended that expenses such as stationery, stamps, telephone, etc., should be treated in a manner different from the expenses of salaries for assistants or deputies.

The method of accounting for salaries of assistants and deputies intended by the Legislature is that set out in Article 5889, R. S., in the following terms:

"Each officer under this chapter shall first, out of the fees of his office pay or be paid the amount allowed him under the provisions of this Chapter, *together with the salaries of his assistants or deputies.* If the fees of such office collected in any year be more than the amount needed to pay the amount allowed such office *and his assistants and deputies* same shall be deemed excess fees, and of such excess fees such officer shall retain one-fourth," etc.

In other words the Legislature intended that from the fees of any particular office the incumbent of the office should be entitled to one-fourth of the excess (up to a certain amount) after only the salaries of assistants and deputies had been deducted from the total amount of fees collected and did not intend that he should be entitled to only one-fourth of the amount remaining after both the salaries of assistants and deputies and the expenses of the office were deducted from the total amount collected.

You are, therefore, advised that in the opinion of this department, the stamp account of the tax collector for sending notices to delinquent owners should be paid out of the general fund of the county.

Very truly yours,
JOHN C. WALL,
Assistant Attorney General.

Op. No. 1995, Bk. 52, P. 117.

CONSTITUTIONAL LAW—JUDGES, QUALIFICATIONS OF—JURORS, QUALIFICATIONS OF.

Constitution of Texas, Article 5, Section 11; Article 16, Section 19; Article 1, Section 15; Article 3, Section 56. Constitution of the United

States, Fourteenth Amendment. Acts Thirty-third Legislature, Chapter 113. Revised Civil Statutes, Article 5117.

House Bill No. 245, which declares that members in fraternal benefit societies and policy holders in life insurance companies shall not disqualify judges or jurors to sit in a trial of cases in which such benefit society or life insurance company may be parties, violates Section 11, Article 5; Section 19, Article 16; Section 15, Article 1; Section 56, Article 3, of the Constitution of Texas and the Fourteenth Amendment to the Constitution of the United States.

AUSTIN, TEXAS, March 14, 1919.

Hon. W. L. Dean, State Senator, Capitol.

DEAR SENATOR DEAN: Your inquiry of March 12 reads substantially as follows:

"The House has passed H. B. No. 245, providing as follows:

" 'Section 1. That in any case in which any fraternal benefit society or other life insurance company of any character doing business in this State is made either a party plaintiff or defendant the judge in whose court such case may be pending shall not be disqualified to try the same by reason of the fact that such judge is a policyholder in such life insurance company, and provided further, that the fact that any juror who is a policy-holder in such insurance company shall not be disqualified to sit as a juror in the trial of such cases.'

"I have been directed by the Committee on Civil Jurisprudence to request that you give us an opinion today, if possible, as to whether the proposed bill would be violative of Section II, Article 5, of the Constitution."

In reply to your inquiry, we beg to advise you that in our opinion this bill if it should be passed by the Legislature would be violative of the Constitution. Our reasons for this conclusion will now be stated.

Section 11, of Article 5, of the State Constitution declares, "no judge shall sit in any case wherein he may be interested."

Section 19, of Article 16, of the Constitution provides: "The Legislature shall prescribe by law the qualification of grand and petit juries."

Section 15, of Article 1, of the Constitution reads: "The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency."

These two constitutional provisions with reference to trial by jury should, of course, be read and construed together. (Chambers vs. Fisk, 22 Texas, 532; Brady vs. Brooks, 99 Texas, 378.) When so considered they mean that the Legislature shall prescribe the qualifications of jurors in such a manner as to maintain the purity and efficiency of the right of trial by jury.

The Constitution itself does not define what is meant by the "purity and efficiency" of a jury trial, but under well known rules of construction, we are permitted to examine other provisions of the Constitution relative to the same subject. We have just seen that as to the judge he is disqualified "if interested" and we are warranted in concluding that the same disqualification would apply to jurors, for this is a determination by the framers of the Constitution that an interested court would not give a fair or impartial trial.

However, the Constitution is to be interpreted in the light of the common law. Black on Interpretations of Law, page 19. (Hewitt vs. State, 25 Texas, 727; Gordon vs. State, 43 Texas, 340; Ex parte King, 35 Texas, 658.) Moreover, a contemporary construction of the Constitution made by the Legislature is to be regarded as a valuable aid in determining its meaning. Black on Interpretations of Law, page 31. (State vs. McAlister, 88 Texas, 280.) By authority of the constitutional provision which we have referred to, the Legislature has heretofore prescribed the qualifications of jurors and among other provisions has declared that any person "interested" directly or indirectly in the subject matter in a suit shall be a disqualified juror. This statute is merely declaratory, however, of the common law and an "interested" juror was disqualified at common law. H. & T. C. Ry Co., vs. Smith, 51 S. W., page 508.

We have just seen that constitutional provisions are to be interpreted in the light of the common law, and that at common law an "interested" juror was disqualified, and that our statutes in that respect are merely declaratory of the common law. We have also observed that the Constitution is to be construed with reference to contemporary legislative interpretation. Our statute (R. S., Art. 5117) declaring that interested jurors shall be disqualified was enacted in August, 1876, and the Constitution was ratified by the people in February, 1876. Harris' Constitution, page 907.

The present statute, enacted immediately following the ratification of the Constitution, may be regarded, therefore, as a correct interpretation of the Constitution, and that in order to have pure and efficient jury trials, the jurors could not be "interested."

From these authorities we have reached the conclusion that the Constitution in conferring power upon the Legislature to prescribe the qualifications of jurors and to maintain the purity and efficiency of the jury system intends to place the qualifications of jurors on the same footing as the qualifications of a judge. That is to say that under the Constitution, neither the judge nor the jury could be interested in a case to be tried before them.

The proposed law embraces within its terms all fraternal benefit societies and all life insurance companies. In the case of fraternal benefit societies and mutual life insurance companies, which are embraced within the general phrase, "other life insurance companies," the policy holders are directly interested in the funds of the commany. (Woodmen of the World vs. Hale, 120 S. W., 539.)

A fraternal benefit society is one which has a representative form of government, without capital stock and which is organized and carried on solely for the mutual benefit of its members and their beneficiaries, has a lodge system and ritualistic form of government, etc. Acts Thirty-third Legislature, Chapter 113, Section 1. By representative form of government is meant one which is governed by the members themselves, who elect representatives or delegates who perform the necessary legislative and executive functions to govern the society. Acts Thirty-third Legislature, Chapter 113, Section 3. The funds with which losses are paid and the expenses of the society maintained are derived from periodical or other payments of

the members of the society. Acts Thirty-third Legislature, Chapter 113, Section 9. It is unnecessary to further discuss the provisions of the Fraternal Benefit Act.

It is elementary that a member of a fraternal benefit society must pay the periodical payments or assessments levied against him for the maintenance of the society, so long as he remains a member. Bacon on Life and Accident Insurance, Vol. 2, Section 485. A mutual insurance company does not differ in principle from fraternal benefit associations. Premiums in a mutual company constitute the fund which is liable for the losses and expenses and each policy holder ordinarily is interested in the losses and profit of the company. Text books say that a mutual company is somewhat in the nature of a partnership. Twenty-one American English Encyclopedia of Law, page 253.

From this discussion of fraternal benefit associations, mutual insurance companies, and from an examination of the methods of their operation, we have concluded that a policy holder in a mutual insurance company and a member of a fraternal benefit society operating under the laws of Texas are interested in such concerns within the prohibition of the Constitution prohibiting, as we have said, a judge from trying a case in which he is interested, and as we have concluded, a juror from serving where he is interested.

The courts of this State have held that a judge holding a policy in a mutual life insurance company is disqualified to preside at the trial of an action on a policy issued by such company. (New York Life Insurance Co. vs. Sides, 101 S. W., page 1163.) In the case cited, the action was brought against the New York Life Insurance Co., to recover upon a policy of insurance. The verdict was in favor of the plaintiff. The case was appealed and the first assignment of error was based upon the contention that the trial judge was disqualified because he was a policy holder in the insurance company. The Court of Civil Appeals sustained this assignment and in part said:

"Appellant's first assignment of error contends that the Honorable R. W. Simpson, the district judge who presided at the trial of this case in the court below, was disqualified to sit therein, because at said time he was a policy holder in the defendant company, and the defendant company was a mutual life insurance company which had no capital stock, and whose only owners were its policy holders. It appears from the affidavit of the trial judge, which was submitted in support of the ground of appellant's motion for a new trial, which set up the trial judge's disqualification to try the case, and which affidavit is embraced in the statement of facts, that the defendant company is a mutual life insurance company, which has no capital stock, and no owners other than its policy holders; that Judge Simpson had, at the time of the trial, a policy issued upon his life by the company, whereby it agreed to pay to his widow the sum of $5,000, and also agreed to pay him at the end of 20 years, if he should be living, and the policy should be in force at that time, the share of the accumulated profits of the company apportionable to said policy. We think that this testimony shows that the trial judge, as one of the owners of the appellant company, is one of the owners of, and necessarily directly interested in, the assets of the company, in the proportion that the amount of his policy bears to the aggregate amount of policies issued and outstanding at the time, and that he would necessarily suffer

a pecuniary loss by a judgment against the appellant, which would have to be collected out of its assests. City of Oak Cliff et al. vs. State of Texas, 97 Tex., 393, 79 S. W., 1068. We therefore conclude that Judge Simpson, who tried this case in the court below, was disqualified, and that the trial of the case before him was a nullity, and hence, the judgment of the court below will be reversed, and the cause demanded." (101 S. W., page 1163.)

This case is controlling authority and definitely settles the question that a judge who is a policy holder in a mutual life insurance company cannot preside at a trial where such company is a party to the litigation. Another principle upon which the opinion is based applies with equal force to the members of a fraternal benefit society, because a member of a fraternal benefit society is a policy holder in such a society, which by this opinion is purely mutual and is membership interested in its funds in the same way and frequently to a greater extent than are policy holders in mutual insurance companies. The question has also been definitely settled as to fraternal benefit societies. In the case of Woodmen of the World vs. Hale, 120 S. W., page 539, one of the questions at issue was whether or not the trial judge was disqualified by the reason of the fact that he held a policy of insurance in the Woodmen of the World. The court held he was disqualified, in part saying:

"The order of Woodmen of the World is a mutual insurance company in effect, and the assets of the order consist only in the general fund of the order, raised by dues and benefit assessments. Each holder of a benefit certificate is an owner of the assets of the order, in proportion that the amount of his certificate bears to all the certificates issued by the order. In other words, the entire assets of the order constitute a general fund in which every holder of a certificate is interested very much in the nature of a stockholder in corporation assets. It certainly disqualifies a judge, when he is a stockholder in a corporation, from sitting as judge in trial of a case in which such corporation is a party. Williams vs. City Bank of Quanah (Tex. Civ. App.), 27 S. W., 147.

"Appellee contends, with able insistence, that the case of Dallas vs. Peacock, 89 Tex., 58, 33 S. W., 220, is authority authorizing the trial judge to sit in this cause. In the case relied on by appellee the City of Dallas was sued for personal injuries, and the judges of the Court of Civil Appeals, Fifth Supreme District, were taxpayers of the city, and certified the question of their disqualification to the Supreme Court, and the Supreme Court answered that they were not disqualified, holding that 'a taxpayer in a city, who is not an inhabitant of the city, has no legal relation to the municipality, except in so far as he is liable for the imposts laid upon his property for the support of the municipal government. Has he an interest in a suit for or against the city which does not involve a tax? We think not.' And the court reviews the contingencies upon which an additional tax might affect the judges as taxpayers, and adds: 'This seems to us a remote contingency.' In other words, the taxes of a municipality belong to the municipality, and not to the taxpayers, and 'the principle is that the interest, if such it may be called, is so indirect, remote, and contingent that to hold a judge or juror not disqualified by reason thereof does not conflict with the fundamental doctrine that a man cannot be made a judge in his own case.' The difference in the Peacock case and the case under consideration is therefore marked and obvious.

"The case of New York Life Ins. Co. vs. Sides (Tex. Civ. App.), 101 S. W., 1163, is in point on the question at issue. In that case Mrs. Sides sued the insurance company and recovered judgment, from which the insurance company appealed, assigning as error the disqualification of the trial judge. The insurance company was a mutual insurance company,

and the trial judge held a policy in it. The insurance company had no capital stock, and no owners other than its policy holders. The policy held by the trial judge was payable to his widow in case of his death, but also had a clause that the trial judge should be paid the amount of the policy, if living at the end of 20 years. All the conditions of the Sides Case are in this case, except the 20-year clause, and this clause could only affect the extent of the policy holder's interest and in no way affect the question of whether such interest is direct or remote. The court held the judge disqualified in the Sides Case, and we think the decision is conclusive of the question presented on this appeal."

Courts in other jurisdictions have held to the same effect. (Martin vs. Farmers' Mutual Fire Insurance Company, 102 N. W., 656; Edmonds vs. Modern Woodmen, 102 S. W., 601.) In the case of Martin vs. Farmers' Mutual Fire Insurance Company, cited above, the Supreme Court of Michigan held the fact that the jurors were members of a mutual fire insurance company liable to assessment disqualified them from sitting.

In the case of Edmonds vs. Modern Woodmen of America, cited above, the Missouri Court of Appeals held that jurors cannot serve who are members of the defendants society, which was a fraternal benefit society, and were disqualified to serve as jurors.

These cases are conclusive of the issue. Illustrative, however, of the attitude which the courts have maintained toward the constitutional provision that we have under discussion, we in addition call your attention to the case of Williams vs. City National Bank, 27 S. W., page 147. In this case the Court of Civil Appeals, speaking through Judge Head, said:

"It appears from a bill of exceptions that the judge who tried this case was a director in the national banking association which was the plaintiff in the court below. By the national banking act it is provided that 'every director must own in his own right at least ten shares of the capital stock of the association of which he is a director. Any director who ceases to be the owner of ten shares of the stock or who becomes in any other manner disqualified shall thereby vacate his office.' Rev. St. U. S., Sec. 5146. That this constitutes such interest as disqualifies a judge from trying a case in which the association is a party, we think there can be no question. City of Austin vs. Nalle, 85 Tex., 520, 22 S. W., 668, 960, 12 Am. & Eng. Enc. Law, 46."

This same doctrine to the effect that a stockholder in a corporation cannot serve as judge or juror in a case where such corporation is a party is followed in other jurisdictions. In the case of Murchison National Bank vs. Dunn Oil Mill Company, 64 S. E., page 883, the Supreme Court of North Carolina held that a stockholder in a bank is incompetent as a juror in an action by the bank upon a promissory note held by it. This is the general doctrine. (See 40 L. R. A., New Series, page 978, Notes; 16 Ruling Case Law Section 91.)

You are, therefore, advised that this proposed law violates the Constitution of the State, because it authorizes judges and jurors who might be "interested" in particular litigation to sit in trial of the issue involved. This conclusion applies specifically to fraternal benefit societies and mutual life insurance companies. As to policy holders in a stock life insurance company, we are unable to

state any general rule. A stock life insurance company is ordinarily owned by its stockholders and as to whether or not a policy holder is interested in the company within the terms of our constitutional provision would depend entirely upon the character of policy which he might hold. Practically all stock life insurance companies issue dividend paying or accumulating policies and certainly any policy holder holding a policy of this kind would be interested in the result of a suit against such a company for the reason that his pro rata accumulation or dividend might depend upon the losses paid or to be paid. At any rate as to a stock life insurance company, the question would be one to be determined at the time the jury is called to the jury box and would involve not only an examination of the juror, but an examination of the particular policy held by him in the stock life insurance company.

It is also quite probable that House Bill No. 245, inasmuch as it would permit jurors to sit in cases in which they are interested would also violate Section 56, of Article 3, of the Constitution, which declares that no special law shall be passed regulating practice in the courts of the State. In other words, if this bill should become a law and it should be concluded that other articles of the Constitution do not prohibit, still the Legislature would be in the attitude of providing one rule for governing fraternal benefit and life insurance companies in the disqualification of jurors and judges and adhering to another rule in the case of fire insurance companies, both mutual and stock, and of all other litigants. It is the opinion of the writer that Section 56, of Article 3, in the respect referred to was placed in the Constitution for the purpose of prohibiting this character of legislation. In other words, the writer thinks that this law is a special law within the inhibitory terms of this section and article of the Constitution. I do not regard the case of Insurance Company vs. Chowning, 86 Tex., 654, as settling the question to the contrary, for in that case the court based its decision upon the conclusion that the act relative to costs did not regulate practice in the courts.

Moreover, we are of the opinion that House Bill No. 245 is violative of the Fourteenth Amendment to the Constitution of the United States. This amendment declares that a state shall not "deny to any person within its jurisdiction the equal protection of the laws." If this bill should become a law we would permit those who are interested, both as policy holders and members of fraternal benefit societies, and mutual insurance companies, to sit as jurors or judges in cases to which such society or such mutual companies are parties; we have just seen that members of fraternal benefit societies and mutual insurance companies are directly interested in the financial welfare of these concerns. In all other cases the statutes and courts of the State with scrupulous care would exclude any one from acting as judge or sitting as juror in any case wherein he is interested in a similar manner, or to a similar extent, and this would plainly be a denial of equal protection of the laws to the various litigants of the State. The courts declare that equal protection of the laws mean the protection of equal laws. Taylor on Due Procedure

of Law, Section 458. While, of course, under some of the federal constitutional provisions the states have a limited power of classification with reference to subjects of legislation, yet this power of classification could not obtain unless there is a substantial basis for it, nor could it exist where such classification would work a denial of fundamental rights. Taylor on Due Procedure of Law, Section 297.

The principle is illustrated by the case of G. C. & T. R. Ry. Co. vs. Ellis, 165 U. S., page 150. In this case the Supreme Court of the United States held that the Texas act of 1889, authorizing the award of attorneys' fees in certain cases and actions against railroads, to be violative of the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States. In discussing the right of the Legislature to create classifications for the purpose of its legislation, the Supreme Court held that there must exist a natural basis of classification and that one cannot be arbitrarily made.

We think the principle enunciated in this case applies directly to House Bill No. 245, which proposes a different rule for the trial of cases in which fraternal benefit and mutual life insurance companies are parties from that rule which applies to all other cases. There exists no natural basis for this classification in selecting jurors and in the qualification of judges.

You are, therefore, advised that House Bill No. 245 violates Section 11, Article 5, of the Constitution of this State, also Section 19, of Article 16, when construed in connection with Section 15, Article 1, of the Constitution of this State, also Section 56, of Article 3, of the Constitution of this State; and also the Fourteenth Amendment to the Consitution of the United States.

Respectfully submitted,

C. M. CURETON,
Attorney General.

Op. No. 2233, Bk. 54, P. 281.

DISTRICT CLERK—SEPARATE FROM COUNTY CLERK—POPULATION—UNITED STATES CENSUS.

(1) The last preceding United States Census, and not the population as based upon the vote for Governor at the last preceding general election, as provided by Article 1703 of the Revised Civil Statutes of 1911, must govern in determining whether or not a county is entitled to the office of district clerk separate from that of county clerk under the provision of Section 20 of Article 5 of our State Constitution.

(2) The Chairman of the Democratic Executive Committee is not authorized to receive and file the application of a candidate for nomination to the office of clerk of the district court separate from that of clerk of the county court when the last preceding United States Census shows the population of such county to be less than eight thousand.

AUSTIN, TEXAS, June 12, 1920.

Hon. H. W. Bludworth, County Clerk, Kleberg County, Kingsville, Texas.

DEAR SIR: The Attorney General is in receipt of your inquiry of the 8th instant which is as follows:

"Article 1703, R. S., provides that in counties having a population of less than eight thousand persons only one clerk shall be elected who shall perform the duties of district and county clerks.

"Kleberg County was organized in 1913 and its population was then estimated to be nine thousand people and under the terms of the Act, a county clerk was elected and a district clerk was elected.

"The Federal census of this county was recently completed and I am advised that it shows a population of considerably less than eight thousand. The article above quoted prescribes that the population shall be estimated on the basis of five inhabitants for every vote cast for Governor in said county at the last preceding general election. I understand that the Supreme Court has held this provision of the article to be void; however, if our population be computed by this method, it would be much less than eight thousand, as not more than two hundred votes were cast for Governor here in 1918.

"Will you please advise me if the chairman of our county Democratic executive committee should receive the application of any person to have his name placed on the ballot as county clerk or district clerk, or should he receive only applications of persons to have their names placed on the ballot for the office of county and district clerk?

"Your advice in the matter will be appreciated by our county chairman as well as by myself, as he also desires to be governed by your decision of the matter."

In the case of Brooks vs. Dulaney, 100 T., 86 (93 S. W., 987), our Supreme Court holds unconstitutional that part of Article 1703 of the Revised Civil Statutes of 1911 which provides that:

"In determing the number of persons in the county under this article, the estimate shall be made on the basis of five inhabitants for every vote cast for Governor in such county at the last preceding general election,"

and further holds that the population of the county as shown by the last preceding United States Census should govern in determining whether or not the county should have a separate officer for the clerk of the District Court from the one holding the office of County Clerk, as provided by said Article 1703 and Section 20 of Article 5 of our State Constitution. We assume that you are familiar with and have access to the report of this case, as cited above, and hence do not deem it necessary to state the case more fully here or to quote at length from it.

Assuming, therefore, that the 1920 United States Census shows your county to have a population of less than eight thousand persons your county judge would not be authorized to order an election, for the election of a person to the office of clerk of the district court of your county separate from that of clerk of the county court, and, for the same reason, the political parties of your county would not be authorized to make nominations of candidates for the office of clerk of the district court of your county separate from that of clerk of the county court. Since your county will not be entitled to the office of clerk of the district court separate from that of clerk of the county court, it is clear that nominations for such office, and the placing of the names of candidates for that office upon the official ballot, is and would be unauthorized.

We are of the opinion, therefore, and you are so advised, that the chairman of the Democratic Executive Committee of your county should not receive and file the application of any person to have his

name placed upon the official ballot of that party as a candidate for the office of district clerk separate from that of county clerk, but should receive and file only applications of candidates for the office of county and district clerk as one office.

In this connection we beg to call your attention to Section 33, of Chapter 97, of the Acts of March 3, 1919, of the United States Congress, which is as follows:

"That the Director of the Census be, and he is hereby, authorized, at his discretion, upon the written request of the Governor of any State or Territory or of a court of record, to furnish such Governor or court of record with certified copies of so much of the population or agricultural returns as may be requested, upon the payment of the actual cost of making such copies and $1 additional for certification; and that the Director of the Census is further authorized, in his discretion, to furnish to individuals such data from the population schedules as may be desired for genealogical or other proper purposes, upon payment of the actual cost of searching the records and $1 for supplying a certificate."

We take the liberty of calling your attention to this provision of the census law in order that it may be availed of by any one who may be desirous of ascertaining definitely and in an official way just what the population of your county is, as shown by the United States Census of 1920.

Yours very truly,
W. W. CAVES,
Assistant Attorney General.

Op. No. 2074, Bk. 53, P. 37.

PUBLIC OFFICES—ELIGIBILITY OF MARRIED WOMEN.

A married woman in this State is legally qualified to execute and make a valid bond and can hold the office of notary public.
Section 26, Article 4, Texas Constitution;
Article 6002-6003, Revised Civil Statutes;
Chapter 32, Acts Thirty-third Legislature at its Regular Session.

AUSTIN, TEXAS, May 29, 1919.

Hon. Marvin Scurlock, County Attorney, Beaumont, Texas.

DEAR SIR: I have your letter of May 27, addressed to the Attorney General, reading as follows:

"The county clerk of Jefferson County has asked that I get an opinion from you stating whether or not a 'married woman can qualify as a notary public.' I enclose brief.

"Please advise me at once what your opinion is on this question."

In reply your attention is directed to Section 26 of Article 4, of the Texas Constitution, which makes provision for the appointment of notaries public, but is silent as to the qualifications of that officer. Also to Article 6002, Revised Civil Statutes, which provides for the appointment, by the Governor, by and with the consent and advice

of the Senate, of a convenient number of notaries public, and also provides for their tenure of office. Your attention is also directed to Article 6003, Revised Civil Statutes, which provides that a notary public must execute a bond with two or more good and sufficient sureties in the sum of $1,000.00 conditioned upon the faithful performance of the duties of that office. It also provides that the notary public shall take and subscribe the oath of office prescribed by the Constitution, which shall be endorsed upon said bond, with the certificate of the officer administering the same.

In an opinion prepared by Honorable B. F. Looney, Attorney General, of date September 24, 1914, this Department held:

"A married woman can hold any public office in Texas, except the offices in which the incumbent is required to be a qualified voter."

The law with reference to the appointment and qualification of a notary public does not require that officer to be a qualified voter, therefore, a married woman is eligible to the office of notary public, provided she can execute a valid bond.

Article 4621, as amended by Chapter 32, of the Acts of the Regular Session of the Thirty-third Legislature, provides that all the property of the wife, both real and personal, claimed or owned by her prior to marriage and that acquired by her after marriage either by devise, descent or by gift, as also the increase of lands thus acquired, shall be solely the separate holdings of the wife and that during marriage the husband shall have the sole management of his separate holdings, both real and personal, and that the wife shall have the separate management of her separate property, to control and dispose of it as she thinks proper and fit, with the proviso, however, that:

"The joinder of the husband in the manner now provided by law for conveyance of the separate real estate of the wife shall be necessary to an encumbrance or conveyance or disposition by the wife of her lands, and the joint signature of the husband and wife shall be necessary to a transfer of stocks and bonds belonging to her or of which she may be given control by this Act; provides, also, if the husband shall refuse to join in such encumbrance or conveyance or transfer of such property, the wife may apply to the district court of the county of her residence and it shall be the duty of the court in term time or vacation, upon satisfactory proof that such encumbrance, conveyance or transfer would be advantageous to the interests of the wife, to make an order granting her permission to make such encumbrance, conveyance or transfer without the joinder of her husband, in which event she may encumber, convey or transfer said property without such joinder."

Article 4622, as amended by said Chapter 32, provides, in part, that any funds on deposit in any bank or banking institution, whether in the name of the wife or the husband, shall be presumed to be the separate property of the party in whose name they stand on the books in said bank, regardless of who made the deposit, and unless said bank or banking institution is notified to the contrary it shall be governed accordingly in honoring checks and orders against such account.

Article 4624, as amended by said Chapter 32, provides in part that

the wife shall never be the joint maker of a note or a surety on any bond or obligation of another without the joinder of her husband with her in making such contract.

Your attention is also directed to Section 21, of said Chapter 32, wrich provides that:

"The fact that the present law denies to married women the right to manage their separate property and to make contracts is unjust to a large number of citizens of this State, creates an emengency * * *" etc.

Just here, I desire to quote, from the opinion of this Department above referred to, the following:

"Chapter 32, supra, gives married women in Texas the right to contract, independent of the husband, with certain specified exceptions. Is any certain kind of a contract or agreement specified in such law? Is she limited to contracting only for necessary supplies? Is there a single exception enumerated to indicate that a married woman cannot contract for the faithful performance of any duty or duties which she may feel herself competent to perform? If so, I fail to find such exceptions. 'As exceptions strengthen the force of a general law, so enumeration weakens, as to things enumerated:' (Lord Bacon.) State vs. Fisher, 24 S. W., 167. A contract, in its more extensive sense, includes every description of agreement or publication whereby one party becomes bound to another to pay a sum of money or to do or omit to do a certain act; or a contract is an act which contains a perfect obligation. Quinn vs. Shields, 17 N. W., 437, 442; 62 Iowa, 129; 49 Am. Rep. 141 (citing Bouvier's Law Dictionary). Contracts have a leading, primary obligation, i. e., to do a specified act, to *perform a specified service*. Mobile Life Ins. Co. vs. Randall, 74 Ala., 170, 176. If, then, a married woman, under our new law, is given the right to contract, she is also at the same time given the authority to execute an official bond for the faithful performance of official duty. A bond is merely an obligation under a seal. Commonwealth vs. Smith, 92 Mass., 448, 455; 87 Am. Dec., 672. 'A bond is what binds. Therefore any instrument in writing that legally binds a party to do a certain thing may be called a bond.' Courand vs. Vollmer, 31 Texas, 397, 401. *A bond is a contract*, and the sureties thereon are simply parties to a contract, within the rules governing constructions of instruments. Eureka Sandstone Co. vs. Long, 39 Pacific, 446; 11 Washington, 161. 'When a State officer was elected and gave his bond, a contract was entered into between him and his sureties and the State. A State may contract with its citizens.' Woodruff vs. State, 3 Arkansas, 285, 301."

You are, therefore, respectfully advised that a married woman can hold and exercise the functions of any public office in this State, be its duties ministerial or judicial, with the exceptions of those offices in which the incumbent is required to be a qualified voter. A person qualifying for the office of notary public is not required, under the law, to be a qualified voter, therefore, a married woman is legally qualified to make the bond, and to hold the office of notary public.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2217, Bk. 54, P. 196.

SURVEYORS—LAND DISTRICTS.

A county that is organized for judicial purposes, but has not complied with law so as to become a separate land district, and is attached to another county for surveying purposes, and the county to which it is attached has a county surveyor, the county first mentioned has a county surveyor within the meaning of Section 16, Chapter 83, Acts of the Thirty-fifth Legislature, Regular Session.

AUSTIN, TEXAS, April 27, 1920.

Hon. J. T. Robison, Commissioner General Land Office, Austin, Texas.

DEAR MR. ROBISON: I have your letter of April 7th addressed to the Attorney General, which reads as follows:

Winkler County was organized some years ago, but prior to its organization it was attached to Reeves County. It has never had a county surveyor and I will assume for purposes of this that the boundaries have not been established and the records of Reeves County have not been obtained in the manner prescribed by law to make it a separate land surveying county.

"The Oil and Gas Act of 1917 provides that applications shall be filed with the county surveyor of the county where the land is situated, if the land be unsurveyed land, for oil and gas purposes. It says if there be no surveyor, the applications shall be filed with the clerk of the proper county.

"In Winkler County some parties have filed with the Reeves County surveyor and this Department has advised them they would have to file with the clerk of Winkler County. They are taking issue with me in the matter and I rather think other rights have intervened. The applications are pending here from the surveyor of Reeves County.

"The question arises, should this Department accept applications that were filed with the surveyor of Reeves County and field notes made by the Reeves County surveyor or should it reject them and accept applications field with the county clerk of Winkler County and recorded in the surveyor's records and then filed notes made by a proper surveyor under such application. I would thank you for an early answer."

The attorneys for parties who have filed with the County Clerk of Winkler County and those who have filed with the County Surveyor of Reeves County have furnished this Department with briefs in behalf of their respective clients.

A correct answer to your inquiry depends upon the question of whether or not the County Surveyor of Reeves County is in contemplation of the law the County Surveyor of Winkler County. If he is, your department should accept applications that were filed with him. If he is not the County Surveyor of Winkler County, then Winkler County has no county surveyor and the applications that have been filed with the County Clerk of that county should be accepted by you.

Section 16 of Chapter 83, Acts Thirty-fifth Legislature, Regular Session, provides that:

"All applications for unsurveyed areas shall be filed with the county surveyor, or his deputy, of the county in which the area or a part thereof is situated, accompanied by one dollar filing fee, but if such county has no surveyor then the application shall be filed with the clerk of the proper county and by him recorded in the surveyor's records, and in that event

the area may be surveyed by the surveyor of the nearest county as now provided by law."

In 1887 Reeves County was an organized county. The Legislature in that year created a number of new counties out of Tom Green County, among the new counties being those of Winkler, Loving and Ward; these counties, being unorganized, were attached to Reeves County for judicial, surveying and all other purposes. (See Gammel's Laws, Vol. 9, p. 807.)

In 1909, before Winkler County was organized, it was attached to Reeves County for judicial and all other purposes. General Laws of the First Called Session of the Thirty-first Legislature, page 12. In this same year, that is, 1909, Winkler County was organized for judicial purposes, and in 1910, at a called session of the Legislature, the Legislature passed a law placing said county in the Seventieth Judicial District and appointed terms of court for said county, and in the third section of said Act the following language is used:

"The unorganized county of Crane is hereby attached to Ector County for judicial and all other purposes, and the unorganized county of Loving is hereby attached to Reeves County for judicial and all other purposes." Page 18, Laws Thirty-first Legislature, Third Called Session.

The codifiers of 1911 embraced in the Revised Statutes as Article 4067b, which is now Article 5299 of Vernon's Sayles' Civil Statutes, the act which attached Loving County to Reeves County for surveying purposes, and this Article makes no mention of the County of Winkler.

In this connection, however, we direct your attention to Article 5297 Vernon's Sayles' Civil Statutes, which reads as follows:

"Any organized county, or newly created district, which may fail or refuse to organize as a separate land district as provided by law shall continue to form a part of the land district to which it was formerly attached until it shall have complied with the provisions of law relating to the election and qualification of a surveyor, and until such surveyor shall have procured the necessary maps, field notes, copies and records as required by law."

You state in your letter that Winkler County has never had a county surveyor, and you assume that the boundaries have not been established and the records of Reeves County have not been obtained in the manner prescribed by law to make it a separate land surveying county. We have been furnished a copy of an affidavit of date April 2, 1920, made by A. M. Randolph, County Surveyor of Reeves County, in which he states that he has been the County Surveyor of Reeves County for thirty-two years, except the years 1909, 1910, 1911 and 1912, when Jno. G. Allen was such surveyor, and that he has had the custody, control and care of the surveyor's records of Winkler County practically all of said period, and he states that at the present time Winkler County is attached to Reeves County for land surveying purposes, and "that as such surveyor my surveys in Winkler County, Texas, have at all times been accepted by the General Land Office as the official surveys of and in that County," and he further states that among the surveys and records in Winkler County in his custody are Volumes a, b and c, being copies of the field notes of the public school

lands in Winkler County, Texas, made under the direction of the General Land Office by W. D. Twitchell, State Surveyor, and that said copies were deposited in his office by the General Land Office of the State of Texas, and that said records and all other surveyor's records of said Winkler County have been kept by him and in his possession, and that of official surveys made in said county and the field notes thereof are recorded in his office, and he further states that the County Clerk of Winkler County has no surveyor's records of said County, and that the General Land Office has always recognized the County Surveyor of Reeves County as being the official custodian of the surveyor's records of Winkler County.

We are also furnished with a copy of an affidavit of date April 3, 1920, made by G. C. Dawson, County Clerk of Winkler County, in which he states that he has been county clerk of that County since its organization, and that Winkler County has never organized as a separate land district, nor surveyed and fixed its boundary lines, nor has it ever had a county surveyor, and that since the organization of said county, as well as prior thereto, it has been attached to Reeves County for land surveying purposes "and the surveyor's records of said county, so far as I know, are still in the possession and custody of the County Surveyor of Reeves County," and he further states that prior to about June 12, 1919, no applications to prospect for minerals on the State's unsurveyed areas situated in Winkler County had ever been filed in his office, that on or about said date he received the first application to prospect for said minerals upon a portion of the State's unsurveyed areas, said application being forwarded to him by the County Surveyor of Ward County, who wrote him to procure a blank book and mark it "County Surveyor's Record," and to record such applications in said book. Since said date, he states that a number of such applications have been filed with him, and having no other record in which to record such matters, "I procured a blank book and have recorded such applications as have been received by me in such book, which I expect to label 'Surveyor's Record,' " and he further states that there are no surveyor's records in his custody as County Clerk of Winkler County other than the volume started by him on or about the above date.

It is stated in the brief filed by counsel for the parties who filed their application with the County Clerk of Winkler County that in 1911 a man by the name of J. K. Little was appointed by the commissioners' court as county surveyor and qualified in the manner required by law. However, it seems that this was all that he ever did do. At any rate, it is apparent that the provisions of Articles 1384 and 5322 Vernon's Sayles' Civil Statutes were never complied with, and that the attempted appointment of Mr. Little was a mere nullity, as he could not perform the duties of County Surveyor until the provisions of the above statutes had been complied with.

We are of the opinion that the Legislature in enacting that part of said Section 16, Chapter 83, wherein it is said: "but if such county has no surveyor, then the application shall be filed with the clerk of the proper county," intended to require the applicant to file his application with the county clerk in those counties which had been organized for land surveying purposes, but for some reason did not have

a county surveyor, but that it was not the intention of the Legislature to require the applicant to file his application with the county clerk of those counties which are unorganized for land surveying purposes, but which are attached to some organized county for land surveying purposes, and the county to which the unorganized county is attached has a county surveyor. If the county to which the unorganized county is attached for land surveying purposes has no county surveyor, then the application should be filed with the county clerk of the county in which the land is situated. If the county to which another county is attached for land surveying purposes has a county surveyor, then the latter county has a county surveyor, within the meaning of the law requiring applications to be filed with the county surveyor.

We are confronted in the instant case, however, with this condition: In a copy of an affidavit of date April 5, 1920, made by A. M. Randolph, County Surveyor of Reeves County. he states that he has never appointed a deputy surveyor to be the county surveyor of Winkler County, and gives as his reason for not doing so that Winkler County is a sparsely settled county, having only about 30 or 40 voters, and without any settled community, and for the further reason that there has never been sufficient surveying work in said county to justify the appointment of such deputy, and that all such work has been done by himself and that he has kept the records of said county in his office at Pecos, Reeves County, Texas, "which is the nearest settlement in my district to said county."

Article 5317 Vernon's Sayles' Civil Statutes reads as follows:

"It shall be the duty of each district surveyor, within twenty days after his election, to appoint as his deputy a special county surveyor for each unorganized county within his district, who shall hold his office during the term of his principal, unless sooner superseded by the appointment of another as his successor. The district surveyor shall immediately notify the Commissioner of the General Land Office of every such appointment. Each special county surveyor so appointed shall have all the powers, perform all the duties and be subject to all the penalties appertaining to county surveyors, and shall keep, in addition to the returns to be made to his principal, a record and map of all the transactions in his office, to become part of the county surveyor's records of such county whenever it may be organized. All such special county surveyors shall reside and keep their offices in their respective counties, if there be settlements in the same, but if there be no settlements in the county, then at the nearest town to such county. Whenever any county may elect a county surveyor, who shall have qualified and given bond, and who shall have procured the maps and records required by law, the district surveyor within whose district such county may have been, or may be at the time, and his deputy shall cease to exercise any official acts within the same."

It will be observed that the above statute makes it the duty of the county surveyor for an unorganized county to appoint as his deputy a special county surveyor for each unorganized county within his district, and that such special county surveyors shall reside and keep their offices in their respective counties, if there be settlements in the same, but if there be no settlements in the county, then at the nearest town to such county. Mr. Randolph states in his affidavit of April 5 that Pecos is the nearest settlement within *his district* to Winkler County, but does not state that Pecos is the nearest settlement to such county, and the statute does not say the nearest town to such county

within the land surveying district, but merely says "at the nearest town to such county." However, as a matter of fact, Mr. Randolph has never appointed a deputy special county surveyor for Winkler County, therefore, the question of what is the nearest town to that county need not give us any concern. Is the provision of said Article 5317 mandatory—that is—has the failure of Mr. Randolph to appoint a deputy special county surveyor for Winkler County deprived that county of the services of a county surveyor? If a person who requests Mr. Randolph to make a survey in Winkler County and such a survey as the county surveyor of a county is bound to make when requested to do so, and should Mr. Randolph decline to make such survey on the ground that he had no authority to do so for the reason that he had not complied with the law in having failed to appoint a deputy special county surveyor for Winkler County, could he be compelled by mandamus to make such surveys? We believe this a good test as to whether or not his failure to comply with the provisions of said Article 5317 has deprived Winkler County of a county surveyor.

In the case of Texas Mexican Railway Co. vs. Locke, 63 Tex. 629, it was said:

"It certainly was not the intention of the Legislature, in providing for the appointment of deputy surveyors in unorganized counties, to make them independent of and place them above the district surveyor. They are but aids to the district surveyor in the discharge of his official duties as such. His powers are not impaired nor his duties curtailed by the appointment of the deputy. While it is not necessary for us to determine whether or not such a proceeding could be maintained against one of these deputies, we have not the slightest doubt but that in a proper case it may be maintained against the district surveyor."

If the surveyor can be compelled to do the work himself when there is a deputy surveyor, it seems reasonable to suppose that he could be compelled to do the work when he has failed to appoint a deputy, for as was said in the case last cited:

"The law in such case clearly imposes the duty upon the district surveyor either to make the survey himself or else to have it made by his deputy. In this respect they are considered inseparable,—the work of the deputy is the work of the surveyor; for it must receive his official sanction before it has validity."

We are further strengthened in the position we have taken in this matter by the fact that we do not believe that the provisions of said Article 5317 should be so construed as to deprive the public of the services of a public official merely because the public official has failed to comply with certain statutory requirements, for surely the failure on the part of a public officer to properly comply with all the requirements of his office should not be so construed as to work a grievous injury to the public, if by any reasonable construction such injury may be prevented.

It follows from what we have said that this Department is of the opinion that at the time the applications in question were filed with Mr. Randolph, County Surveyor of Reeves County, and with the County Clerk of Winkler County that Winkler County did, in fact, have a county surveyor, to-wit: the county surveyor of Reeves County,

and therefore, that the applications filed with the County Surveyor of Reeves County should be accepted, and the applications filed with the County Clerk of Winkler County should be rejected.

Yours very truly,

E. F. SMITH,
Assistant Attorney Generol.

Op. No. 2124, Bk. 53, P. 250.

COUNTY TRAFFIC OFFICERS.

The commissioners' court of each county in this State is authorized by law to employ one or more special deputy sheriffs, to be known as the "County Traffic Officers," for the purpose of enforcing the traffic laws of this State; provided, that no county can employ more than two regular county traffic officers nor more than two additional deputies for special emergencies to aid said regular deputies in their work.

The compensation of said traffic officers shall be fixed by the commissioners court, prior to their selection. Counties who receive thirty thousand dollars or more annually from the registration fees on motor vehicles may expend not to exceed five per cent. of said funds and counties receiving less than thirty thousand dollars annually from the registration fees on motor vehicles may expend not to exceed 7½ per cent. of such fund in the payment of the county traffic officers and other expenses incident thereto.

The commissioners court can not make a contract with the county traffic officers to pay said officers for their services by witness fees. Witness fees can not be made the subject of a contract between the county traffic officers and the commissioners court. The commissioners court may enter into a contract with the county traffic officers whereby the county traffic officers shall furnish and maintain their own motorcycles and such other equipment as may be necessary for the performance of their duties under the law.

Chapter 127, Acts of the Thirty-sixth Legislature, passed at its Regular Session.

AUSTIN, TEXAS, August 4, 1919.

Hon. J. Willis Pierson, District Attorney, Dallas, Texas.

DEAR SIR: I have your letter of August 1st, addressed to the Attorney General, together with the enclosures. You ask for an opinion from this Department on the validity of the following order of the commissioners' court of Dallas County.

"It is ordered that two special deputy sheriffs be employed to enforce the Highway Law regulating the operation of motor vehicles in Dallas County, as provided by law. It is ordered that the salaries of the two special deputy sheriffs be fixed as follows: All witness fees claimed and collected by said deputy sheriffs shall be accounted for in a sworn statement filed with the county auditor at the end of each month. The salaries of each deputy sheriff for each month shall be the difference between witness fees collected for said month and the sum of $150.00. Each of said special deputy sheriffs shall furnish and maintain in every respect his own motorcycle and other equipment necessary in the performance of his duties under the law. Said special deputy sheriffs shall in all things conform themselves to the law in all things governing their appointment."

In reply your attention is respectfully directed to Chapter 127,

Acts of the Thirty-sixth Legislature, passed at its Regular Session. The purpose of this law being to insure the adequate enforcement of the traffic laws of this State and especially the laws regulating the use of motor vehicles and motorcycles on the public highways. This law authorizes the commissioners' court of each county in this State to employ one or more special deputy sheriffs who shall be, whenever practical, motorcycle riders and shall be assigned to work under the directions of the sheriff of the county.

These special deputy sheriffs shall be known as the "County Traffic Officers" and the special work of said officers shall be the efficient enforcement of the traffic and highway laws of this State and prompt arrest and prosecution of all offenders of said laws and to that end they shall diligently patrol all public highways and keep a vigilant lookout for all violators of said law.

However, it is provided by the terms of this Act that no county shall be authorized to employ more than two regular deputies under this Act, nor more than two additional deputies for special emergencies to aid said regular deputies in their work.

Section 4, of said Chapter 127, reads as follows:

"The compensation of said deputies shall be fixed by the commissioners court prior to their selection, and in addition thereto said commissioners court shall be authorized to provide, at the expense of the county, necessary equipment for said officers to enable them to discharge their duties. The pay of said deputies shall not be included in the settlements of the sheriff in accounting for the fees of office, but shall be independent thereof."

The order of the commissioners court, which we have hereinabove quoted in full, provides that "each of said special deputy sheriffs shall furnish and maintain in every respect his own motorcycle and other equipment necessary in the performance of his duties under the law."

By the correspondence enclosed with your letter I observe that there is a controversy between your department and the commissioners' court as to whether the commissioners' court had the authority, under the law, to enter into a contract with the county traffic officers whereby said officers were to furnish their own motorcycles and other necessary equipment.

You are advised that in the opinion of this department the Commissioners' court and said county traffic officers have the authority, under the law, to enter into such contract and in this connection I again call your attention to a portion of the provisions of said Section 4 above, wherein it is provided that: "said commissioners' court shall be authorized to provide, at the expense of the county, necessary equipment for said officers to enable them to discharge their duties."

In the opinion of this department the above language can not be construed as being mandatory. In other words the commissioners' court has the right, should they desire to do so, to provide the county traffic officers with motorcycles and other necessary equipment at the expense of the county, but the language above used being only directory, the commissioners' court also has the authority to enter

into a contract with said county traffic officers, whereby said officers are to furnish and maintain their own motorcycles and other equipment.

That portion of the order of the commissioners' court which provides that: "The salaries of each deputy sheriff for each month shall be the difference between witness fees collected for said month and the sum of $150.00," is invalid, for the reason that the witness fees that may be earned by the county traffic officers can not become the subject of a contract between said officers and the commissioners' court. Such a contract between the commissioners' court and the traffic officers would, in the opinion of this department, be contrary to sound public policy for the reason that such an arrangement would tend to encourage the officers to tax witness fees in many cases in which they might not be equitably entitled, and for the further reason that Sections 5 and 6 of said Chapter 127 provide what funds may be used by the commissioners' court in paying the salary and expenses of said traffic officers. The Legislature having made provision for the payment of said traffic officers out of these particular funds, the commissioners' court is absolutely excluded from using any other funds in paying the salaries and expenses of said officers.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

RECORDS—RIGHTS OF ABSTRACTERS.

Op. No. 2015, Bk. 52, P. 229.

A county clerk must furnish proper facilities to abstracters and all other citizens in order that they may inspect, examine and make copies of any and all books, records and file papers belonging to his office.

There is no law which authorizes the county clerk to permit an abstractor or any other person, other than the owner, to remove from his office deeds, oil leases, assignments, releases and transfers, either before or after they are recorded. The clerk may permit court papers to be removed from his office, but must require the party taking said papers to leave a descriptive receipt for the same.

The county clerk shall record every instrument of writing, authorized to be recorded by him, in the order and as of the time when the same shall have been deposited for record.

Articles 333, 1758, 6790, Revised Statutes.

AUSTIN, TEXAS, March 31, 1919.

Hon. F. S. Morris, County Attorney, Stephenville, Texas.

DEAR SIR: I have a letter addressed to the Attorney General from Honorable J. J. Pate, county clerk of your county, propounding to this Department certain inquiries, and as is our custom, I am addressing the reply to you as county attorney and will mail a copy to Mr. Pate. The inquiries, in substance, are as follows:

First: Is a county clerk required to deliver to an abstracter deeds,

oil leases, assignments, realeases and transfers before they are recorded without the abstracter giving a receipt for each instrument?

Second: Is there any law requiring the county clerk to furnish desk room in his office to any kind of an abstracter when the vault is supplied with a large desk for their use?

I quote the third inquiry, which is as follows:

"The law says that instruments shall be recorded in the order in which they are filed, but all clerks in the oil country have been filing the instruments as they come in on the hour, and then during the day some man who has a deal on wants to get the deputy to put on an instrument after hours, and pay him for his time, so we have been doing that to accommodate the public, and so I desire that you give me your opinion on this, and I thank you in advance for an early reply."

The law that is applicable to the first inquiry is to a very considerable extent applicable to the second inquiry. Therefore, for the sake of convenience, we will consider these two questions together.

Article 1758, Revised Civil Statutes, 1911, which has reference to county clerks and their duties, states that:

"They shall also keep such other dockets, books and indexes as are, or may be, required by law; and all books and records and file papers, belonging to the office of county clerks in this State, shall at all reasonable times be open to the inspection and examination of any citizen, who shall have the right to make copies of the same."

It is clearly evident that the Legislature in enacting the above statute intended that any citizen should have the right to inspect, examine and make copies of all books, records and file papers belonging to the office of county clerks in this State.

Article 333, Revised Civil Statutes, 1911, reads as follows:

"Each attorney at law, practicing in any court, shall be allowed at all reasonable times to inspect the papers and records relating to any suit or other matter in which he may be interested without being required to take copies thereof; but no person whatever shall be allowed to take any papers out of the office to which they belong without the permission of the clerk or keeper of the records; and the party withdrawing said papers shall leave a descriptive receipt for the same."

The above article has reference to the papers filed in a suit, or other court papers, and does not refer to deeds, deeds of trust, releases and transfers and other papers required to be recorded by the county clerk. The last clause in the above statute does not apply to attorneys-at-law only, but it applies to any person. The language used in this last clause leaves it discretionary with the clerk or the keeper of the records as to whether he shall allow anyone to take any papers out of the office to which they belong. In the case of Swann vs. The State, 39 Tex. Crim. Rep., 310, the court in construing the above-quoted article after quoting the statute, said:

"This statute would seem to apprehend that every attorney may at all reasonable hours inspect the papers in any cause in which he may be in-

terested, but there appears to be a limitation on the right to withdraw papers from the court or custody of the clerk, as this can be done alone on permission of the clerk and then he must leave a descriptive receipt of such papers. It would appear that if the clerk is authorized to grant permission he can withhold permission to withdraw papers from his custody. He could not, however, decline to permit an inspection of such papers or the making of copies thereof."

Therefore, in answer to the first inquiry, you are advised that there is no law which authorizes the county clerk to permit an abstracter or any other person other than the owner to take deeds, oil leases, assignments, releases and transfers out of his office either before or after they are recorded. It is discretionary with the county clerk as to whether he will or will not permit an abstracter to remove from his office any court papers, that is, papers filed or relating to some law suit. This would, of course, include all papers filed in probate cases. However, should he choose to allow the abstracter or any other person to remove such papers, he must, under the statute, require the abstracter to leave with him a descriptive receipt for each paper or instrument taken from his office.

In answer to the second inquiry, you are advised that under the statute a county clerk must furnish proper facilities, not only to abstracters, but to all citizens in order that they may inspect, examine and make copies of all tax records and file papers belonging to this office.

Passing now to a consideration of the third and last inquiry made by Mr. Pate, your attention is directed to Article 6790, Revised Civil Statutes, 1911, which reads as follows:

"Each recorder shall, without delay, record every instrument of writing authorized to be recorded by him, which is deposited with him for record, with the acknowledgments, proofs, affidavits and certificates written or printed on the same, and all other papers referred to and thereto annexed, in the order and as of the time when the same shall have been deposited for record, by entering them word for word and letter for letter, and noting at the foot of such record all interlineations, erasures and words visibly written on erasures, and noting at the foot of the record the hour and the day of the month and year when the instrument so recorded was deposited in his office for record."

I understand from a careful reading of the third inquiry made by Mr. Pate, which we have hereinabove quoted in full, that it is the practice in his office, and he states it is the practice of all clerks in the oil country, to file instruments as they come in and then some arrangement is made with some man desiring to get his instruments recorded out of their order with the county clerk or one of his deputies to record the instrument after the usual hours of closing the county clerk's office. Such practice is not permissible under the law. I shall take occasion just here to call attention to Article 363, Penal Code of Texas, which reads as follows:

"If any officer or person, authorized by law to demand or receive fees of office, shall wilfully collect any fee or fees due him by law in excess of the fee or fees allowed by law for such service, or for fees not allowed by law, he shall be punished by imprisonment in the State Penitentiary not less than two nor more than five years for each offense."

Article 363 of the Penal Code provides that the above article applies to all persons holding any office to which fees are attached. and would include the office of county clerk. There is no law restraining the county clerk or his deputies from working as many hours as they may desire, but each person who files an instrument in the office of the county clerk should receive the same fair an impartial treatment, and if the clerk and his deputies keep the county clerk's office open and work after the usual closing hour, they should and must under the law record each instrument in the order in which it is filed.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

Op. No. 2082, Bk. 53, P. 99.

PUBLIC OFFICES—SCHOOL TRUSTEES—MUNICIPAL CORPORATIONS.

1. A woman can not be appointed by a board of commissioners to the position of school trustee in a city or town of less than five thousand inhabitants, where such city or town is organized under the first thirteen chapters of Title 22, Revised Statutes.

2. If the office of school trustee is elective in such city a woman would be eligible to hold such position.

3. A woman is eligible to be school trustee in a town or village organized under Chapter 14, Title 22, Revised Statutes.

4. A woman would be eligible to the position of school trustee in a city of five thousand inhabitants or more, provided there was nothing in the charter of said city prohibiting her from holding such position.

AUSTIN, TEXAS, June 6, 1919.

Hon. W. J. Embrey, City Attorney, Brenham, Texas.

DEAR SIR: I have yours of June 3rd, asking whether or not a woman is eligible to the position of trustee for the school board of the city of Brenham. I had a former communication from you on this subject and did not answer same for the reason that I had already replied to the same inquiry to another citizen of your city. It is rather difficult to answer your question, for the reason that I do not know under what law your city is chartered. However, I am under the impression that your city is working under the provisions of the first thirteen chapters of Title 22 of the Revised Civil Statutes.

Upon that presumption I will refer you to Article 794, Vernon's Sayles' Civil Statutes, which provides that "no person other than an elector resident of the city shall be appointed to any office by the city council."

This provision of the Statute applies only to appointive officers in towns of less than five thousand inhabitants, chartered under the first thirteen chapters of Title 22, whether same be operated under a city council or a city commissioner.

qualified voter. Then in the statute above referred to, no person

other than a qualified voter resident of the city shall be appointed to any office of the city council.

In the case of San Antonio Independent School District vs. State, ex rel, 173 S. W., 525, in which a writ of error was denied by the Supreme Court, it was held that a city school trustee was a city officer. You will observe that this provision of the statute applies only to officers who are appointed. The conclusion is, therefore, inevitable that in a city of five thousand inhabitants or less, operated under the first thirteen chapters of Title 22, R. C. S., can not appoint a woman as a trustee of the city schools, but inasmuch as this statute does not apply to cities of more than five thousand inhabitants, nor to towns and villages organized under Chapter 14, Title 22, Revised Civil Statutes, there would be no objection to the appointment of a woman to the position of school trustee in such cities, towns or villages.

Therefore, I would advise you:

1st. That a woman can not be appointed by a board of commissioners to the position of school trustee in a city or town of of less than five thousand inhabitants where such city or town is organized under the first thirteen chapters of Title 22, Revised Statutes.

2nd. That if the office of school trustee is elective in such city a woman would be eligible to hold such position.

3rd. A woman is eligible to be school trustee in a town or village organized under Chapter 14, Title 22 of the Revised Civil Statutes.

4th. A woman would be eligible to the position of school trustee in a city of five thousand inhabitants or more, provided there was nothing in the charter of said city prohibiting her from holding such position.

Yours very truly,
JOHN W. MAXWELL,
Assistant Attorney General.

Op. No. 2043, Bk. 52, P. 407.

SCHOOLS AND SCHOOL DISTRICTS—SALARY OF COUNTY SUPERINTENDENT.

The salary and expenses of the office of county superintendent of public instruction shall be pro rated among the common school districts and all incorporated school districts within the county having less than five hundred scholastics.

Chapter 41, Acts Thirty-fifth Legislature, Fourth Called Session; Article 2752, Revised Civil Statutes.

AUSTIN, TEXAS, April 18, 1919.

Miss Annie Webb Blanton, State Superintendent of Education, Capitol.

DEAR MISS BLANTON: I have your letter of April 16th, reading as follows:

"I am enclosing a letter from Mr. M. E. McNally, superintendent of Hall County schools, in which he asks for a construction of the law con-

cerning the compensation of county superintendents. The question submitted is, has the county superintendent supervision of all common districts and independent districts of not over 150 scholastics; or should it read of all common school districts and independent districts of a scholastic population of not over 500."

In reply, your attention is directed to Chapter 41, Acts of the Thirty-fifth Legislature passed at its Fourth Called Session. Said Act fixes the salary of county superintendents at a graduated amount, depending upon the population of the county, beginning with counties having a scholastic population of two thousand or less and ending with all counties having a scholastic population of ten thousand or more.

The paragraph fixing the salary of the county superintendent in counties having a scholastic population of ten thousand or more reads as follows:

"In all counties that have a scholastic population of 10,000 or more the county superintendent shall receive an annual salary of $2,100.00, provided that in making the annual per capita apportionment to the schools, the county school trustees shall also make an annual allowance out of the State and county available funds for salary and expenses of the office of the county superintendent of public instruction, and the same shall be pro rated to the schools coming under the supervision of the county school superintendent. The compensation herein provided for shall be paid monthly upon the order of the county school trustees; provided, that the salary for the month of September shall not be paid until the county superintendent presents a receipt from the State Superintendent of Public Instruction, showing that he has made all reports required of him. It is further provided, however, that no county superintendent of of public instruction shall be allowed to exceed two hundred dollars annually for office and traveling expenses."

It will be observed that it is within this paragraph, and in the very sentence, which fixes the salary of the county superintendents in counties of more than ten thousand scholastics, that provision is made as to how the county superintendent shall be paid as follows:

"The county school trustees shall also make an annual allowance out of the State and county available funds for salary and expenses of the office of the county superintendent of public instruction and the same shall be pro rated to the schools coming under the supervisions of the county school superintendent."

A strict construction of that part of the paragraph would make it apply only to county superintendents in counties having a scholastic population of ten thousand or more; however, the controlling consideration in construing a statute is the ascertainment of the intention of the Legislature, which when ascertained must be given effect when not inconsistent with the organic law of the State. The only reasonable construction that can be placed on this paragraph is that it was the intention of the Legislature to make that part of the paragraph which we have last above quoted apply to all counties having a county superintendent, regardless of the scholastic population.

Said Chapter 41 then provides that the salary and expenses of the

office of the county superintendent of public instruction shall be prorated to the schools coming under the supervision of the county school superintendent.

Article 2752, Revised Civil Statutes, provides that:

"The county superintendent of public instruction shall have, under the direction of the State Superintendent of Public Instruction, the immediate supervision of all matters pertaining to public education in his county * * * He shall have authority over all of the public schools within his county, except such of the independent school districts as have a scholastic population of five hundred or more * * *"

We find then that the county school superintendent shall have supervision over all the common school districts and of all incorporated school districts having a scholastic population of less than five hundred.

You are, therefore, respectfully advised that the salary and expenses of the office of the county superintendent of public instruction shall be prorated among the common school districts and of all incorporated school districts within the county having less than five hundred scholastics.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

Op. No. 2023, Bk. 52, P. 301.

COUNTY OFFICERS—HIRING JAIL GUARDS.

The sheriff may, when necessary, with the approval of the commissioners court, or in case of emergency with the approval of the county judge, employ jail guards.

In counties of less than forty thousand the sheriff shall be allowed for each guard necessarily employed in the keeping of prisoners two dollars for each day; no allowance shall be made for the board of such guard, nor shall any allowance be made for the jailer or his turnkey.

In counties having a population of forty thousand or more and also containing a city having a population of twenty-five thousand or more, according to the last United States census, the commissioners court may allow any jail guard, jailer and turnkey three dollars per day.

Articles 49, 52, 1143, Code Criminal Procedure;
Article 7127, Revised Civil Statutes.

AUSTIN, TEXAS, April 7, 1919.

Hon. J. A. Brooks, County Judge, Falfurrias, Texas.

DEAR SIR: I have your recent letter addressed to the Attorney General reading as follows:

"Brooks County has no county attorney, therefore, I am asking for a little information in order to keep the record straight. Can a commissioners court allow the sheriff pay for a jail guard when there are no prisoners in jail charged with misdemeanors? My interpretation of the law is that first it must be necessary for the protection of the prisoner, and then the guard must actually be jail guard, and not jailer or turnkey, or simply an excuse to pay salary for a department sheriff."

Article 52 Code of Criminal Procedure provides that the sheriff may appoint a jailer, but no provision is therein made for this jailer to be paid by the commissioners court of the county. Article 1143, Code of Criminal Procedure as amended by the Thirty-fifth Legislature at its Regular Session, provides that: "In counties having a population of forty thousand or more and also containing a city having a population of twenty-five thousand or more, according to the last United States census, the commissioners court may allow each jailer, jail guard and turnkey three dollars per day."

You are, therefore, advised that in counties of less than forty thousand population and in counties of more than forty thousand population, unless they contain a city having a population of twenty-five thousand or more, the commissioners court is without authority to pay the salary of a jailer. Article 49, Code of Criminal Proceedure, provides that the sheriff shall be keeper of the jail and responsible for the safe keeping of all prisoners.

Article 7127, Revised Civil Statutes, reads as follows:

"Whenever in any county it may become necessary to employ guards for the safe keeping of prisoners and the security of jails, the sheriff may, with the approval of the commissioners court, or in case of emergency, with the approval of the county judge, employ such number of guards as may be necessary; and his account therefor, duly itemized and sworn to, shall be allowed by said commissioners court and paid out of the county treasury."

And Article 1143, Code of Criminal Procedure, provides in part:

"The sheriff shall be allowed for each guard necessarily employed in the keeping of prisoners two dollars for each day and there shall not be any allowance made for the board of such guard nor shall any allowance be made for the jailer or his turnkey * * *"

That part of Article 1143 quoted above applies to counties of less than forty thousand and to counties of more than forty thousand, unless they also contain a city having a population of twenty-five thousand or more, according to the last United States census.

Now, to answer your precise question in a brief and concise way, you are advised that the sheriff can only employ guards for the safe keeping of prisoners and the security of the jails and he can only employ such guards with the approval of the commissioners court, or in case of emergency, with the approval of the county judge, and the clause which provides that the sheriff may in case of emergency employ guards with the approval of the county judge clearly indicates that the county is not to be liable for the salary or wages of any guard employed by the sheriff unless such employment has first been authorized by the commissioners court, or in case of emergency, by the county judge, and the statute (1143) provides that there shall not be any allowance made for the board of such guard, nor shall any allowance be made for the jailer or his turnkey, except in counties having a population of forty thousand or more and also containing a city having a population of twenty-five thousand or more. Your interpretation of the law, as stated in

your letter, is, therefore, correct in this: that before a guard is employed, it must be thought necessary for the protection of the prisoners or the security of the jail and the guard must actually be jail guard and not jailer or turnkey.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

Op. No. 2197, Bk. 54, P. 92.

QUARANTINE—COUNTY AND CITY HEALTH OFFICERS—PAYMENT FOR SERVICES.

County and city health officers have only the authority to establish local quarantine.

Only commissioners courts and city councils in incorporated cities have the authority to declare general quarantine within their respective jurisdictions.

County health officers have not the authority to establish local quarantine in an incorporated city where there is a regularly appointed and acting city health officer.

Where a county health officer goes into an incorporated city at the request of the city health officer and attempts to establish local quarantine, the county is not liable to him for his services.

Articles 4548 to 4553a inclusive, 4533, 4540, 4541 and 4542, Revised Civil Statutes.

AUSTIN, TEXAS, March 27, 1920.

Dr. C. W. Goddard, State Health Officer, Capitol.

DEAR DOCTOR: Your letter of the 4th inst., together with a letter from F. L. Wilson, County Judge of Ellis County, has been received. Judge Wilson's letter reads as follows:

"In regard to the compensation of county health officer, and who should pay for his services to an incorporated town, will state more fully than before.

"In April or May, 1918, Dr. West, our county health officer, was called by the mayor of Ferris, an incorporated town in Ellis County, to come to Ferris and place that town under strict quarantine, that smallpox had been raging and that the Ferris city physician, and other officers, had failed in their efforts to keep the disease from spreading, owing to the fact that people would not obey the instructions given by the city physician there. The county health officer went to Ferris and placed that town under strict quarantine, but before going he brought the matter before the county judge, who advised him that the town of Ferris would have to pay for his services, if he did go to Ferris. He went, expecting Ferris to pay him. However, he never told the city authorities at Ferris before he went that he was looking to Ferris for his pay.

"After rendering the services referred to, Dr. West presented his bill to the city council at Ferris, and it refused to pay for such services, claiming that it was the county's place to pay Dr. West. So Doctor West wants his money, and the claim will be barred by limitation before long. So I will appreciate an opinion from the Attorney General's Department as to who should pay this bill."

We have heretofore received a communication from you, together with another letter from Judge Wilson, relative to this matter. From

the facts stated in these letters, Judge Wilson desires to know whether it is the duty of Ellis County or of the City of Ferris to pay Dr. West, the County Health Officer, for his services in establishing a quarantine in the City of Ferris, an incorporated city, acting upon the request of the city authorities of Ferris. It appears from Judge Wilson's letter that the City of Ferris is an incorporated town and has a City Health Officer; that smallpox was raging in the City of Ferris, and that the local health authorities were unable to cope with it; that request was made by the city officers to Dr. West, County Health Officer, to come and quarantine the city; that the County Judge advised Dr. West that he must look to the City of Ferris for compensation for his services, but Dr. West did not make known to the city officials that he was expecting the City of Ferris to pay him for his services. In response to this invitation by the Mayor and City Health Officer, Dr. West went to Ferris and assisted the City Health Officer in establishing a thorough local quarantine.

Article 4538, Revised Statutes of 1911, provides for the creation of the office of county health officer. Article 4539 prescribes his qualifications, manner of appointment and compensation. That part of said Article, dealing with the subject of compensation, reads:

"Compensation of said county health officer shall be fixed by the commissioners court; provided, that no compensation or salary shall be allowed, except for services actually rendered."

Article 4543 prescribes the duties of county health officers, and among these duties is the duty of "discharging duties of county quarantine."

Article 4568 deals specifically with the powers and duties of county health officers with reference to quarantine. By the provisions of this Article, *it is made the duty of the county health officer to declare and maintain quarantine, either within or without the county limits, when directed to do so by the commissioners' court,* and provides that when quarantine is so established, the county shall be liable for certain expenses incurred. A portion of said Article reads:

"Chartered cities and towns are embraced within the purview of this article and the mere fact of incorporation does not exclude them from the protection against epidemic diseases given by the commissioners court to other parts of their respective counties. The medical officers of chartered cities and towns can perform the duties granted or commanded in the several chapters, but must be amenable and obedient to the rules prescribed by the Texas State Board of Health. This article, however, must not be construed as prohibiting any incorporated town or city from declaring, maintaining and paying for local quarantine."

A careful study of this provision of this article makes it plain to us that general quarantine is to be declared only by the commissioners' court, and when such quarantine is declared, it may be declared in favor of, or against, any chartered city or town in the county.

In other words, the county has the authority to do for a chartered city or town, by the way of general quarantine, everything that it may lawfully do for that portion of the county that is not embraced in chartered cities and towns. It also provides that incorporated cities and towns may declare, maintain and pay for local quarantine.

Articles 4540, 4541, 4542, 4548 to 4553, inclusive, deal with the establishing, maintaining, duties, powers, compensation, etc., of city health officers.

Article 4548 defines the duties of city health officers and reads as follows:

"Each city health officer shall perform such duties as may now or hereafter be required by the city councils and ordinances of city physicians, and such duties as may be required of him by general law and city ordinances with regard to the general health and sanitation of towns and cities, and perform such other duties as shall be legally required of him by the mayor, councils, commissioners or the ordinances of his city or town. He shall, in addition thereto, discharge and perform such duties as may be prescribed for him under the directions, rules, regulations and requirements of the State Board of Health and the president thereof. He shall be required to aid and assist the State Board of Health in all matters of quarantine, vital and mortuary statistics, inspection, disease prevention and suppression and sanitation within his jurisdicton. He shall at all times report to the state board of health, in such manner and form as shall be prescribed by said board of health, the presence of all contagious, infectious and dangerous epidemic diseases within his jurisdiction, and shall make such other and further reports in such manner and form and at such times as said state board of health shall direct, touching all such matters as may be proper for the state board of health to direct, and he shall aid said state board of health at all times in the enforcement of proper rules, regulations and requirements in the enforcement of all sanitary laws, quarantine regulations and vital statistics collection, and perform such other duties as said state board of health shall direct."

Article 4553a, Revised Civil Statutes, is known as the "Sanitary Code for Texas." Rule 2 of said Code reads:

"For the purpose of these regulations the phrase 'local health authority' shall be held to designate the city or county health officer or local board of health *within their respective jurisdictions.*"

Rule 3 defines the term "contagious diseases." Smallpox is defined as a contagious disease.

Rule 5 prescribes the rules and regulations as to quarantine and disinfection to be observed by health authorities, etc. A portion of said rule reads:

"The following rules of instruction for the regulation of quarantine, isolation, and disinfection in the several contagious diseases, hereinbefore mentioned, are to be observed by all boards of health, health officers, physicians, school superintendents and trustees and others. All health authorities of counties, cities and towns in this State are hereby directed and authorized to establish local quarantine, hold in detention, maintain, isolate and practice disinfection, as herein provided for, of all (such infected) persons, vehicles or premises which are infected or are suspected of being infected with any of the above named diseases whenever found."

Rules 31 and 32 read:

"Rule 31. Health authorities to assume control of quarantine in their jurisdiction.—In all incorporated cities and towns the city health authorities shall assume control and management of contagious diseases and exposures and practice quarantine, isolation and disinfection as herein

provided. In those portions of all counties in this state, outside of incorporated cities and towns, the county health officer shall assume management and control of contagious diseases and exposures and practice quarantine, isolation and disinfection as herein provided.

"Rule 32. These rules not to prevent local rules of quarantine if no conflict.—Nothing contained in these regulations shall be construed to prevent any city, county or town from establishing any quarantine which they may think necessary for the preservation of the health of the same; provided, that the rules and regulations of such quarantine be not inconsistent with the provisions of these regulations and be consistent with and subordinate to said provisions, and the rules and regulations prescribed by the governor and state board of health. It shall be the duty of the local health authority to at once furnish the president of the state board of health with a true copy of any quarantine orders and regulations adopted by said local authorities."

A close study of these articles and rules leads us to the conclusion that it was only the intention of the Legislature to confer upon "local health authorities" power to establish local quarantine. By local quarantine, it is to be understood that quarantining of a building or a portion thereof, and only applies to the particular premises quarantined as is defined under Subdivisions a to g, inclusive, of Rule 5 referred to above. Under these provisions, "local health authorities" have not the authority to declare the entire county or an incorporated city quarantined either absolutely against all or a part of the world. In other words, "local health authorities" have not the power to establish general quarantine. The authority to establish an absolute or general quarantine rests with the commissioners' court or the city officials of an incorporated or chartered city.

From the several letters before us relative to this matter, we learn that the City Health Officer at Ferris was only endeavoring to establish a local quarantine; that is he was trying to enforce quarantine in accordance with the provisions of Rule 5 of the Sanitary Code. In this, he was unsuccessful and it became necessary to call in the assistance of Dr. West, the County Health Officer, who succeeded in establishing a strict local quarantine.

From the provisions of Rule 31 quoted above, it will be seen that it was the duty of the city health officer of the City of Ferris to enforce local quarantine within the City of Ferris, and that it was the duty of the county health officer to enforce local quarantine in those portions of the county outside of incorporated cities and towns. We do not think it was the official duty of Dr. West to go to Ferris and enforce local quarantine. The statute has plainly made it the duty of the city health officer to enforce local quarantine within an incorporated city. It appears to us that in performing this service Dr. West was acting for and in behalf of the city and not in his official capacity. He may have attempted to act officially, but the law does not clothe him with such authority in incorporated cities. If he was not acting legally within his official capacity, then certainly the county is not liable to him for his services. The liability of the city to pay Dr. West for his services depends entirely upon its contract, either expressed or implied, with him. The city of Ferris requested his services at a critical time and he responded to its call. This is not such a matter as this Department should be called upon to interpret.

Yours very truly,

BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 2091, Bk. 53, P. 123.

PUBLIC OFFICERS—PUBLIC HEALTH COUNTIES, CITIES AND TOWNS.

A city or town of five thousand inhabitants or less can not abolish the office of city health officer.
A county health officer can not hold the office of city health officer.
A county health officer can not act as city health officer without being especially employed by the city.
R. C. S. Articles 4548 to 4552; Constitution, Article 16, Section 40.

AUSTIN, TEXAS, June 9, 1919.

Hon. H. B. Medley, Mayor, Roby, Texas.

DEAR SIR: We have yours of the 2nd instant, in which you make the following inquiry:

"Can a town under 5000 inhabitants, commission form of government, abolish the office of city health officer?
"Can the county health officer hold the office of city health officer?
"Can the county health officer act as city health officer without being especially employed by the city?"

Replying thereto I will refer you to Articles 4540, 4541, 4542, 4548, 4549, 4550 and 4551, all of which relate to the office of city health officer.

Article 4540 creates the office of City Health Officer; Article 4541 provides, among other things, the following:

". . . . but in no instance shall the office of city health officer be abolished."

Section 40, Article 16 of the Constitution reads as follows:

"No person shall hold or exercise, at the same time, more than one civil office of emolument, except that of justice of the peace, county commissioner, notary public and postmaster, unless otherwise specially provided herein."

The Articles of the Revised Civil Statutes above referred to, together with Articles 4538 and 4539, make the offices of county and city health officers separate and distinct offices in this State, and provide for their compensation by different methods.

That of the County Health Officer, by fees, to be paid for services rendered; that of the City Health Officer by such compensation as shall be fixed by the city government.

Their methods of appointment are different; their duties are different and their compensation, as fixed by statute, are different.

Therefore, in response to your inquiries I will advise you:

1.

That a City of five thousand inhabitants or less, operating under the Commission form of Government, can not abolish the office of City Health Officer.

2.

That the County Health Officer can not hold the office of City Health Officer, inasmuch as it is a separate and distinct office of emolument.

3.

That the County Health Officer can not act as City Health Officer without being specially employed by the City. The duties of a County Health Officer are specific. He gets his authority from appointment by the county commissioners and he can not exercise the duties of a separate officer, which separate officer is under the jurisdiction and direction of the city government.

Yours very truly,

JOHN MAXWELL,
Assistant Attorney General.

OPINIONS ON PUBLIC OFFICERS—FEES AND COMPENSATION.

Op. No. 2245, Bk. 54, P. 392.

CENSUS—POPULATION—COUNTY COMMISSIONERS—COMPENSATION.

The respective provisions of Chapter 29, General Laws, Fourth Called Session, Thirty-fifth Legislature, making compensation for county commissioners dependent upon population, become operative at such time as the enumeration of such county is accepted and approved by the director of census as correct, complete and final, and not as of the date prescribed by Congress as of which the enumeration shall be taken.

AUSTIN, TEXAS, August 14, 1920.

Hon. F. M. Scott, Marshall, Texas.

MY DEAR SIR: The Attorney General is in receipt of yours of the 3d instant, which is as follows:

"Under the Acts of 1918, Fourth Called Session of the Legislature, Chapter 29, Section 1, it is provided that in all counties containing a population of forty thousand and not more than fifty thousand, the county commissioners of the several counties shall each receive a salary of $1,500.00 per annum, payable in equal monthly installments. Under the same Act it is provided that in all counties containing a population of not less than twenty-nine thousand and not more than forty thousand population, the county commissioners of the several counties shall each receive a salary of $1,200.00 per annum, payable in equal monthly installments.

"Under the 1910 census, Harrison County had a population of something over thirty-seven thousand, and, of course, under this statute the commissioners of Harrison County, Texas, have been receiving a salary of $1,200.00 per annum, payable in equal monthly installments. Under the 1920 census, Harrison County is shown to have a population of something over forty-three thousand inhabitants. This census, of course, applies to January 1, 1920.

"I desire an opinion from you as to when the new compensation of $1,500.00 per annum should take effect as to the commissioners in Harrison County. Under the statute, of course, they are entitled to $1,500.00 per annum, payable in equal monthly installments of $125.00 each. I desire to know whether this new compensation should begin with January 1, 1920, or should begin with the date upon which we receive notice of the population of Harrison County. I will appreciate your opinion in this matter as early as it is practicable for you to give it your attention."

Your inquiry presents two questions. The first is: Can the salary or compensation of a County Commissioner be increased during his term of office? If this question is answered in the negative further inquiry will be unnecessary. If it is answered in the affirmative then the second question is: Assuming that Harrison County is now shown officially by the United States Census of 1920 to have "a population of 40,000 and not more than 50,000" when would, or does, Article 6901c of Chapter 29 (p. 52) of the General Laws of the Fourth Called Session of the Thirty-fifth Legislature, approved March 22, 1918, become effective as to that county, said county, prior to the 1920 census, having a population of 30,000 or more, but less than 40,000, and therefore being, up to the time the 1920 census became or becomes effective, under the provisions of article 6901d of said Chapter 29?

Article 7086 of the Revised Civil Statutes of 1911 expressly provides that "the salaries of officers shall not be increased nor diminished during the term of office of the officers entitled thereto."

This article would seem to answer our first question, but, plagiarizing one of our well-known cartoonists, "It doesn't mean anything," being only a legislative declaration and there being no provision of like effect in our constitution. This is evidenced by the well-known legislative and judicial history of our State.

That the salary or compensation of a county officer, where such salary is not fixed at a definite sum by law, but the fixing of which is vested in the Commissioners Court, may be increased or diminished during the term of such officer, has been expressly decided. Collingsworth County vs. Myers (Crt. Civ. App.) 35 S. W., 414; Orr vs. Davis (Crt. Civ. App.) 30 S. W., 249; Bastrop County vs. Hearn, (Sup. Crt.) 8 S. W., 202; Hill County vs. Sauls (Crt. Civ. App.) 134 S. W., 267.

It has been held in Pennsylvania (Guildin vs. Schuylkill County, 24 Att. 171; Commonwealth ex rel. Commissioners of Schuylkill County vs. Conroy, 24 At. 172; Santa Barbara County vs. Twitchell, 178 Pac. 945), Washington (State ex rel. Maltbie vs. Will, 103 Pac. 479; State vs. Wardell, 183 Pac. 67), California (McFadden vs. Borden, 152 Pac. 977), Wyoming (Davis vs. Board of Commissioners, 33 Pac. 467), Kentucky (Neutzel vs. Fiscal Court Jefferson County, 208 S. W., 11; Fox vs. Landtrip 185 S. W.. 136; Beauchamp vs. Snider, 185 S. W., 863), Alabama (Franklin County vs. Richardson, 79 Sc. 384). New York (People ex rel. Noble vs. Mitchel, 115 N. E., 271), Michigan (Kenney vs. Board of State Auditors, 155 N. W. 510), and, possibly, in other states, that the salary or compensation of a public officer cannot be increased or diminished during his term of office, but all of these states, as far as we have been able to ascertain, have constitutional provisions expressly prohibiting this being done. We have no such inhibition in our Constitution.

That a salary or compensation fixed at a definite sum by legislative enactment, although not so fixed by the Constitution, cannot be increased or diminished by any other than legislative authority, whether during the term of office or otherwise, is too evident to require discussion or the citing of authorities, but that even such salary or compensation so fixed, but not being so fixed by the Constitution, may be increased or diminished by legislative enactment, even during the term of the officer then serving, is clearly established. This is evidenced not only by the cases herein cited to that effect but also by the act now under consideration, as well as by numerous other acts, notably Chapter 32 (p. 54), General Laws Regular Session Thirty-sixth Legislature, increasing, and that during the terms of office of the officials then serving, the salaries of the judges of our Supreme Court, Courts of Civil Appeals and District Courts. This last act was held valid by our Court of Civil Appeals in King vs. Terrell, 218 S. W., 42, and writ of error refused by our Supreme Court, March 25, 1920, without a written opinion. In this case said Article 7086 was not thought enough of by either counsel or court to be cited or discussed.

Hence we conclude that this article, whatever significance, if any, it might have in other matters, can have no effect whatever on your

question here presented, and that the salary of a county commissioner may be increased or diminished, within proper bounds, by proper authority, during his term of office. That the Legislature has the right to fix by law the compensation of such officers, same not being fixed by the Constitution, is expressly declared by Section 44 of Article 3, of our State Constitution, and that in so doing it may increase or diminish such compensation during the term of such officer is evident from what we have already said. By said Chapter 29 the Legislature has fixed the compensation of such officers, as it has done from time to time heretofore (Sec. 14, Ch. 164, Gen. L. 15 Leg., Aug. 23, 1876, Art. 2466, R. S. 1895, Art. 3870, R. C. S. 1911; Ch. 33 Gen. L. S. S. Eighteenth Leg., Feb. 5, 1884, Art. 4718 R. S. 1895, Art. 6901, R. C. S. 1911; Ch. 126, Gen. L. R. S. Thirty-third Leg., April 3, 1913; Ch. 98 G. L., R. S., Thirty-sixth Leg.), at an annual salary, payable as stated, the amount of salary varying in different counties according to population, and the fact that an increase of population in a particular county may occur during the term of an officer and thereby work an increase in the compensation of such officer during his term, is no bar to such law becoming effective during such term.

That our Legislature may enact a law to become effective within a given county, or other district or territory, only when the population of such county, or other district or territory, has reached a certain number, otherwise to remain inoperative as to such county, or other district or territory, is well understood. There is no reason, therefore, why article 6901e of said Chapter 29 should not become operative or take effect as to your county at such time as your county should come under its provisions as prescribed by the rule laid down in article 3901e of that Chapter.

This brings us to our second question.

Certain states have laws declaring when certain of their laws, similar to the act here under consideration, to be operative only in those political subdivisions or municipalities having a stated number of inhabitants as shown by the United States census, shall become effective. For instance, under the law of Minnesota cities and towns in that state are given certain classifications according to population as shown by the last United States census, the compensation of the officers of such cities and towns being graduated according to population, much the same as this act prescribing compensation for county commissioners, and that State has a general law providing, in effect, that such classification shall become effective as of the first day of January of the year next following that in which the census is taken. (Sec. 12, Ch. 124, Laws Minn. 1905). That state has another law to the effect that the Governor of the State shall procure from the Director of Census a certificate as to the population of the various political subdivisions and municipalities of the State, and file such certificate with the Secretary of State, and that laws of that State, dependent on population, shall be effective from and after the date of such filing of such certificate, when not otherwise prescribed by law. From People vs. Williams, (27 Pac. 929, California seems to have a similar law for the classification of counties according to population. Unfortunately we have no such law in this State. Neither does any law of the United States declare at what time the taking of the census, as

to population or other data, shall be completed, or when such census shall become effective, nor is there any provision for proclaiming or declaring the result of the census at any time as to population or other data. The Director of Census is authorized, but not required, to publish census bulletins from time to time, and is also authorized, at his discretion, but is not required, to issue certificates as to population and certain other matters when properly applied for, on payment of the prescribed fee. There is no declaration as to when the census, as to population, shall be completed or become effective. (Ch. 97, Acts Congress, March 3, 1919).

We note that in the case of Nelson vs. Edwards, 55 T. 389, our Supreme Court says with respect to the tenth census (1890), in a controversy as to whether or not Titus County was entitled to the office of Tax Collector, separate from that of Sheriff, under Section 16 of Article 8 of our Constitution, that "so far, then, as we are advised, it would seem for the purposes of the question now before the court, the filing the list (of Census Enumerator) in the office of the County Clerk would be sufficient evidence of the census of that County in the absence of any allegation and testimony that it was not correct;" but on this point, it will be observed that the Act of Congress providing for the taking of the tenth census, as stated in the opinion in that case, required the Census Enumerator to file his enumeration list in the office of the County Clerk, whereupon it is supposed that it was intended that the list should become a public record as to population, and that such filing of it was meant to have that effect, while the act providing for the taking of the fourteenth (1920) census contains no such provision. Hence this case affords no light on the question here presented, and the question was not raised nor discussed in the case of Brooks vs. Dulaney (Sup. Crt. Tex.) 93 S. W., 997.

In some States, counties, cities and towns are classified according to population for the purpose of determining the salaries to be paid certain officers, the law not prescribing any rule or method as by a census, or otherwise, for determining population. In such states, as to such laws, it has been held that when, at whatever time the population of a county, city or town reaches that prescribed by law for a certain class, such county, city or town "then by statute automatically fell into the" class to which it belonged according to population "as soon as that fact was properly ascertained;" and that "in the absence of any law pointing out how that population should be ascertained the court can determine the fact by proof just as it can determine any other fact." People vs. Wang Wong, 28 Pac. 270; Fancher vs. Rosenoff, 118 Pac. 315. This rule does not obtain, however, where the law, as in the case of the act here under consideration, expressly provides "that the United States census shall govern as to population," or where such laws are to become effective according to population as shown by a state census. In the case of Wolfe vs. City of Moorehead, 107 N. W., on the question as to when a state law became effective to be determined by population based on a state census, the Supreme Court of Minnesota says:

"The plaintiff argues that, inasmuch as the enumeration was required to be completed on or before the 1st day of July, and to be placed in the hands of the superintendent of the census not later than the 10 of July,

therefore the election held in October was governed by statutes applicable to cities of more than 4,000 inhabitants. That enumeration did not constitute the census in law; on the contrary, it was but a step in its creation. The census went into legal effect upon its compilation and publication by the superintendent. Section 18. Until that time, the various municipal corporations of the State were governed by the laws applicable to cities of the class determined by the previous census."

From the case of City of Huntington vs. Cast, by the Supreme Court of Indiana, 48 N. E., 1025, it appears that the mayor of the city of Huntington claimed to have taken a census of that city, same being authorized by the law of that state, but that the enumeration or record so made was never made public, inspection of it by interested citizens was refused by the mayor, it was never filed with the city clerk nor with the papers of his offce. and was, prior to the controversy before the court, destroyed by the mayor. The court says:

The question then arises whether the enumeration so made, and the evidences of which are nowhere to be found, can be called a 'census' as provided for in the statute in question. The statute mentions the census to be taken by the mayor in connection with the census taken by the United States. Even if it were not mentioned in such connection, we should know that the census provided for in the statute, to be taken by the mayor of the city, must be an official enumeration of the people, and as such a public record. The standard definitions are to this effect. Webster says that a census in 'an official registration of the number of the people.' The Century Dictionary: 'An official enumeration of the inhabitants of a State or country, with details of sex and age," etc. The Standard Dictionary: 'An official numbering of the people of a country or district.' Burrill Law Dict.: 'In the Roman law. A numbering or enrollment of the people, with a valuation of their fortunes." Black Law Dict.: 'The official counting or enumeration of the people of a state or nation, with statistics,' etc. Beuv. Law Dict.: 'An official reckoning or enumeration of the inhabitants and wealth of a country.' The census to be taken by the mayor, in contemplation of the statute before us, was, therefore, in the first place, to be an official enrollment of the people of the city of Huntington. Such an enrollment or registration of the people was also to be a public document, to be preserved in the archives of the city, where it might be subject to the inspection of all those interested. A census is not merely a sum total, but an official list, containing the names of all the inhabitants."

Also, it has been held that courts will take judicial notice as to what the population of a given governmental subdivision is, as shown by official census bulletins, publications and records (Cyc. Vol 16, p. 879; C. J. Vol. 11, page 70), but, as stated by the Supreme Court of Arkansas, in Childers vs. Duvall, 63 S. W., 802, "until the means of information provided by law were, or are, furnished, it is clear that no official notice could have been taken of the census for the purpose of electing or appointing a county clerk.

"A census in modern time is an official enumeration of the in habitants of a state or country with details of sex, age, family, occupation, possessions, etc. A census should be an official enumeration of the people, and as such, a public record, containing not merely a sum total, but an official list of the names of all the inhabitants preserved in the public archives and, except in so far as the statute under which it is taken prescribes otherwise, subject to public in-

spection." (C. J. Vol. 11, p. 70, and authorities cited; Ch. 97, Acts of Congress, March 3, 1919, U. S. Comp. St. 1919, Sup. Vol. 1, Title 31, Secs. 4388a-4388nn). It consists of and is the completed, accepted and approved final documents or records prepared and compiled by proper authority in compliance with a law providing therefor and lodged with the proper governmental agency, showing such data, facts and information as are required by law to be so shown. "The last United States census," then, which "shall govern as to population in determining the compensation" of county commissioners under this Act, must be the last "official enumeration of the inhabitants" of your county by the United States Government, "and, as such, a public record containing * * * an official list of the names of all inhabitants" of that county, "preserved in the public archives" of the government, and, "except in so far as the statute under which it was taken prescribes otherwise, subject to public inspection."

From the foregoing, we gather that the word "census" as used in this act does not refer to the original count or enumeration or listing by the census enumerator, because, clearly that act alone, just that and nothing more, would not, under the Act of Congress referred to, constitute the census. The law prohibits the enumerator, under heavy penalty, from divulging, otherwise than to certain other census officials, any information obtained by him in the discharge of his duties. He must make his report to the census supervisor of his district, who, in turn, after making corrections, if any be necessary, must report to the director of census. The enumeration list must reach the director of census and be checked, corrected if necessary, and be officially approved and accepted by and lodged with the proper governmental agency before it can become "an official enumeration," a "public record," and "an official list * * * preserved in the public archives and * * * subject to public inspection." It is only when the record is thus completed, officially accepted and approved by and lodged with the proper governmental agency that it can be said of it "This is the census," or that it can be officially published, announced or certified to as such, and it is only then and not at any time before that it can be said that the *census* shows population or any other fact. Until such finality, there is no census.

It is true that the Act of Congress providing for the taking of the 14th (1920) census states that it shall be the duty of the enumerator "to obtain each and every item of information and all particulars required by this Act, as of date January 1st of the year in which the enumeration shall be made" (Sec. 12) and that "the enumeration of the population required by Section 1 of this Act shall be taken as of the first day of January" (Sec. 20), and that the census, as completed, shows what the population of your county was on January 1, 1920, but this cannot be taken as fixing a time at which the different provisions of this Act are to become effective in the various counties of this State, dependent on population as shown by such census. This act does not provide that the population of a county at the time of the census enumeration shall govern in its applica-

tion, or that it shall become effective as of the date fixed by Congress as of which the enumeration shall be taken, and to place such a construction on the Act might, and likely would, result in an embarrassing situation in case a census should show such a decrease in the population of a county as to reduce the compensation of the commissioners of such county from a higher to a lower salary, they having theretofore, prior to the completion of the census, re ceived compensation at the higher rate. The provision is that "the last United States *census* shall govern as to population," etc. It is only when there is a "census" to "govern" that the act can become effective and there can be no "census" either in fact or in law until the several acts or steps prescribed by law for taking the census are complied with and completed.

The articles of said Chapter 29 here under consideration read as follows:

"Article 6901c. Provided that in all counties containing a population of 40,000 and not more than 50,000 population, the county commissioners of the several counties shall each receive a salary of $1,500 per annum, payable in equal monthly installments, and this salary shall be in lieu of all other fees and per diem of all kinds now allowed by law.

"Article 6901d. Provided, that in all counties containing a population of 30,000 and not more than 40,000 population the county commissioners of the several counties shall each receive a salary of $1,200 per annum, payable in equal monthly installments, and this salary shall be in lieu of all other fees and per diem of all kinds now allowed by law.

"Article 6901e. The last United States census shall govern as to population in determining the compensations herein provided."

We conclude, then, that there was no United States census to govern as to the population of your county as to the 14th (1920) census until the enumeration as to your county was completed, officially approved and accepted by the Director of Census as final and correct, and lodged with the proper governmental agency, but that thereupon, there was such census, and that at and from such time, and not before, your county commissioners, according to the population of your county, as stated by you, became and were entitled to compensation as salary under article 6901c of said Chapter 29.

Very truly yours,
W. W. CAVES,
Assistant Attorney General.

Op. No. 2131, Bk. 53, P. 331.

DELINQUENT TAXES—FEES OF COUNTY ATTORNEY.

1. The fee of a county attorney in a delinquent tax suit is that provided by House Bill 40, as amended by Senate Bill 147, passed at the Second Called Session of the Thirty-sixth Legislature.
2. A suit for the collection of taxes past due and owing by a delinquent owner should include all taxes for all years delinquent against all real estate of such owner at the time suit is filed, and only one fee to the

county attorney accrues. He is not entitled to a separate fee because navigation or other improvement district taxes are included in the suit.

AUSTIN, TEXAS, September 11, 1919.

Hon. Tom C. Stephenson, County Attorney, Orange, Texas.

DEAR SIR: We have a letter from you which is in part as follows:

"During the past two and one-half years I have collected for Navigation District in Orange County delinquent taxes by suit to the amount of over $7,000.00. I want to get your opinion as soon as possible as to my fees in said cases, and herewith refer you to Article No. 5986, Title 96, of the Revised Civil Statutes of 1914."

The Article referred to by you does not provide to the county attorneys a separate fee for instituting a suit to collect delinquent navigation district tax.

House Bill 40, as same was amended by Senate Bill 147 passed at the Second Called Session of the Thirty-sixth Legislature, fixes the fee the county attorney is entitled to receive for instituting suit to collect delinquent taxes. The entire act contemplates that any suit for the collection of taxes against a delinquent owner shall include all the taxes for all years delinquent against the property of such owner. This is made plain by the provisions of said Act to which your attention will now be called.

In Section 1 of the Act it is provided that the collector of taxes

"shall mail to each and every recorded owner of any lands or lots situated in such counties a notice showing the amount of taxes appearing delinquent or past due and unpaid against all such lands and lots according to the delinquent tax records of their respective counties on file in the office of the tax collector. * * * And whenever any person or persons, firm or corporation shall pay to the tax collector *all* of the taxes, interest, penalties and cost shown by the records aforesaid to be due and unpaid against any tract, lot or parcel of land *for all of the years for which said taxes may be shown to be due and unpaid,* that it shall be the duty of the tax collector to issue to such person or persons, firm or corporation a redemption receipt covering such payment as is now required by law."

Section 3 of the Act contains the following provisions:

"As soon as practicable after the expiration of ninety days from the date of notice mailed to the delinquent owner by the tax collector under the provisions of this Act the county attorney, or district attorney, if there be no county attorney, shall file or institute suit, as otherwise provided by law, for the collection of *all delinquent taxes due at the time of filing such suit against any lands or lots situated in the county,* together with interest, penalties and costs then due, as otherwise provided by law; provided, that for the work of filing such suits, the county or district attorney shall receive a fee of four ($4.00) dollars for the first tract of land included in each suit and one ($1.00) dollar for each additional tract included therein, etc."

Of course in your case, the suits having been instituted prior to the time Senate Bill 147 goes into effect, the fee provided in House Bill 40 is the one you are entitled to for each delinquent suit properly instituted by you.

The provisions of the Act quoted above make it plain that it is the duty of the County Attorney to include all taxes of every character

and description owed by a delinquent owner at the time the suit is instituted in one suit. It was never intended by the Legislature that a delinquent owner should be harassed by a multiplicity of suits. Had the Act not contained the provisions quoted, equity would relieve a delinquent owner from a multiplicity of suits. It would not be right to institute a suit against a delinquent owner for delinquent school district taxes, another suit for the collection of delinquent road district taxes, another for the collection of delinquent drainage district taxes, another for the collection of delinquent irrigation district taxes, etc., although the law authorizing the creation of such districts, in each instance, provides that such taxes may be collected by suit, as otherwise provided by law.

Of course if navigation district taxes are the only taxes delinquent against the lands of an owner, it would be proper to institute suit for the collection of the same and the county attorney would be entitled to the fee provided by House Bill 40, as amended by Senate Bill 147, for the institution and prosecution of a delinquent tax suit.. But if other taxes, at the time, are likewise past due and owing by the delinquent owner, they should be included in the same suit and only one fee would accrue. The fee is for the institution and prosecution of the suit, and the delinquent owner, by proper proceedings, could require all taxes owing by him at the time of the institution of a given suit to be included therein, or, if more than one suit had been brought to collect taxes then due by him, could have the suits consolidated, tried as one suit and only one fee would accrue to the county attorney.

Under this law, no suit is properly brought which does not include all delinquent taxes for all years owing by the delinquent owner, except taxes levied by virtue of the charter provisions and ordinances of an incorporated city or town.

Yours very truly,

JNO. C. WALL,
Assistant Attorney General.

Op. No. 2008, Bk. 52, P. 189.

CONSTITUTIONAL LAW—DISPOSITION OF FINES.

A fine that is imposed and collected for the violation of any of the provisions of Chapter 4, Title 12, of the Penal Code of Texas shall be deposited with the county treasurer and by him placed in the county funds to the credit of Class No. 2, to be used in payment of scrip issued under the provisions of the road law or for work done on roads and bridges.

Section 24, Article 16, Texas Constitution;
Articles 1433, 1438, Revised Statutes.

AUSTIN, TEXAS, March 24, 1919.

Hon. Jno. W. Baker, State Treasurer, Capitol.

DEAR MR. BAKER: I have your letter of March 21, wherein you enclose a letter from Mr. J. W. Burleson, County Clerk of Gatesville, Texas, his letter reading as follows:

"I have collected a fine under the Pure Feed Law for conviction of selling feed misbranded; the representatives from the A. and M. College in-

former me that under the law this fine should be remitted to you for the benefit of the funds for the said fund. The law is not very specific in that it mentions *penalties* imposed being remitted to the Treasurer, but it seems to me that it does not apply to fines collected under criminal prosecution. I am ready to dispose of this fine and would like to have what information you may have in the matter. If you are not prepared to answer, please refer to the proper official for reply and greatly oblige."

In reply your attention is directed to Article 734 Penal Code of Texas, wherein it is provided that the manufacturer, importer, agent or seller of each concentrated commercial feeding stuff shall before the article is offered for sale pay to the director of the Texas Agricultural Experiment Station an inspection tax of ten cents per ton for each ton of such concentrated feeding stuff sold or offered for sale in the State of Texas and shall affix to each lot shipped in bulk and to each bag, barrel or other package of such concentrated feeding stuffs a tag to be furnished by said director, stating that all charges specified in said Section have been paid, and further provides:

"The amount of the inspection tax and penalties received by said director shall be paid into the State Treasury. So much of the inspection tax and penalties collected under this Act shall be paid by the State Treasurer to the treasurer of the Texas Agricultural and Mechanical College as the director of the Texas Agricultural Experiment Station may show by his bills has been expended in performing the duties required by this Act, but in no case to exceed the amount of the inspection tax and penalties received by the State Treasurer under this Act * * *"

Article 735 of the Penal Code as amended by Chapter 106, Acts of the Thirty-fifth Legislature, provides that upon the failure of any manufacturer, importer or agent selling, offering or exposing for sale any concentrated commercial feeding stuff without the tax tag required by said Article 734, shall

"on conviction be fined not less than $100.00 nor more than $500.00 for the first conviction and not less than $500.00 nor more than $1,000.00 for each subsequent conviction."

Evidently the Legislature in enacting Article 734 intended that the inspection tax of ten cents per ton which is paid into the hands of the director of the Texas Agricultural Experiment Station should be paid by said director into the State Treasury and paid by the State Treasurer to the treasurer of the Texas Agricultural and Mechanical College to the amount the director of the Experiment Station may show has been expended in performing the duties required under this law. We do not think that the Legislature intended that the fines imposed and collected for the violation of the provisions of Article 735 should be paid into the State Treasury and by him paid out in the manner provided for by Article 734. One reason we have for thinking as we do is that said Article 734 provides:

"The amount of the inspection tax and penalties *received* by said director shall be paid into the State Treasury * * *"

There is no provision whereby the fines imposed and collected for violating the provisions of Article 735 are ever to be received by said

director and he, therefore, could not comply with the provision of Article 734, which we have last quoted, for the reason that these fines are never in his hands.

From Mr. Burleson's letter it is evident that a conviction has been secured for a violation of some provision of said Article 735, and that the representative from the A. & M. College thinks the fine collected for the violation of this law should be transmitted to you as State Treasurer and later on to be paid by you to the treasurer of the Texas Agricultural & Mechanical College. With this contention we cannot agree, for the reason that Section 24, of Article 16. of the Texas Constitution provides that:

"The Legislature shall make provision for laying out and working public roads, for the building of bridges, and for utilizing fines, forfeitures and convict labor to all these purposes."

And it is provided by Article 1433, Revised Statutes, that all claims against a county shall be registered in three classes and it is provided that the following claims shall be registered in Class No. 2:

"All scrip issued under the provisions of the Road Law or for work done on roads and bridges."

And it is provided by Article 1438, Revised Statutes, that the funds received by the county treasurer shall be placed in three classes, and in Class Number 2 it is provided that:

"all money received under any of the provisions of the Road and Bridge Law, including the penalties recovered from railroads for failure to repair crossings, prescribed in Article 6494, and all fines and forfeitures; and this fund shall be appropriated to the payment of all claims registered in Class Second."

Our construction of said Section 24, of Article 16, of the Constitution is that all fines collected for violations of the various statutes of the Penal Code shall be used in laying out and working public roads and the building of bridges and it is quite evident that the Legislature in enacting that provision of Article 1438, which we have hereinabove quoted, placed the same construction on this Section of the Constitution, for they have there provided that all fines shall be appropriated to the payment of all claims registered in Class Second, and as we have seen, it is provided by said Article 1433 that the claims in Class 2, and the only claims in that class, are for scrip issued under the provisions of the Road law or for work on roads and bridges.

The only case construing that part of Section 24, Article 16 of the Constitution relative to fines is the case of the Houston & Texas Central Railway Co. vs. H. W. Harry & Bros., 63 Texas, 256. That was a suit brought by H. W. Harry & Bros. to recover damages under a statute which permitted the shipper or owner of goods under certain circumstances to recover from a railroad company damages in an amount equal to the amount of the freight charges for every day said freight was held in violation of the statute. The damages to be recovered under the provisions of this statute would not inure to the public, but to the person or persons who suffered damages. The Court said:

"Section 24, Article 16, of the Constitution evidently refers only to such fines and forfeitures as under the law may inure to the public; such as fines imposed as punishment for crime, and such forfeitures as occur through bail bonds and like obligations, and has no application to such sums as under statutes may inure to the citizen for a wrong done to himself, the extent of recovery alone being prescribed by law."

It is, therefore, the opinion of this Department and you are so advised that a fine that is imposed and collected for violations of any of the provisions of Article 735 Penal Code of Texas as amended by Chapter 106, Acts of the Thirty-fifth Legislature, passed at its Regular Session, shall be deposited by the county clerk with the county treasurer and by him placed in the county funds to the credit of Class No. 2, to be used in payment of scrip issued under the provision of the Road Law or for work done on roads and bridges.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2151, Bk. 53, P. 419.

COMMISSIONERS' COURT—COUNTY HEALTH OFFICER ASSISTANT—PAYMENT OF SALARY BY COUNTY.

County health officers have no authority to appoint an assistant irrespective of what the duties of said assistant may be.

The commissioners court has no authority to pay the salary of an assistant to the county health officer.

Article 4539, Revised Statutes, 1911.

AUSTIN, TEXAS, November 28, 1919.

Hon. J. Willis Pierson, District Attorney, Dallas, Texas.

DEAR SIR: Your letter of the 10th instant addressed to the Attorney General has been received. The delay in answering your communication has been occasioned by a great rush of business in this office, as well as the absence of the writer and other Assistants from the office on official business for several days. Your letter reads as follows:

"The county health officer of Dallas County desires to appoint a lady assistant to assist in carrying out the work of his department, and the plan has the approval of the commissioners court of this county, and they are willing to make the appointment and pay the salary out of the general fund of the county.

"Now this is the situation presented: The person whom the health officer desires to appoint is Mrs. Kennedy, who is now a deputy sheriff under Mr. Dan Harston, sheriff of this county, and drawing a salary as such. It is determined that she is the proper person for this special work which the county health officer has in mind to do, and that her position, as deputy sheriff, adds to her qualifications to render the particular service, and the commissioners court proposes to supplement her salary by a fixed amount out of the general fund to be paid her in addition to the salary paid her by Mr. Harston, as a deputy sheriff.

"I desire a ruling from your Department upon the question of whether or not it would be legal for the commissioners court to make such an

arrangement, thereby supplementing the salary she receives as deputy sheriff, to properly remunerate her for the extra services rendered."

In reply to same, beg to advise that on the 20th day of December, 1916, this Department held, in an opinion prepared by Honorable C. W. Taylor, Assistant Attorney General, and directed to Honorable A. L. Bevil, County Attorney, Kountze, Texas, that the commissioners court has no authority to create the office of assistant health officer.

For your information, I am herewith enclosing you a copy of that opinion.

It seems that the Legislature has made no provision whatever for any kind of an assistant to the county health officer. It may be that all the county health officer of Dallas County wants is an office assistant, such as filing clerk or stenographer, or it may be that he wants an assistant to assist him in field work or in other ways. We can very readily see how such an assistant as stated in your letter would be of great service and benefit to the county health officer, but the question arises whether or not the commissioners court is authorized to pay the salary out of the general funds of the county to any kind of an assistant to the county health officer without express legislative authority to do so. In the case of Baldwin vs. Travis County, 88 S. W., 480, 101 Tex., 628, it was said: "County commissioners courts have no power or authority, except such as is conferred upon them by the Constitution or statutes of the State."

Article 4539, Revised Statutes 1911, which authorizes the commissioners court to appoint a proper person for the office of county health officer, makes no provision whatever for the appointment or payment of any kind of an assistant to the county health officer.

You are, therefore, advised that it is the opinion of this Department that the commissioners court is not authorized to pay the salary of an assistant to the county health officer. In view of the decision we have reached with reference to this matter, we do not think it necessary to discuss the further question raised in your letter as to whether it would be lawful for the commissioners court to pay the salary of an assistant to the county health officer, which assistant also, at the same time, is a regularly appointed and acting deputy sheriff and drawing a salary as such from the sheriff.

Yours very truly,
BRUCE W. BRYANT.
Assistant Attorney General.

CONFLICT OF LAWS—FEES OF OFFICE—TAX COLLECTORS.

Op. No. 2123, Bk. 53, P. 292.

A general law passed at the same session of the Legislature, but subsequent to a particular law on the same subject, will not repeal the particular law, unless there is such repugnancy between them that both laws cannot stand.

Tax collectors are entitled to retain as their commissions only two per

cent. out of the amounts collected by them under the provisions of Chapter 73, Acts of the Thirty-fifth Legislature, Fourth Called Session.

ATTORNEY GENERAL'S DEPARTMENT, August 4, 1919.

Hon. R. J. Windrow, State Highway Engineer, Austin, Texas.

DEAR SIR: We have your communication of recent date in which you make the following inquiry:

"Page 101 of the General Laws of the Regular Session of the Thirty-sixth Legislature prescribes the amount of compensation to tax collectors for collection of motor vehicles license fees. This amount is fixed at 2% of the total collections made.

"Section 2 of Chapter 158 of the General Laws of the Regular Session of Thirty-sixth Legislature appears to be in conflict with page 101, in that a commission of 5% on all 'license taxes' collected is allowed the county tax collector.

"Please advise if under authority of Section 2 of Chapter 158 a tax collector could rightfully retain a 5% commission for collecting motor vehicle license fees."

With reference to the published Acts of the Regular Session of the Thirty-sixth Legislature, we find that Chapter 61, page 101, was approved by the Governor on the 13th day of March, 1919, and became effective ninety days after adjournment. This chapter provides, in part, as follows:

"Section 6. As compensation for their services under this Act, tax collectors shall receive two per cent. of all amounts collected by them, but in no event shall any tax collestor receive any sum exceeding the amount fixed as a maximum of their fees under Chapter 4, Title 58, of the Revised Civil Statutes of 1911, as amended by the Acts of the Thirty-third Legislature, page 246."

We further see that Chapter 158, page 299, Acts of the Regular Session of the Thirty-sixth Legislature was approved by the Governor March 31, 1919, and became effective ninety days after adjournment.

This chapter is an amendment, among others, of Article 3872, Revised Statutes of 1911, relating to the fees of tax collectors. The amendment to the original article provides for a commission to said tax collector of one per cent for the collecting of taxes in improvement districts that are subdivisions of counties and brings forward with the old article the following provision:

"And on all occupation and license tax collected, five per cent."

There is, therefore, an apparent conflict between the provisions of Chapter 61 and Chapter 158, in that Chapter 61 provides for two per cent for tax collectors on automobile license taxes and Chapter 158 provides for five per cent to tax collectors on all occupation and license taxes. And inasmuch as Chapter 158, providing five per cent. was approved by the Governor at a date later than the date upon which Chapter 61 was approved, providing two per cent, the question arises as to whether or not the provisions of Chapter 158 by implication repealed the provisions of Chapter 61. Both Acts became effective on the same date, to-wit, ninety days after adjournment.

We will, therefore, address ourselves to this inquiry: Will a gen-

eral Act passed subsequent to a particular Act. on the same subject matter, at the same session of the Legislature, repeal the particular Act, both Acts becoming effective on the same date; or will the particular Act be allowed to stand as an exception to the provisions of the General Act?

On this subject, I first quote to you from Sedgwick on "Statutory and Constitutional Law," who in discussing this subject, says:

"In regard to the mode in which laws may be repealed by subsequent legislation, it is laid down as a rule, that a general statute, without negative words, will not repeal the particular provisions of a former one, unless the two Acts are irreconcilably inconsistent (Dwarris on Statutes, 532, 6 Rep., 196; Brown vs. County Com., 21 Penn., 37; Omit vs. Commonwealth, 21 Penn., 427); as for instance, the statute 5 Elizabeth, c. 4, that *none shall use* a trade without being apprentice, did not take away the previous statute 4 and 5 Philip and Mary, c. 5, declaring that *no weaver* shall use, & c. The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all. So where an act of Parliament had authorized individuals to inclose and embank portions of the soil under the River Thames, and had declared that such land should be 'free from all taxes and assessments whatsoever.' The Land Tax Act, subsequently passed, by general words embraced all the land in the kingdom; and the question came before the King's Bench, whether the land mentioned in the former Act had been legally taxed; and it was held that the tax was illegal."

This same question is discussed at length in Sutherland on "Statutory Construction," Section 268 et seq. The general rule, of course, is that where two statutes cover the same subject matter, the latest statute controls, but the case before us is different in that these two statutes were passed at the same session of the Legislature, one being particular and the other general, and both became effective on the same date.

"Section 268. The presumption is stronger against implied repeals where provisions supposed to conflict are in the same Act or were passed at nearly the same time. In the first case, it would manifestly be an inadvertence for it is not supposable that the Legislature would deliberately pass an Act with conflicting intentions; in the other case the presumption rests on the improbability of a change of intention, or if such change had occurred, that the Legislature would express it in a different act without an express repeal of the first. 'Statutes enacted at the same session of the Legislature should receive a construction, if possible, which will give effect to each. They are within the reason of the rule governing the construction of statutes in pari materia. Each is supposed to speak the mind of the same Legislature, and the words used in each should be qualified and restricted, if necessary, in their construction and effect, so as to give validity and effect to every other Act passed at the same session.' The presumption is that different Acts passed at the same session of the Legislature are imbued by the same spirit and actuated by the same policy, and that one was not intended to repeal or destroy another, unless so expressed. Where two Acts are passed or go into effect the same day it is strong evidence that they were intended to stand together. So where the later law was the first to be introduced. An amendment of a law shows that the Legislature did not intend to repeal it by a prior law. At the

same session of the Legislature two Acts were passed relative to the place where actions against corporations might be brought. The Act first passed provided that such actions might be brought in any county where the cause of action or a part thereof accrued, or in any county where the corporation had an agency or representative or in which was its principal office. The second Act gave a right in terms to bring an action in any county in which the cause of action or a part thereof arose—it contained no repealing clause. It was held not to repeal the former.

"The different sections or provisions of the same statute or code should be so construed as to harmonize and give effect to each, but if there is an irreconcilable conflict, the later in position prevails. But where an Act divided the Territory of Colorado into seventeen counties and defined the boundaries of each in seperate sections, and there was a conflict in the descriptions, it was held that the descriptions were in the nature of grants and that the earlier sections were to be first satisfied. Where a statute expresses first a general intent, and afterwards an inconsistent particular intent, the latter will be taken as an exception from the former and both will stand."

The author further says, in Section 274:

"It is a principle that a general statute without negative words will not repeal by implication from their repugnancy the provisions of a former one which is special, local, or particular, or which is limited in its application, unless there is something in the general law or in the course of legislation upon its subject matter that makes it manifest that the Legislature contemplated and intended a repeal."

And farther on, in the same section, the author further says:

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

The author quotes a great mass of authorities supporting these positions. In State vs. McCurdy, 62 Minn., 509, 516, 517, 64 N. W., 1133, the court says:

"Repeals by implication are not favored. The question is one of legislative intent, and its intent is to be ascertained in other respects, when not expressly declared, by construction. Considerations of convenience, justice and reasonableness, when they can be invoked against the implication of repeal, are always very potent. Where a general intention is expressed, and also a particular intention is expressed which is incompatible with the general one, the particular intention shall be considered an exception to the general one. Thus, when the Legislature enacts a statute in general terms it is not reasonable to suppose that they intended to abrogate particular legislation, to the details of which they had previously given their attention, unless the general act shows a plain intention to do so. The general law can have full effect beyond the scope of the particular or special act, and, by allowing the latter to operate according to its special aim, the two Acts can stand together."

This question has also been up for discussion in our own courts. In the case of Houston and Texas Central Railway Company vs. Ford, 53 Texas, 364, a very similar question to this arose. The railway company was raising the question of venue, claiming that a later Act passed by the same Legislature repealed by implication the former

Act under which the suit was brought. The court sustained both acts in the following words:

"As they were passed at the same session of the Legislature, a more liberal rule of construction should be allowed against the repeal by implication of the first by the passage of the second, and we are of the opinion that there is not such irreconcilable repugnancy between them as to authorize us to say that it was thus repealed. Neill vs. Keese, 5 Tex., 23; Cain vs. State, 20 Tex., 355."

In the case of Laughter vs. Seela, 59 Texas, 177, the same question came before the Supreme Court in this State, as to whether or not the later statute repealed the former, both being passed at the same session of the Legislature, and in discussing this question, the court speaks as follows:

"In Lovett vs. Casey, 17 Tex., 594, the court says, in relation to a similar question: 'The two Acts went into effect the same day, and both must be regarded as equally valid. If it can be done, we are bound to construe them in such a way as to sustain both.' In that case the conflict was quite as apparent as in this.

"In Neill vs. Keese, 5 Tex., 33, this rule was applied to two Arts passed, not on the same day, but at the same session. The court, in that case, said: 'It would not be a reasonable mode of construing Acts of the Legislature so to construe them as to make one Act repeal another passed at the same session. It cannot be supposed that it was their intention that Acts thus passed should abrogate and repeal one another,' Scoby vs. Sweatt, 28 Texas, 713.

"In fact, unless the two Acts present a very strong case, indeed, of repugnancy or irreconcilable inconsistency or palpable absurdity, a court would not be justified in holding that an Act passed on the same day and at the same time as another Act worked a repeal, in the same breath, of the other Act. In such a case the power of the court to declare that one of two such Acts shall survive at the expense of the other is very doubtful indeed.

"The repugnance, under such circumstances, must be very marked, clear and unmistakable to authorize the adoption of such a course in any case. This is an elementary canon of construction with courts. The reason of it is that laws are presumed to be passed with deliberation and with a full knowledge of the existing laws on the subject.

"In the absence of an express repeal of an Act, or where the intention and purpose to repeal is not plainly made manifest from the terms used, it is not part of the duty of courts to resort to technical subtleties to defeat the obvious purpose of the legislative power, in a matter over which that power has a constitutional right to exercise control. H. & T. C. R. R. vs. Ford, 53 Tex., 364.

"In Cain vs The State, 20 Tex., 361, the same views are announced and enforced. In that case, the two legislative Acts under consideration were passed on different days of the same session, and the cogent reasons there given apply much more strongly to the present case. Austin vs. G. C. & F. R. R., 45 Tex., 236."

These two cases do not seem to have been overruled by any case which I have been able to find in the Reports of Texas cases. In the case of Rogers vs. United States, 185 U. S., page 83, the same question was presented to the Supreme Court of the United States. Mr. Justice Brewer discussed at length this question of the repeal of a particular act by the passage subsequently of a general act embodying the same subject matter.

The court says, in part, as follows:

"It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special. In ex parte Crow Dog, 109 U. S., 556, 570, this court said:

" 'The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is generalia specialibus non derogant. "The general principle to be applied," said Bovill, C. J., in Thorpe vs. Adams (L. R., 60, p. 135), "to the construction of Acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two Acts standing together." "And the reason is," said Wood, V. C., in Fitzgerald vs. Champenys (30 L. J. N. S., Eq. 782; 2 Johns. & Hem., 32, 54), "that the Legislature having had its attention directed to special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special memtion of its intention so to do." '

"In Black on Interpretation of Laws, 116, the proposition is thus stated:

" 'As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all.'

"So, in Sedgwick on the Construction of Statutory and Constitutional Law, the author observes, on page 98, with respect to this rule:

" 'The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.'

"And in Crane vs. Reeder, 22 Michigan, 322, 334, Mr. Justice Christiancy, speaking for the Supreme Court of that State, said:

" 'Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the Legislature is not to be presumed to have intended a conflict.'

"Both the text books and the opinion just quoted cite many supporting authorities."

It will also be further borne in mind, in investigating this question, that the provision as to five per cent to tax collectors in the amending article, 3872, Chapter 158, was simply a reiteration of that same provision in the original article 3872; that said original article with this five per cent provision was in full force and effect when chapter 61 was introduced and passed by the Legislature, and it is,

therefore, reasonable to conclude that in the passage of Chapter 61, it was the intent of the Legislature to make the commissions to tax collectors on their collections for automobile license taxes an exception to the general law under which they were allowed to collect five per cent on occupation and license taxes.

I, therefore, advise you in response to your inquiry that tax collectors are entitled to retain as their commissions only two per cent out of the amounts collected by them under the provisions of Chapter 73, Acts of the Thirty-fifth Legislature, Fourth Called Session.

Yours very truly,

JOHN MAXWELL,
Assistant Attorney General.

Op. No. 2140½, Bk. 53, P. 393.

COUNTY JUDGES—EXCESS FEES—LEVEE BONDS—COUNTY SUPERINTENDENTS—EXPENSES ALLOWED.

1. County judges may be appointed to sell levee improvement district and seawall bonds and the commissions received by him for such services are not fees of office and need not be accounted for by him in his report of fees collected.
2. County judges cannot act as attorneys for improvement commissioners and receive fees therefor.
3. County superintendents are allowed for traveling and office expenses a sum not to exceed $200 per annum.

Articles 5556-5557 and 5579, Revised Civil Statutes. Chapter 41, Acts Fourth Called Session of the Thirty-fifth Legislature.

AUSTIN, TEXAS, October 24, 1919.

Hon. G. O. Crisp, County Attorney, Kaufman, Texas.

DEAR SIR: Your letter of the 22nd inst., addressed to the Attorney General, has been received. It reads as follows:

"Please advise me whether a county judge, who sells bonds for a levy district, reports the fees allowed him under Art. 5579, Acts 1915, as fees of office and should he account for such fees under the fee bill.

2nd. Also advise whether $200.00 allowed a county snperintendent for office expenses, under House Bill 26, Chapter 41, Acts of the Fourth Called Session of the Thirty-fifth Legislature, is in addition to the $100.00 allowed under Article 2758, 1911, Revised Civil Statutes, or is the county superintendent allowed $200.00 and no more?"

In reply to your question, beg to advise that Articles 5556 and 5557 read as follows:

"When such bonds have been registered as provided for in the preceding articles of this chapter, the county commissioners court may appoint the county judge, or some other suitable person, to sell said bonds on the best terms and for the best price possible; provided, that none of said bonds shall be sold for less than the face par value thereof and accrued interest thereon; and, as fact as said bonds are sold, all money received therefrom shall be paid into the county treasury and shall by him be placed to the credit of such improvement district.

"Before the county judge, or such other person as may be appointed by the commissioners court, shall be authorized to sell any of said improve-

ment bonds, the county judge, or other person so appointed, shall execute a good and sufficient bond payable to the commissioners of such improvement district, to be approved by the commissioners court of said county, for an amount not less than the amount of the bonds issued, conditioned upon the faithful discharge of his duty, which bonds shall be subject to the approval of said improvement commissioners; and the person selling said bonds shall be allowed one-half of one per cent. of the amount received for sale of the bonds sold by him in full payment for his services in their behalf."

From the provisions of these two articles, it is made plain that the county commissioners court may appoint the county judge to sell levee bonds or they may appoint any other suitable person. These articles require that the person appointed by the commissioners court to sell said bonds shall execute a good and sufficient bond payable to the commissioners of such improvement district. From this and the other provisions of these two articles, it appears that the services performed in selling said bonds are not necessarily a duty imposed by law upon the county judge. The matter is left entirely optional with the commissioners court as to whom they shall appoint to sell the bonds and receive the commission of one-half of one per cent fixed by the statute as compensation for said services.

You are, therefore, advised that it is the opinion of this Department that county judges should not be required to account for the fees they receive for selling bonds under the provisions of Articles 5556 and 5557 of the Revised Statutes.

But you in your letter cite Article 5579 of the Revised Statutes and that article reads as follows:

"The improvement commissioners are hereby empowered and authorized to employ counsel to represent such districts in the preparation of any contracts, or the conducting of any proceedings in or out of court, and to be the legal adviser of such improvement commissioners upon such terms and for such fees as may be agreed upon by them and approved by the county judge; and such commissioners may draw a warrant in payment of such legal services, to be paid out of the fund of said district upon approval by the county judge."

You will note that the duties of the counsel that may be employed under the provisions of this Article are to prepare contracts or to look after court proceedings and to be the legal adviser of such improvement commissioners and upon such terms and for such fees as may be agreed upon by them and approved by the county judge. This article contemplates that the improvement commissioners may need the services of an attorney to assist them in the ways mentioned in the article and that for his services he shall receive such fees as may be agreed upon and approved by the county judge. If the county Judge was permitted to serve the improvement district under this Article, he would have the authority to approve his own account against the improvement district and this would be contrary to public policy, and it is the opinion of this Department, and you are so advised, that the improvement commissioners cannot employ county judges to perform the duties enumerated under Article 5579.

In reply to your second inquiry, beg to advise that under the provisions of Chapter 41, Acts of the Fourth Called Session of the Thirty-fifth Legislature, county superintendents are entitled, for office and

traveling expenses, to a sum not to exceed $200 per annum. This provision supersedes and repeals that portion of Article 2758 which provides that county superintendents shall be allowed any sum not to exceed $100 per annum for stamps, stationery, expressage and printing.

Yours very truly,

BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 1987, Bk. 52, P. 57.

FEES OF OFFICE—MILEAGE OF SHERIFFS—JUSTICE OF THE PEACE FOR HOLDING EXAMINING TRIAL IN MISDEMEANOR CASES.

The sheriff in counties having a population of less than forty thousand (40,000) inhabitants is entitled for executing each warrant of arrest or capias in felony cases three ($3) dollars and fifteen (15) cents for each mile actually and necessarily traveled in going to place of arrest and for conveying a prisoner or prisoners to jail; if traveling by railroad, ten (10) cents a mile for himself and ten (10) cents a mile for each prisoner. When traveling otherwise than by railroad, fifteen (15) cents a mile for himself and fifteen (15) cents a mile for his prisoner. If more than one prisoner, ten (10) cents a mile for each additional prisoner.

A justice of the peace for holding an examining trial in misdemeanor cases shall be entitled to the same fees allowed by law for similar services in the trial of misdemeanor cases before a justice of the peace, provided he shall never receive more than three ($3) dollars in any one case.

Articles 1130 and 1181, Court of Criminal Procedure. Chapter 161, Acts Thirty-fifth Legislature, passed at its Regular Session.

AUSTIN, TEXAS, March 1, 1919.

Hon. Roy L. Hill, County Attorney, Paint Rock, Texas.

DEAR SIR: I have your letter of February 20th addressed to the Attorney General, wherein you propound to this Department in substance the following two questions:

(1) What mileage is the sheriff, in counties having less than forty thousand (40,000) population, allowed under Article 1130 Code of Criminal Procedure as amended by Chapter 161, Acts Thirty-fifth Legislature passed at its Regular Session?

(2) To what fee, if any, is a justice of the peace entitled for holding an examining trial in a misdemeanor case?.

Subdivision 1 of Article 1130, Code of Criminal Procedure, as amended by Chapter 161 Acts Thirty-fifth Legislature passed at its Regular Session provides that the sheriff in counties that have a population of less than forty thousand (40,000) inhabitants, as shown by the last Federal census, shall receive:

"For executing each warrant of arrest or capias, or for making an arrest without warrant, when authorized by law, the sum of three ($3) dollars; and fifteen (15) cents for each mile actually and necessarily traveled in going to place of arrest, and for conveying the prisoner or prisoners to jail, mileage, as provided for in Subdivision 5 (Article 1130) shall be allowed and one ($1) dollar shall be allowed for the approval of a bond."

Subdivision 5 of Article 1130 referred to in the above quotation provides that the sheriff shall receive:

"For removing a prisoner, for each mile going and coming, including guards and all other expenses when traveling by railroad, ten (10) cents; when traveling otherwise than by railroad, fifteen (15) cents; provided, that when more than one prisoner is removed at the same time, in addition to the foregoing, he shall only be allowed ten (10) cents a mile for each additional prisoner * * *"

You are, therefore, respectfully advised that the sheriff in counties having a population of less than forty thousand (40,000) inhabitants is entitled for executing each warrant of arrest or capias in felony cases three ($3.) dollars and fifteen ($.15) cents for each mile actually and necessarily traveled in going to place of arrest, and for conveying the prisoner or prisoners to jail, if traveling by railroad ten ($.10) cents a mile for himself and ten ($.10) cents for each prisoner; when traveling otherwise than by railroad, fifteen ($.15) cents a mile for himself and fifteen ($.15) cents a mile for his prisoner; if mone than one prisoner, he shall receive ten ($.10) cents a mile for each additional prisoner.

Replying to your second question, your attention is respectfully directed to Article 1181, Code of Criminal Procedure, which reads as follows:

"That in all cases where justices of the peace shall sit as an examining court in misdemeanor cases, they shall be entitled to the same fees allowed by law for similar services in the trial of misdemeanor cases to justices of the peace, to be paid by the defendant in case of final conviction; provided, he shall never receive more than three ($3) dollars in any one case."

The above quoted article was enacted by the Thirtieth Legislature at its Regular Session and approved April 16th, 1907, and took effect ninety days after adjournment. The Thirtieth Legislature adjourned April 12th, 1907. Prior to the enactment of this article, the courts had continuously held that the justice of the peace was not entitled to any fee for holding an examining trial in misdemeanor cases. Judge Brooks, speaking for the court in the case of Huizar vs. State, 63 S. W., 329, said:

"We find a motion to re-tax the cost in the record. The motion sets up that the justice of the peace and constable have nine dollars and twenty-five cents ($9.25) taxed as costs against appellant for an examining trial. It appears that the examining trial, if any, was in a misdemeanor case. There is no provision of law authorizing such fees."

This case was decided on May 22, 1901. The facts in the case of ex parte Fletcher Way, 48 Texas Criminal Reports, 584, were that the said Way was arrested for theft of property under the value of fifty ($50.) dollars. An examining trial was had before a justice of the peace, in which costs aggregating nineteen dollars and twenty-five ($19.25) cents were incurred. Subsequently, the said Way was tried and convicted in the county court; and the costs of the examining trial were taxed as part of the costs in the county court. Way sued out a writ of habeas corpus before the county judge of Travis County, and upon the hearing he was remanded to the custody

of the officer, until the examining trial costs were paid, as well as the other costs. From this judgment he appealed to the Court of Criminal Appeals and the court there held that:

"There is no statute in Texas authorizing a justice of the peace to receive fees for holding examining trials in misdemeanor cases. In fact there is no legal necessity for such examining trial, under our Code of Criminal Procedure. * * *"

The above case was decided November 15th, 1905. In the case of Wade vs. State, 90 S. W Rep., 503, decided December 6th, 1905, the Court of Criminal Appeals again held that the justice of the peace was not entitled to any fee holding examining trial in a misdemeanor case. Thereafter, as we have seen, the Legislature enacted Article 1181 hereinabove quoted, and in enacting this Article it is stated in the emergency clause that:

"The fact that there is now no law authorizing justices of the peace, sheriffs and constables to charge and collect fees in misdemeanor cases in examining trials creates an emergency," etc.

It is clearly evident that the Legislature was familiar with the decision which we have hereinabove called attention to, and that their purpose in enacting this Article was to provide a means whereby a justice of the peace could receive a fee for holding an examining trial in a misdemeanor case. It may be true as the court stated in the case of ex parte Fletcher Way that there is no legal necessity for the justice of the peace holding an examining trial under our Code of Criminal Procedure, yet it is the Legislature and not the judiciary that is to decide whether such examining trial in misdemeanor cases is necessary or not.

The Legislature has made provision for the payment of a fee to the justice of the peace for holding an examining trial in misdemeanor cases. It now remains to be determined whether the Legislature has made any provision for the holding of such examining trial by a justice of the peace, for the Article (1181) hereinabove quoted only provides for a fee and does not of itself authorize a justice of the peace to hold an examining trial in misdemeanor cases. It is provided by Article 292 Code of Criminal Procedure that:

"When a person accused of an offense has been brought before a magistrate, that officer shall proceed to examine into the truth of the accusation made, allowing the accused, however, sufficient time to procure the aid of counsel."

Provision is made by the Article last above quoted for a person accused of an offense to have an examining trial, and the degree of the offense is not defined. It, therefore, naturally follows that a person accused of an offense which is either a felony or a misdemeanor may have an examining trial. The person before whom the examining trial is to be held is a magistrate, and Article 41 of the Code of Criminal Procedure defines who are magistrates as follows:

"Either of the following officers is a 'magistrate' within the meaning of this Code: the judges of the Supreme Court, the judges of the Court of Appeals, the judges of the district court, the county judges of the county, either of the county commissioners, the justices of the peace, the mayor or recorder of an incorporated city or town."

Article 62 of the Code of Criminal Procedure defines an examining court as follows:

"When the magistrate sits for the purpose of inquiry into a criminal accusation against any person, this is called an 'evamining court.'"

From the provisions of the Articles which we have hereinabove quoted, it is clearly evident that a justice of the peace may sit as an examining court and that a person accused of a misdemeanor may have an examining trial before such justice of the peace.

You are, therefore, respectfully advised that a justice of the peace for holding an examining trial in misdemeanor cases shall be entitled to the same fees allowed by law for similar services in the trial of misdemeanor cases before a justice of the peace; provided, he shall never receive more than three ($3.) dollars in any one case.

Yours very truly,

E. F. SMITH,

Assistant Attorney General.

Op. No. 2078, Bk. 53, P. 61.

SHERIFFS' FEES—ATTACHING AND CONVEYING WITNESSES.

In a county of less than 40,000 inhabitants, the sheriff is entitled to a fee of 50 cents for attaching each witness and for each mile he may be compelled to travel in executing the writ of attachment 10 cents, provided he shall not duplicate his mileage when two or more witnesses live in the same vicinity or neighborhood and are served during the same trip.

In counties where there shall have been cast at the next preceding presidential election less than 3,000 votes, the sheriff shall receive for conveying attached witnesses to any court or grand jury out of his county $1.00 per day for each day actually consumed in going to and returning from such court, and his actual expenses and the expenses of witnesses not to exceed 50 cents per meal and 35 cents per night for lodging for any witness.

Chapter 161, Acts of the Thirty-fifth Legislature, passed at its Regular Session.

Section 8, Article 1130, Code of Criminal Procedure.

AUSTIN, TEXAS, May 30, 1919.

Hon. Homer Jennings, County Attorney, Marlin, Texas.

DEAR SIR: I have your letter of May 26th addressed to the Attorney General reading as follows:

"Attached hereto is a request made of me by the sheriff of Falls County for a construction of Article 1130 of the Code of Criminal Procedure of Texas, this being a county of less than 40,000 population.

"The sheriff of Falls County, acting under authority of a writ of attachment issued out of the district court of Webb County, attached two wit-

nesses in this county and conveyed them to Laredo, Webb County. He was allowed by the district judge of Webb County ten cents per mile for each mile traveled by him by rail in conveying the two witnesses to Laredo and in returning to the county seat of this county, and in addition costs of the meals of the witnesses and himself at the rate of fifty cents per meal. His items of three days per diem, service of writ, and railroad fare of witnesses, however, were not approved by the court.

"The sheriff's construction is that he was entitled to mileage at the rate of ten cents per mile for each witness he conveyed under the writ from Marlin to Laredo. It is my construction that in addition to his own mileage of ten cents per mile in going to and returning from Laredo, and the meals of himself and witnesses, he was also entitled to his per diem cost of service of writ and the railroad fare of the two witnesses to Laredo which were advanced by him.

"Will you kindly give us at your earliest convenience the proper construction of this matter that the amount due may yet be collected by him."

In reply, your attention is directed to Chapter 161, Acts of the Thirty-fifth Legislature, passed at its Regular Session. Said Chapter amends Sections or Subdivisions 1, 2, 6, and 7 of Article 1130 of the Code of Criminal Procedure.

Subdivision 2 provides that in counties that have a population of less than 40,000 inhabitants, as shown by the last federal census, the sheriff shall receive for summoning or attaching each witness 50c and, where a bond is required of said witness, the sum of $1.00 shall be allowed for the approval of said bond.

Subdivision 6 provides that in counties that have a population of less than 40,000 inhabitants, as shown by the federal census, the sheriff shall receive for each mile he may be compelled to travel in executing a writ of attachment 10c, provided that in no case shall he be allowed to duplicate his mileage when two or more witnesses are named in the same or different writs in any case, and he shall serve process in the same vicinity or neighborhood during the same trip. He shall not charge mileage for serving such witnesses to and from the county seat, but shall only charge one mileage and for such additional mileage only as is actually traveled, in summoning or attaching each additional witness.

Section 8 of Article 1130, Code of Criminal Procedure, which was not amended by said Chapter 161 of the Acts of the Thirty-fifth Legislature, passed at its Regular Session, provides that in counties where there shall have been cast at the next preceding presidential election less than 3,000 votes, the sheriff shall receive for conveying a witness attached by him to any court or grand jury or in the habeas corpus proceeding out of his county, or when directed by the judge from any other county to the court where the case is pending, $1.00 per day for each day actually and necessarily consumed in going and returning from such court and his actual expenses by the nearest practicable route, or nearest practicable public conveyance, the amount to be stated by him in an account which shall show the place at which the witness was attached, the distance to nearest railroad station, and miles actually traveled to reach the court; if horse or vehicle were used, from whom hired and price paid and length of time consumed and the amount paid out for said horse or vehicle and to whom; if meals and lodging were provided, from

whom and when and price paid, provided that officers shall not be entitled to receive exceeding 50 cents per meal and 35 cents per night for lodging for any witness. This section then continues by providing what the said account of the sheriff shall show before he is entitled to compensation or expenses of attached witnesses.

In this connection, I desire to state that Section 5 of said Article 1130, which provides for the mileage to be paid the sheriff for removing a prisoner, does not apply to conveying an attached witness; also, that Section 7, as amended by said Chapter 161 of the Acts of the Thirty-fifth Legislature at its Regular Session, which provides mileage to be paid the sheriff for serving criminal process not otherwise provided for, does not apply to conveying attached witnesses. The only sections of said Article 1130 and of said Chapter 161, relating to attaching and conveying witnesses, are the ones above referred to, to-wit: Sections 2 and 6 of said Chapter 161 and Section 8 of said Article 1130.

You are, therefore, respectfully advised that in the case which you submit, the sheriff is entitled to a fee of 50 cents for attaching each of the two witnesses and is entitled to 10 cents for each mile he may have been compelled to travel in order to execute the writs of attachment. However, he would not be allowed to duplicate his mileage if the two witnesses were named in the same or different writs and were witnesses in the same case and he served the writ on them in the same vicinity or neighborhood during the same trip. For the purpose of illustration, we will assume that he served the two witnesses with the writs of attachment during the same trip. In that event, he would be entitled to his 10 cents per mile from the time he left his office in the county seat until he served the writ on one witness, and again he would be entitled to 10 cents a mile for the miles actually traveled from the place where the first witness was attached until he served the writ on the second witness. After serving the writs of attachment, his mileage stopped, and from then on he would only be entitled to receive $1.00 per day for each day actually consumed in going to and returning from Laredo, and his actual and necessary expenses and the actual and necessary expenses of the two witnesses not to exceed 50c per meal and 35c per night for lodging for each witness.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

Op. No. 2162, Bk. 53, P. 472.

"SPECIAL DEPUTY SHERIFFS"—"COUNTY TRAFFIC OFFICERS"—FEES—SHERIFFS.

Special deputy sheriffs or county traffic officers are entitled to collect the usual fees allowed peace officers for making arrests and serving criminal process. These fees when collected are to be paid to the sheriff, who must account for same in his annual report as "fees of office."

Chapter 127, Acts Thirty-sixth Legislature;
Articles 43, 54, 1173, Code Criminal Procedure.

AUSTIN, TEXAS, December 13, 1919.

Hon. W. E. Davant, County Attorney, Bay City, Texas.

DEAR SIR: Your letter of recent date addressed to the Attorney General has been received.

Your inquiry calls for a construction of Chapter 127 of the Acts of the Thirty-sixth Legislature. The purpose of the Act as stated in Section 1 is to insure the adequate enforcement of the traffic laws of this State, which have heretofore or may hereafter be enacted. The right is also conferred on the commissioners court of each county to employ one or more *special deputy sheriffs for that purpose,* who shall be, whenever practicable, motorcycle riders, and shall be assigned to work under the directions of a sheriff of the county. Section 2 prescribes the special duties of said special deputy sheriff in the following language:

"The special work of said officers shall be the efficient enforcement of the traffic and highway laws of this State, and permit arrest and prosecution of all offenders of any of said laws, and to that end they shall diligently patrol the public highways and keep a vigilant lookout for all violators of said law."

Section 3 provides that no county may employ more than two regular deputies, and they shall be required to take the oath of office and give the bond as other deputy sheriffs and may be dismissed from service on request of the sheriff, whenever approved by the commissioners court, or may be dismissed from the commissioners court upon their own initiative, and also provides that for special emergency two additional deputies may be appointed by the commissioners court.

Section 4 provides the compensation of said deputies shall be fixed by the commissioners court, and authorizes the commissioners court to provide, *at the expense of the county,* necessary equipment for said officers to enable them to discharge their duties, and further provides that the pay of said deputies shall not be included in the settlement for the sheriff in accounting for fees of office, but shall be independent thereof.

Section 5 provides out of what fund the salaries of said special deputy sheriffs shall be paid.

Section 6 denominates the said special deputies as "*county traffic officers*" and further defines the duties of said officers. It makes it the duty of said officers to co-operate with the police department of each city or town within the county in the enforcement of said traffic laws. It makes it their duty to enforce traffic laws in all portions of the county. It provides that all complaints shall be filed before the proper city officials; that the fines arising therefrom shall be paid into the treasury of the city for maintenance of its streets; that all fines collected outside of cities and towns shall be paid into the county treasury, and may in the discretion of the commissioners court be used in helping defray the expense of maintaining said traffic officers.

Section 6a repeals all laws in conflict herewith.

Section 7a is the emergency clause and reads in part as follows:

"The fact that many owners of motor vehicles in this State escape the payment of their license fee under the present law, and the fact that repeated violations of the law regulating the use of the public highways is of daily occurrence, resulting from lax enforcement of such laws, and the further fact that the sheriffs of the various counties in this State are unable to now adequately enforce said laws so as to afford proper safety and protection to the public, creates an emergency, etc."

The question to be first determined before answering your inquiry is to determine whether county traffic officers are entitled to any fees whatever for making arrests, taking bonds, executing criminal process, etc., under the provision of this Act.

In order to properly answer your question, we must look to the intention of the Legislature in enacting this law. The Legislature evidently intended to appoint "county traffic officers" and to give such officers certain privileges as peace officers and make it the special duty of said officers to enforce the traffic laws of the State of Texas in incorporated cities and towns, as well as other portions of the respective counties. It is very plain that the Legislature did not intend to confer upon these special officers all the power, authority and duties of a regular peace officer, because it limited their duties by the provisions of Section 6 to the enforcement of the traffic laws in all portions of the county.

This Department has heretofore held that county traffic officers were not authorized to execute civil process or criminal process, except such as directly grew out of or was incident to the enforcement of the traffic laws of this State.

Article 43 of the Code of Criminal Procedure defines who are "peace officers" as follows:

"The sheriff and his deputies, constable, the marshal, constable or policeman of an incorporated town or city, and any private person specially appointed to execute criminal procedure."

Article 1173 of the Code of Criminal Procedure, provides that certain fees shall be allowed the sheriff or other peace officer performing the same services, in misdemeanor cases, to be taxed against the defendant upon conviction.

We have referred to Article 1173 above for the reason that if "special deputy sheriffs" or "county traffic officers" referred to by the provisions of the Act under consideration are to collect any fees for making arrests, summoning witnesses, summoning jurors, etc., such fees will of necessity be allowed by virtue of this article. Their work in general has to do with the violations of the traffic laws of this State, which are, with one or two exceptions perhaps, all misdemeanors.

The officers created by the provisions of this Act are special officers with special duties to perform .They file the bond and take the oath of regular deputy sheriffs, but their duties are special. By the provisions of Article 54 of the Code of Criminal Procedure, it is provided:

"Whenever a duty is imposed by this Code upon such sheriffs, the same duty may lawfully be performed by his deputies, and where there is no sheriff in a county, the deputy of that office as to all proceedings under

the criminal law devolve upon such officer, who, under the law, is in power to discharge the duties of sheriff, in case of vacancy in the office."

If it were not for the special provisions of this Act fixing the special duties to be performed by the officers referred to in this Act as "special deputy sheriffs" or "county traffic officers," these officers would have all the authority and power to perform all the duties of the sheriff of a county, but the Legislature has seen fit to place a limitation upon the authority of these deputies and county traffic officers and fixes their duties as being the enforcement of the traffic and highway laws of this State, etc.

It is evident that when any officer performs the duty required of him by statute, that he is entitled to the compensation allowed him by law. If these special officers make an arrest for violation of the State traffic and highway laws, and when the defendant is convicted, Article 1173 referred to above provides that the peace officer making the arrest is entitled to certain compensation. We are therefore led to the inevitable conclusion that these special officers are not only peace officers as that term is defined by the statute, but they are entitled to the compensation provided for by the statute.

The question then arises to whom do these fees belong and do the fees belong to the special officers who do the work or do they belong to the sheriffs who are the principals of the special officers, his agents, or deputies. These special officers are only peace officers by virtue of being special deputy sheriffs and no provision is had in the statute for the payment of any fees to these special deputy sheriffs as such, because it is provided that their compensation shall be paid by the county out of certain funds.

We have therefore reached the following conclusion: That special deputy sheriffs or county traffic officers operating under the provisions of this Act are entitled to the usual fees allowed the sheriff or other peace officer for making arrests, serving subpœnas, summoning jurors and performing such other duties in the enforcement of the traffiic and highway laws of this State, but that such fees cannot be retained by them personally, but must be paid over to their principal, the sheriff of the county in which they operate. You are further advised that sheriffs must account for fees thus received as "fees of office" under provision of Chapter 4, Title 56, Vernon's Sayles' Civil Statutes.

Yours very truly,
BRUCE W. BRYANT,
Acting Attorney General.

OPINIONS ON RAILROADS AND TO RAILWAY COMMISSION.

RAILROADS—HIGHWAYS—RIGHT OF WAY.

Op. No. 2107, Bk. 53, P. 212.

(1) A railroad intersecting a public highway must maintain said crossing in a reasonably safe condition of repair for public traffic.
(2) A railroad cannot be required to pay for the hard surfacing of a highway on the railroad right-of-way, but would be required to maintain same after construction.
Revised Statutes, Articles 6484, 6485, 6487 and 6494.

AUSTIN, TEXAS, June 25, 1919.

Hon. R. J. Windrow, Engineer, State Highway, Austin, Texas.

DEAR SIR: We have yours of the 19th, in which you make inquiry as follows:

"We have received a letter from Mr. B. D. Marburger, district engineer of the Missouri, Kansas & Texas Railway Company, which reads as follows:

" 'We have a bill rendered by J. W. McCutcheon, engineer in charge of Meridian Highway Crossing, our Austin branch track near Granger. This bill carries two items, grading and hard surfacing inside of right of way limits. We are agreeable to paying for grading; this be incident to railroad location, but we do feel that the hard surfacing should not be paid for by railroad company, for the reason that taxes assessed against the precinct with Federal aid includes the railroad same as an individual and to pay for hard surfacing inside of right of way direct would, therefore, be a double assessment. Kindly advise your opinion in the matter.'

"A proper answer to Mr. Marburger's letter will require an interpretation of Articles 6485 and 6484 of the Revised Statutes of Texas, which relate to the duty of railroad companies to construct and maintain crossings.

"This, therefore, is to request that you advise us whether or not the duty of the railroad company to place and keep a crossing in 'proper condition for the use of the traveling public' imposes on them an obligation to construct a hard surface crossing in case the road on each side of the crossing is a hard surface road."

We have examined Articles 6484 and 6485 of the Revised Statutes. The portion in the article that refers to the matter of your letter reads as follows:

"Such corporation shall have the right to construct its road across, along or upon any sream of water, water course, street, highway, plank road, turnpike or canal which the right-of-way of said railway shall intersect or touch, but such corporation shall restore the stream, water course, street, highway, plank road, turnpike or canal thus intersected or touched to its former state or to such state as not to unnecessarily impair its usefulness, and shall keep such course in repair."

Article 6487 provides as follows:

"Such crossings shall not be less than thirty feet in width, and shall be made and kept in such condition as to admit of the free and easy passage of horses, cattle, sheep, hogs and all other domesticated animals, wagons and other vehicles."

Article 6494 reads as follows:

"It shall be the duty of every railroad company in this State to place and keep that portion of its roadbed and right-of-way over or across which any public county road may run in proper condition for the use of the traveling public;"

and provides a penalty for each day's failure to comply therewith. These are the only statutes, so far as I find, that relate to and govern the duties and obligations of railway companies to public highways in crossing the same.

It is clearly evident from this that the railroad company should:

First: In crossing a public highway place such public highway in a safe condition for public travel;

Second: That they should maintain such public highway across their right-of-way in as good condition of repair as the balance of such highway by the county or town through which the same passes. There is no obligation upon the railroad company, so far as I can find, which requires them to assume any extra burden of any construction of public highway across their right-of-way other than to maintain such crossing in a passably safe condition and to grade same in reasonable compliance with the line of the established highway and to maintain the necessary culverts for drainage.

I do not believe that you could require a railroad company to pay the cost of the hard surfacing of a highway across their right-of-way, but, after the county has constructed said highway with hard surfacing or other permanent construction, it would be the duty of the railroad company, under Article 6494, to maintain such portion of the highway as intersects their right-of-way in as good condition as the balance of the roadway is maintained by the county.

Yours very truly,

JOHN MAXWELL,
Asistant Attorney General.

Op. No. 2209, Bk. 54, P. 151.

MINES AND MINING—RAILROAD RIGHT-OF-WAY—OIL AND GAS.

1. Where a railroad corporation does not own the fee title to its right-of-way lands, or has not acquired title to the oil therein, it is unauthorized to lease such land for drilling for oil thereon.

2. A railroad corporation that owns the fee title to its right-of-way lands may lease same for drilling for oil thereon.

AUSTIN, TEXAS, April 16, 1920.

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

DEAR SIR: We have yours of March 31, 1920, which is as follows:

"Will you please at your early convenience advise this Commission as to whether or not there is anything in the laws of this State prohibiting a railroad company from leasing its right-of-way for the purpose of drilling for oil, or we might say, leasing their mineral rights?"

A railroad corporation may or may not own the fee title to the

lands upon, over or under which it operates its line of railroad, commonly called a "right-of-way," and it will be readily understood, and is well established upon authority, that its rights relative to such lands differ in the one case from the other. Your inquiry makes no distinction in this particular and hence our answer is addressed to both.

We will first consider the question as it relates to right-of-way lands the fee title to which is not owned by the corporation.

The case of Gladys City Oil, Gas and Manufacturing Company vs. Right-of-Way Oil Company was one in which a railroad corporation (T. & N. O. Ry. Co.) claimed the fee title to certain lands constituting part of its right-of-way across the Veatch survey of land situated in Jefferson County, Texas, and, so claiming, executed a mineral lease on same in favor of the Right-of-Way Oil Company. Under this lease the Right-of-Way Oil Company entered upon that part of the railroad right-of-way lands covered by its lease and bored for and developed oil thereon. Those from whom the railroad company deraigned its asserted title to such lands also claimed to own the fee title to such lands and contended that they were the owners of the oil thereon and thereunder.

Judgment was rendered in the trial court in favor of the Right-of-Way Oil Company, but on the theory that its lessor, The Texas and New Orleans Railway Company, owned the fee title to the land in question. The case was appealed to the Court of Civil Appeals and that court, after a lengthy discussion not necessary to quote here, reached the conclusion that the fee title to the land involved was vested in the Gladys City Oil, Gas and Manufacturing Company and not in the railway company, and in rendering a final judgment in the case said:

"First. That the Texas & New Orleans Railway Company have a right-of-way across the Veatch survey, 100 feet in width, except that part thereof through the Gladys City tract, as to which it has a right-of-way 200 feet in width. Second. That the Gladys City Oil, Gas & Manufacturing Company has the fee-simple title to this land subject to the easement, as aforesaid, of the Texas & New Orleans Railway Company, so long as the same may be used by it as and for railway purposes. Third. That the Texas & New Orleans Railway Company has no right to the oil or other minerals beneath the surface of said strip comprising its right-of-way, as aforesaid, nor to sink wells and extract the same, but that such oil is the property of the Gladys City Oil, Gas & Manufacturing Company and of its lessee * * *" Gladys City Oil, Gas & Mfg. Co. vs. Right-of-Way Oil Co., 137 S. W., 181.

This disposition of the case by the Court of Civil Appeals was affirmed by our Supreme Court in Right-of-Way Oil Co. vs. Gladys City Oil, Gas and Manufacturing Co., 157 S. W., 737.

Hence, omitting lengthy quotations from these cases, as well as the citation of other numerous authorities tending to the same conclusion, we are of the opinion, and you are so advised, that a railroad corporation has not the right to lease its right-of-way lands to another for the purpose of prospecting for and mining oil thereon where such corporation does not own the fee title to such lands, or has not acquired in some proper way the title to the oil therein.

The rule seems to be different, however, where a railroad corpora-

tion owns the fee title to the lands constituting its right-of-way. That a railroad corporation may own the fee title to lands constituting its right-of-way is readily seen by reference to Articles 1140 and 6537 to 6540, inclusive, of the Revised Civil Statutes of 1911. Our Courts have also held to the same effect in Calcasieu Lumber Company vs. Harris (Supreme Court) 13 S. W., 453; Right-of-Way Oil Company vs. Gladys City Oil, Gas & Mfg. Co. (Supreme Court) 157 S. W., 737; Ft. Worth & D. C. Ry. Co. vs. Ayers (Civil Appeals) 149 S. W., 1068.

It is true that Article 6542, Revised Statutes of 1911, provides that: "no railway company shall have the power, either by its own employes or other persons, to construct any buildings along the line of their railroad to be occupied by their employes or others, except at their respective depot stations and section houses, and at such places only such buildings as may be necessary for the transaction of their legitimate business operations, and for shelter for their employes, nor shall they use, occupy or cultivate any part of the right-of-way over which their respective roads may pass, with the exception aforesaid, for any other purpose than the construction and keeping in repair their respective railways," but in discussing this article in a case where a railroad corporation had leased to another, for storing and handling lumber as a retail lumber dealer, a part of its right-of-way lands owned by it in fee, considering this article along with Articles 6537 to 6540, inclusive, our Supreme Court says:

"The question arises whether Article 6542 has any application to land in which a railway company owns an estate in fee, even though its railway may be built upon it. There is nothing in that article which evidences intention to provide a police regulation looking to the safety of travel, or other like matter to which such regulations may properly apply. The statute confers the right on such corporations to own the fee in lands whether these be necessary to the operation of the company's business or not, though in the one case they are required to alienate them, but in the other not. There is nothing in the article evidencing an intention to take away from a railway company, so long as it owns the fee in land, the rights and powers usually incident to such ownership; and the power of the Legislature to do this may be questioned, unless in a case where this may become necessary as a police regulation. The ownership of land, when the estate is a fee, carries with it the right to use the land in any manner not hurtful to others; and the right to lease it to others, and therefore derive profit, is an incident of such ownership. No such rights, however, exist as to a right-of-way acquired by condemnation, or by a conveyance made by the other which only conveys an easement. * * * The statute in question prohibits railway companies from erecting along their lines, except at enumerated places, buildings even for the comfort of their employes, and limits their right at the places named to such buildings as may be necessary for the transaction of their legitimate business operations, and for shelter of their employes; and it declares that they shall not 'use, occupy, or cultivate any part of the right-of-way over which their respective roads may pass,' etc. It is true that the words 'right-of-way' have become descriptive of the land over which a railway runs, to the extent to which the easement extends; but, looking to the entire act, we are of the opinion that the prohibition was made for the benefit and protection of the land owner, and for no other purpose, and that it has no application in cases in which a railway company owns an estate in fee in the land." Calcasieu Lumber Co. vs. Harris, 13 S. W., 455.

To this same effect is the case of Ft. Worth & D. C. Ry. Co. vs.

Ayers (Civil Appeals), supra. The Supreme Court of Illinois states the rule in this way:

"A railway company, when invested with the fee title, except in the discharge of its duties as a common carrier, is the owner of and entitled to the exclusive use, possession and control of its right of way the same as a private person, and holds and owns its property disencumbered of any right therein of its abutting or adjoining neighbors as fully and completely as does the individual owner of property." Kotz vs. I. C. Ry. Co., 59 N. E., 240.

In the case of Stephenson vs. St. Louis S. W. Ry. Co., 181 S. W., 568, our Court of Civil Appeals in discussing this question said:

"It is safe to assert that all authorities agree that, whenever a railway company is the owner of the fee in lands constituting its right-of-way, it may in reference thereto clearly exercise the rights and powers 'usually incident to such ownership * * * in any manner not hurtful to others, and the right to lease it to others and therefrom derive profit is an incident of such ownership.' Calcasieu Lumber Co. vs. Harris, 77 Tex., 18, 13 S. W., 453. The rule quoted is not affected by Article 6532, Revised Statute, 1911, which, in substance, provides that the right-of-way secured by any railway in this State 'in the manner provided by law shall not be construed to include the fee in lands,' nor by Article 6542, Revised Statutes, 1911, which provides, among other things, that:

"Railways shall not have power 'to construct any buildings along the line of their railroad to be occupied by their employes or others, except at their respective depot stations and section houses, and at such places only such buildings as may be necessary for the transaction of their legitimate business operations, and for shelter of their employes.'

"Statutes of substantially similar import were in existence at the time the opinion was written in Calcasieu Lumber Co. vs. Harris, supra, and are quoted in full in the opinion. The court bases its holding in that case on the ground that, railways being authorized by statute to acquire the fee in lands by voluntary grant to aid in the construction of their roads, as they are also now authorized to do (Articles 6538, Revised Statutes, 1911), the provision of the statute necessarily has reference only to lands or rights of way upon which they only have an easement, and not that they may not in any event acquire a greater estate therein."

We do not omit to note the well established rule "that a corporation has power to do only such acts as its charter, considered in relation to the general law, authorizes it to do," (C. C. & S. F. Ry. Co. vs. Morris & Crawford, 67 T. 692), but since a railroad corporation is expressly authorized by statute to acquire and hold the fee title to lands upon which its right-of-way may be located, it certainly could not be said that the exercise by it of one of the well recognized elements of such title, that is, the leasing of such land, would constitute an exercise by such corporation of a power which its charter, considered in relation to the general law, does not authorize; and, indeed, it might well be presumed that the law specifically authorizing such a corporation to acquire and hold the fee title to right-of-way lands also expressly authorizes it to lease such lands, because such a right is one of the essential elements of a fee title, and the legislature, in enacting such a law, must be presumed to have understood the legal meaning and effect of the language used.

We also note "that corporations organized for public purposes cannot, by contract or sale, lease or otherwise, render themselves in-

capable of performing their duties to the public, or in any way absolve themselves from the obligation which forms the main consideration for giving them a corporate existence, unless this be done by consent of the State, given through the charter, or in some other manner," (G. C. & S. F. Ry. Co. vs. Harris & Crawford, 67 T. 692); also, that such an occupancy and use, by private enterprise, of railroad right-of-way lands, although owned by the corporation in fee, as might render the maintenance and operation of the railroad more dangerous or hazardous, or as might involve or divert the assets of the corporation, and the like, might be called in question, but each such case would, ordinarily, turn upon the facts pertinent to such issue, and not upon the right, per se, of the corporation to exercise the ordinary and well established incidents of ownership of the land involved.

We are of the opinion, therefore, and you are so advised, that where a railroad corporation owns the fee title to the lands constituting its right-of-way, it may lease the same for the purpose of drilling for oil thereon.

It will be understood that in answering your inquiry we have endeavored to confine ourselves strictly to the question asked, and that in a general way, not having before us, and therefore not endeavoring to pass upon, any particular case, or any particular state of facts. We can conceive of a case wherein the right-of-way of a railroad corporation, even though the fee title to the same be vested in the corporation, might be so given over to prospecting for, developing and mining oil thereon as to interfere with the corporation in the discharge of its functions as such, or in such a way as to increase the hazard to the railroad company, its agents and employes and the general public, in the conduct, maintenance and operation of the railroad, or that a railroad corporation might so contract with respect to the mining of oil upon its right-of-way lands as would involve it in the conduct of a business not contemplated by nor embraced in its charter or the laws governing its operation, and the like, but none of these questions are before us; we are passing upon the bare legal right of a railroad corporation to lease its right-of-way lands for the purpose of drilling for oil thereon, and that without regard to the question as to whether or not any particular transaction entered into for that purpose might or might not result in a condition that would be violative of the charter rights of the corporation, or of some law of this State.

In passing upon this question, we have not had before us and, therefore, have not passed upon any rule or regulation that may have been promulgated by your body with reference to railroad corporations or the oil industry in this State, and do not understand that you have any rule or regulation that would affect the question here presented.

Yours very truly,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2080, Bk. 53, P. 77.

RAILROADS—SPUR TRACKS—SIDE TRACKS—RAILROAD COMMISSION—POWERS. RAILROADS—THEIR POWERS, DUTIES AND OBLIGATIONS.

The powers and duties of the Railroad Commission are statutory, and they may exercise only such authority and power as are conferred by statute.

Revised Statutes, Articles 6653-6716;

Elliott on Laws, Second Edition, Volume 2, Section 685;

State vs. Atlantic, etc., R. R. Co. (Fla.), 40 Southern, 875;

Railroad Commissioners vs. Oregon, etc., R. R. Co., 17 Ore.. 65. 19 Pacific, 702, 2 L. R. A., 195.

2. The powers, duties and liabilities of railroad companies are statutory, except that such powers and duties are the same as prescribed by the common law, and the remedies against them are the same, except where otherwise provided by statute.

Revised Statutes, Articles 6655-6716-707.

3. Under Article 6715, Revised Statutes, "All railroads in Texas shall be required to build sidings and spur tracks sufficient to handle the business tendered such railroads, when ordered to do so by the Railroad Commission, as hereinbefore provided." This statute is construed as conferring power upon the Railroad Commission to require the construction of sidings and spur tracks for public uses only at stations, free from discrimination in favor of any particular individual.

Railroad Commission vs. St. Louis & S. W. Railway Co. of Texas, 80 S. W., 102-1141;

Aycock vs. San Antonio Brewing Association, 63 S. W., 933;

B. S. L. & T. Ry. Co. vs. Moore, 174 S. W., 847;

M. K. & T. Ry. Co. vs. Carter, 68 S. W., 159;

U. P. Ry. Co. vs. C. R. I. & P. Ry. Co., 163 U. S., 554;

T. & F. S. Ry. Co. vs. T. & N. O. Ry. Co., 67 S. W., 325;

Graham vs. Railway Co., 154 S. W., 729;

Lumber Co. vs. Railway Co., 82 S. W., 816;

S. A. & A. P. Ry. Co. vs. Tracy, 164 S. W., 269;

Stolle Stone Co. vs. M. P. Ry. Co., 175 S. W., 250;

Crosbytown & Southplains R. R. Co. vs. Railroad Commission, 169 S. W., 1038;

Ryan Lumber Co. vs. Ball, 197 S. W., 1036;

N. Pacific R. R. Co. vs. Railroad Commission, 58 Wash., 360, 158 Pac., 938.

4. Under the provisions of Chapter 35, General Laws of the Thirty-fourth Legislature, 1915, the Railroad Commission of Texas may, upon a hearing, if supported by the evidence, order any railroad company or receiver thereof, upon application of any shipper tendering traffic for transportation, to construct, maintain and operate, upon reasonable terms, a switch connection from its track with any private side track or spur track, which has been or shall hereafter be constructed by any shipper, to connect with its railroad, where such connection is reasonably practical and can be put in with safety, and will furnish business to justify the construction and maintenance of same, requiring such railroad to furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of any shipper.

5 The Railroad Commission of Texas has authority to adopt reasonable rates, rules and regulations for the operation of all private side tracks or spur tracks, connecting with any railroad, and likewise has the authority to fix just and reasonable rates to be charged by any railroad company or receiver for traffic moved and handled over such side tracks or spur tracks extending to private industries adjoining any such railroads.

Chapter 35, General Laws of the Thirty-fourth Legislature, 1915.

6. The Railroad Commission has no authority to require a railroad company to construct, in whole or in part, a spur track or side track for the use of a private industry off of its right-of-way.

Chapter 35, General Laws of the Thirty-fourth Legislature, 1915.

7. A statute, giving to a public service commission, such as a Railroad Commission, the power to compel a railroad company to construct a spur track, connecting with a private side track of a shipper, where such side track of a shipper is adjoining the right-of-way of a railroad and where the costs of the construction, maintenance and operation of the same is pro-rated between the railroad company and the shipper in proportion to the benefits received by such, has been uniformly upheld by our courts.

Union Lime Co. vs. C. & N. W. Ry. Co., 233 U. S., 211;
Hairston vs. D. & W. Ry. Co., 208 U. S., 598;
Ochs vs. C. & N. W. Ry. Co., 135 Minn., 323, 160 N. W., 856;
Am. & Eng. Ann. Cases, 1918, E., 339;
Am. & Eng. Ann. Cases, 1915, D., 211;
State Public Utilities Commission vs. Railroad Commission, 277 Ill., 574, 115 N. E., 519;
Brick Co. vs. Great Northern R. R. Co., 137 Minn., 314, 163 N. W., 656;
Woodenware Co. vs. Railroad Commission, 116 N. W., 435;
People vs. Public Service Commission, 159 N. Y. St., 977;
Railroad Company vs. Guano Co., 94 S. E., 763;
Railroad Company vs. State, 53 Okla., 712, 157 Pacific, 1039.

8. A spur track intended primarily for the immediate use of a single shipper, but open upon reasonable terms to the use of all members of the public who may have occasion to use it, is a public use, and is sustained by an overwhelming authority.

Railway Company vs. Morehouse, 112 Wis., 1, 87 N. W., 849;
Railway Company vs. Porter, 43 Minn., 527, 46 N. W., 75;
De Camp vs. Hibernia Ry. Co., 47 N. J. L., 43;
Railroad Co. vs. Mont. Union R. R. Co., 16 Mont., 504, 41 Pacific, 232;
Chicago Dock, etc., Co. vs. Garrity, 115 Ill., 155, 3 N. E., 448;
Railroad Co. vs. Petty, 57 Ark., 359, 21 S. W., 883;
Kettle River Ry. Co. vs. Eastern Ry. Co., 41 Minn., 461, 43 N. W., 469;
National Docks Ry. Co. vs. Central Ry. Co., 32 N. J., 755;
Hays vs. Risher, 32 Pa. St., 169;
Zircle vs. Southern R. R. Co., 102 V. A., 78, 45 S. E., 802.

AUSTIN, TEXAS, June 3, 1919.

Hon. Clarence E. Gilmore, Railroad Commissioner, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter of recent date, which reads as follows:

"The Angelina & Neches River Railroad owns and operates a line of railroad from Koltys, Texas, to Chireno, Texas. They also operate an extension of that line about 6½ miles from Chireno, but regular service is not operated over this extension, the contention being in the first place that the line does not belong to it and that it is a private spur constructed for the purpose of moving logs out of the section into which it is extended. It appears from the facts as we have been able to ascertain them, that service is being given to Rogers Mill, and to the Western Naval Stores Company for the shipment of turpentine. All of the facts seem to indicate that while there is a separate ownership claimed for this extension, it has in fact and in truth the same owners as the A. & N. R. R. and is really operated in connectiton with their line.

"That you may be in full possession of all the facts we have, we are attaching hereto our entire file, and call your attention particularly to the report of the traveling inspector of this Commission dated April 26th, together with his plans attached thereto, and further to an opinion rendered by the Attorney General's Department on April 12, 1913, a copy of which appears in the file, touching a very similar situation.

"This extension has been constructed since the Act of the Legislature of 1915.

"The Dallas Cooperage Company of Dallas, Texas, has made application to the Commission to require the Angelina & Neches River Railroad to

construct a spur track about 1½ miles east of Chireno, Texas, on this spur or extension or to give them connection and handle their tonnage.

"We will thank you for your opinion on the following proposition: Has the Railroad Commission of Texas the authority under the law to require either the construction of a spur track in response to their application, or to require the Angelina & Neches River Railroad Company, or the particular organization operating this extension, to connect with a spur track for the Dallas Cooperage Company and furnish it transportation facilities?"

Under the provisions of Article 6716, of the Revised Civil Statutes, power is conferred on the Railroad Commission of Texas to require compliance by railroad companies in this State with all provisions of law affecting railroads in the State.

The Constitution provides for the creation of the Railroad Commission, to be composed of three commissioners, and fixes the tenure of their office. The powers and duties of railroad companies are statutory, except that such powers and duties are the same as prescribed by the common law, and the remedies against them are the same, except where otherwise provided by statute. (Art. 707, Revised Civil Statutes.) Therefore, as to the law governing the duties, liabilities and obligations of railroad companies, built and operated in this State, we must look to our statutes and to the common law.

The powers and duties of railroad commissions are statutory, and they may exercise only such authority and power as are conferred by statute. As stated by Elliott on Railroads, Second Edition, Volume 2, Section 685, "A railroad commission, although it is a statutory tribunal with naked statutory powers, necessarily possesses some incidental or implied power. The implied powers are such, as, by necessary implication, result from the principal powers granted by the statute creating a commission." It has been held by the courts that railroad commissioners have such powers only as are expressly or impliedly conferred on them by statute.

State vs. Atlantic, etc., R. R. Co. (Fla.), 40 Southern, 875;
Railroad Commissioners vs. Oregon, etc., R. R. Co., 17 Ore., 65, 19 Pacific, 702, 2 L. R. A., 195;
Elliott on Railroads, Second Edition, Volume 2, Section 682.

Therefore, to determine the obligations, if any, of a railroad company, requiring the building of spur tracks by it for the use and benefit of private industries, located adjoining the right of way of such railroads, we must necessarily look to the common law, as well as to the laws of this State governing the subject matter.

"Under the common law, which is expressly declared to be in force in this State as to carriers (Art. 707, R. S.), it is the duty of railroads to furnish reasonable facilities for the transaction of public business.

"Our statutes in reference to building depots, keeping them lighted and warmed, etc., are but legislative declarations of what is deemed necessary of railroads to do in order to discharge their common-law obligations." (C. S. R. R. Co. vs. Railroad Commission, 179 S. W., 1042.)

The common law does not make it the obligation of a railroad

company to construct "spur tracks or switches" on its line of railroad solely for the use of private industries located along such tracks. Therefore, we must look to our statutes for the authority and power, if any, requiring railroad companies in this State to build and maintain spur tracks at places other than at stations on its line of railroads for the sole use and benefit of private industries, located adjoining the tracks of said railroads.

Article 6715, of the Revised Civil Statutes, 1911, referring to the building of spur tracks by railroads, reads as follows:

Art. 6715. "All railroads in Texas shall be required to build sidings and spur tracks sufficient to handle the business tendered such railroads, when ordered to do so by the Railroad Commission as hereinafter provided." (Acts 1903, page 93, Section 1.

This statute was construed in case of Railroad Commission vs. St. Louis & Southwestern R. R. Co., of Texas, 80 S. W., 102, the opinion being delivered by Justice Key, of the Austin Court of Civil Appeals, in which case, a writ of error was denied by the Supreme Court. This court held, referring to the language of the statute above quoted, that, "the business tendered such railroads" refers to freight and passengers which come to the railroads from the *public* for transportation as a *public highway*, and that the statute was not intended to require railroad companies to construct "switches and spur tracks" away from their stations to accommodate *individual* interests. In the case (Railroad Commission vs. St. L. S. W. Ry. Co., 80 S. W., 102), the Railroad Commission made, promulgated and issued an order by which it directed that when the Angelina County Lumber Company, of Keltys, Texas, a saw mill company, to construct a road bed for a side track about one thousand feet long, running between the mill of said lumber company and the railroad company's right of way, and had furnished the ties ready for laying of the iron thereon, as well as the right of way free of cost to the railroad company, that it should furnish iron for said side track, and lay the same, and should operate said side track for the receiving and discharging of all freight tendered to it for transportation to and from all points on said track. Later, the Railroad Commission amended its order and by said amended order required the railroad company to furnish, at its own cost and expense, the necessary material, including rails, switches, fixtures, spikes, fastenings, etc., and the labor necessary to lay said side track, in accordance with a certain map or plat which had therefore been filed with the Railroad Commission, and required the Angelina County Lumber Company, at its own expense, to do all of the grading required for said track, in such manner as might be directed by the railroad company, and further required the Angelina County Lumber Company to furnish all the land necessary for the right of way for said spur track. The said spur track proposed to be built was to be located partly upon the right of way of the railroad company and partly upon the land of the lumber company, adjoining said right of way, and the same, when completed, was to be used exclusively for the use and benefit of the lumber company, to enable

it to more expeditiously transport the lumber from its saw mill, adjoining said right of way, to the railroad. The railroad company required the lumber company, before agreeing to build said spur track, to execute to it a contract by which it would agree, among other things, to indemnify the railroad company for any damage which might result to the railroad company in the operation of its trains on said siding or spur track, which the lumber company refused to do. The railroad company then refused to comply with the order of said railroad company or to construct said spur track in accordance therewith. Suit was then brought by the railroad company against the lumber company and the Railroad Commission of Texas to enjoin them from enforcing the order, requiring it to construct and build said spur track, and for the purpose of having said order decreed by the court to be unreasonable, unfair, unjust and unlawful and cancelled, set aside and held for naught. The court, in construing this statute (Revised Statutes, Art. 6715), construed the same as "conferring power upon the Railroad Commission to require the constructions of sidings and spur tracks for public uses only, free from discrimination in favor of any particular individual." The court held further that the Railroad Commission, in this instance, had exceeded its authority, when it undertook to compel the railroad company to construct a side track for the sole use of the Angelina County Lumber Company, as stipulated in the order of the Railroad Commission. Railroad Commission vs. St. Louis, S. W. R. R. Co., 80 S. W., 1141.

It was expressly held in Aycock vs. S. A. Brewing Association, 63 S. W., 953, that a street railway company, incorporated for the transportation of freight in a city, was not operating a railroad in contemplation of Title 115 (then Title 94 of the Revised Civil Statutes of the State), by reason of the fact that its line was used by a brewing company in the transportation of its freight by means of steam locomotives and cars.

In B. S. L. & W. Ry. Co. vs. Moore, 174 S. W., 847, it was determined that such a spur as this required for the Cooperage Company's use could be made subject to a lumber company's exclusive control, and that no rights or duties to the public, such as Title 115 is designated to safeguard, would be involved. In rejecting the contention that a member of the public could complain of a refusal of shipping facilities over such a spur it was said: "The spur in question was a private track built for the sole and special use of the lumber company, and was under the exclusive control of that company. The railroad company could not, without violating its contract with the lumber company, which had assisted in the construction of the spur, place cars thereon for the use of shippers generally, unless by permission of said company." B. S. L. & W. Ry. Co. vs. Moore, 174 S. W., 847. These cases are in line with the decision of the Supreme Court in Railroad Commission vs. St. L. S. W. Ry. Co., 98 Tex., 67 (80 S. W., 141), that "it was not intended to require railroad companies to construct" switches and spur tracks "away from their lines to accommodate individuals." It logically follows that such tracks may be provided and used, under private contract,

like other necessary facilities to cut and move timber and lumber The following cases uphold and enforce just such contracts in s far as the rights of railroads thereunder are concerned:

M., K. & T. Ry. Co. vs. Carter, 95 Tex., 461-474 (68 S. W., 159);
U. P. Ry. Co. vs. C., R. I. & P. Ry. Co., 163 U. S., 564 (16 Sup. Ct 1173), 41 L. Ed., 265;
T. & F. S. Ry. Co. vs. T. & N. O. Ry. Co., 28 Tex. Civ App,, 551, 554 to 555 (67 S. W., 525);
Graham vs. Railway Co. (111 Ark., 598), 164 S. W., 729;
Lumber Co. vs. Railway Co., 36 Tex. Civ. App., 563 (82 S. W., 816);
S. A. & A. P. Ry. Co. vs. Tracy (61 Tex. Civ. App., 574), 130 S. W., 639;
Stolle Stone Co. vs. M. P. Ry. Co. (189 Mo. App., 683), 175 S. W., 250.

The case of Texarkana & Fort Smith R R. Co. vs. T. & N. O. R. R. Co., 67 S. W., 525, in a case involving the legal status of a spur track or switch put in by a railroad company under contract with a lumber company for its exclusive use to transport its products to the railroad, as to whether or not the "spur track or switch," so constructed, was a part of the railroad property and applied to *public purposes* or a matter of contract as between the railroad company and the lumber company. The lumber company and the railroad company entered into a contract for the construction of a spur track leading from the railroad company to the lumber company's mill off of the right of way of the railroad company and across certain public streets of the city of Beaumont. The city of Beaumont consented to the building of said spur tracks. The spur track was used by the railroad company in hauling the products of the saw mill to its railroad, the service being exclusively for the use and benefit of the lumber company and the railroad company. Later, the lumber company attempted to assign to another railroad company the right to make use of said spur track. The Appellate Court, in passing upon the question, held in substance that the spur track was not a part and parcel of the railroad proper, but that its construction and operation was a matter of contract, and that by its building the same in the manner stated, it did not become invested with the public's right to use the same as other parts of the main line of said railroad. The court further held that the lumber company had no right to authorize the use of said spur track by another railroad in contravention of its contract with the railroad company interested in building the same.

The case of M. K. & T. R. R. Co., of Texas, vs. Carter, 68 S. W., 159, is illustrative of the principle involved in this discussion, to the effect that the construction of a spur track by a railroad to a private industry on its line of railroad does not invest said spur track with all of the incidents attached to the construction and operation of a railroad spur track at stations to be used by the public. In this case, a railroad company contracted to build and maintain a side track and switch for the mere convenience of a saw mill owner, in consideration of the latter releasing the company from any and all damages arising from the injury to or killing of stock belonging to him or his contractors or employees by the locomotives and cars on

the side track and switch, and from all damages resulting from the injury or destruction of his and his contractors and employees' property by fire from any locomotive of the company at or about he side track and switches. The mill owner's property burned from parks alleged to have been emitted by the engine of the railroad ompany on or about said spur tracks because of alleged defective ppliances on said engine. The mill owner sued the railroad company for damages for the alleged burning of his mill.. The railroad company plead the aforesaid contract of non-liability for injury to the property of the mill owner in bar of his recovery, and in addition thereto, plead that said contract was invalid by reason of the statute, providing that railroad companies and other common carriers of goods, etc., for hire, shall not limit their liability as it exists at common law by any general or special notice, or in any manner whatever. The court held, in substance, that the spur track was not a part and parcel of the railroad company's line, but was such a spur track as it was authorized to build and construct by virtue of the contract as aforesaid, and that the agreement between the parties did not embrace "property" for the injury or destruction of which the company was liable as a common carrier, and that said contract was not void as against public policy, the agreement establishing a side track and switch where none existed and where none was required by the public, merely for the promotion of the private interests of the mill owner and without relieving the company from its duty in the equipment and management of its trains. This opinion was rendered by our Supreme Court and recognizes the doctrine, as it was then and is now, that a spur track, constructed by a railroad off of its right of way to a private industry, is a subject matter of contract alone and is not a duty or obligation on the part of a railroad company to the owner or owners of said private industries, when said spur tracks are to be used exclusively for their benefit and not for the use and benefit of the public. Under this same statute (Art. 6715) it has been held that the Railroad Commission can compel a railroad to build a siding at a station on the right of way to facilitate public traffic. Crosbytown & Southplains R. R. Co. vs. Railroad Commission, 169 S. W., 1038. See Ryan Lbr. Co. vs. Ball, 197 S. W., 1036.

The doctrine announced by the Texas decisions, as above quoted, is sustained by decisions of other jurisdictions. The case of Northern Pacific R. R. Co. vs. Railroad Commission, 58 Wash, 360, 158 Pacific, 938, 28 L. R. A. (new series), known as "The Burnham Spur Case," is in point. In that case, Burnham, the applicant for the spur track, owned and operated a saw mill tributary to the line of the railroad company, at a point between two stations, about three thousand feet distant from the main line of the railroad. The company refused to construct a spur track, and the mill owner appealed to the Railroad Commission under the then existing Roalroad Commission law of that State. The commission, after a hearing, ordered the railroad company to build a spur track from its main line across its right of way and over certain private lands to the mill. The order required the applicant to do the grading and furnish the ties, but that all other expenses

should be borne by the railroad company. In reversing the decision of the trial court, the Supreme Court of Washington, in part said:

"The order makes no provision for a right-of-way, and the evidence does not disclose who owns the land over which the spur track is to be constructed * * * The applicant contends that the order is a taking of its property without due process of law, and that it contravenes the Fourteenth Article of Amendment to the Federal Constitution. We think this view must prevail. The saw mill is a private industry and the effect of the order is to take the private property of the appellant and devote it to the private use of Burnham."

Continuing further, the court said:

"We are persuaded upon both principle and authority that the Burnham Mill is a private business, and that an order requiring the railroad company to construct a swith or spur track beyond its right-of-way to afford him better and cheaper facilities is, in substance and effect, requiring the company to devote its property to the private use of another, and is within the protective clause of the Federal Constitution."

The Legislature of the State of Nebraska passed a statute which required every railroad company, upon application, at its own expense to construct and maintain a spur track on its right of way to reach every grain warehouse on land contiguous thereto. This Act of the Legislature, on an appeal to the Supreme Court of the United States, in the case of Missouri Pacific R. R. Co. vs. Nebraska, 217 U. S., 196, was held to be unconstitutional.

In our opinion, the Railroad Commission of Texas is not authorized by said Article 6715 of the Revised Civil Statutes of the State to compel a railroad company to build and maintain a spur track, leading from the railroad to a private industry adjoining the right of way of said railroad. This statute has to do with side tracks and switches at stations only for the use and benfit of the *public* and such has been the construction placed upon the same by our courts.

However, the Legislature of this State, since the enactment of Article 6715, as carried forward in the Revised Civil Statutes of 1911, has enacted another law with reference to "spur tracks and switches" to be constructed by railroads, which act is known as Chapter 35, General Laws of the Thirty-fourth Legislature 1915, which act, omitting the caption, enacting and emergency clauses, reads as follows:

Section 1. "Any railroad company or receiver thereof upon application of any shipper tendering traffic for transportation shall construct, maintain and operate upon reasonable terms, a switch connection with any such private sidetrack or spur track which has been or shall hereafter be constructed by any such shipper, to connect with its railroad where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against such shipper."

Sec. 2. "If any railroad company or receiver thereof shall fail to install and operate any such switch connection as aforesaid, on application therefor by any shipper, such shipper may make application to the Railroad Commission of Texas, and said commission shall be authorized and empowered to enter such orders as may be necessary governing the construction, maintenance and operation of said swith connection with said

private sidetrack or spur track, where such connection is reasonably practicable, and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same."

Sec. 3. "The Railroad Commission of Texas shall fix just and reasonable rates to be charged by railroad companies or receivers thereof for traffic moved and handled over such private sidetracks or spur tracks extending to private industries, and it shall be the duty of the Railroad Commission to adopt such rates, rules, and regulations as will prevent any discrimination in the operation of such tracks or the handling of such traffic. Whenever any railway company or receiver thereof shall operate any private sidetrack or spur track without charge, the Railroad Commission of Texas shall have power and authority to compel the operation without charge of any private sidetrack or spur track similarly situated."

Sec. 4. "The Railroad Commission of Texas shall prescribe reasonable rates, rules and regulations for the operation of all private sidetracks or spur tracks as may already have been or may hereafter be constructed either by the railroad companies themselves or by individuals or corporate interests, or jointly by such railroads and individuals or corporations, when such private sidetracks or spur tracks are operated by railroad companies or the receivers thereof; and shall have power and authority to order and compel the operation of said private sidetracks or spur tracks whenever the railway company or receiver thereof is operating other private sidetracks or spur tracks similarly situated, and to prevent discrimination therein."

Sec. 5. "Whenever any railroad company or receiver thereof shall hereafter construct or maintain or contribute to the construction or maintenance of any private sidetrack or spur track to any private industry, the Railroad Commission shall have power to order such railway company or receiver to construct or maintain or contribute to the construction or maintenance of a sidetrack or spur track to any private industry similarly situated, on the same terms and conditions."

Sec. 6. "Failure upon the part of any railroad company or receiver thereof to observe and obey the orders of the Railway Commission issued in compliance with this Act shall subject such railroad company to the fines and penalties prescribed by law for failure to obey the lawful requirements, orders, judgments and decrees of the Railroad Commission."

Sec. 7. "Any person injured by a violation of the terms of this Act shall have the right to bring suit for his actual damages and for enforcement of his rights under this Act."

Sec. 8. "This Act shall be cumulative of all other acts governing railroads or receivers thereof."

Section 1 of the Act provides, in substance, that a railroad company or receiver thereof, upon application to the shipper tendering traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection with any such "private side track or spur track" which has been or shall hereafter be constructed by any shipper to connect with its railroad; (1) where such connection is reasonably practicable, (2) where such connection can be put in with safety, (3) where such industry so served by a switch track will furnish sufficient business to justify the construction and maintenance of same, (4) and such railroads are required to furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against such shipper.

Section 2 of the Act provides, in substance, that if any railroad company or receiver shall fail to install and operate any such switch connection, as provided for in Section 1 of the act, such shipper may make application to the Railroad Commission, and said Commission is authorized and empowered, to enter such orders as may be necessary, governing the *construction, maintenance* and *operation* of "said switch

connection with said private sidetrack or spur track", where such connection is *reasonably practicable*, and can be put in with *safety* and will furnish sufficient *business* to justify the construction and maintenance of the same.

Section 3 of the act authorizes the Commission "to fix just and reasonable rates" to be charged by railroad companies or receivers thereof for traffic moved and handled over such private sidetracks or spur tracks extending to private industries, and it is the duty of the Railroad Commission to adopt such rates, rules and regulations as will prevent any discrimination in the operation of such tracks or the handling of such traffic. It is further provided that whenever any railway company or receiver thereof shall operate any private sidetrack or spur track without charge, the Railroad Commission of Texas shall have power and authority to compel the operation without charge for any private sidetrack or spur track similarly situated.

It is further provided in Sections 4 and 5 of the Act, that the Railroad Commission shall prescribe reasonable rates, rules and regulations for the operation of private side tracks or spur tracks by railroads, and providing penalties against railroads for their refusal to comply with the orders of the Railroad Commission in such matters.

For the purposes of this discussion, it is unnecessary to refer to other provisions of the Act.

By the weight of recent authority, a statute giving to a public service commission, such as a Railroad Commission, the power to compel a railroad company to construct a spur track connecting with a private side track of a shipper, where such side track of the shipper's is adjoining the right-of-way of the railroad and where the costs of the construction, maintenance and operation of the same is prorated between the railroad company and the shipper in proportion to the benefits received by each, has been uniformly upheld by our courts.

Union Lime Co. vs. C. & N. W. Ry. Co., 233 U. S., 211;
Hairston vs. D. & W. Ry. Co., 208 U. S., 598;
Ochs vs. C. & N. W. Ry. Co., 135 Minn., 323, 160 N. W., 866;
Am. & Eng. Ann. Cases, 1918, E., 339;
Am. & Eng. Ann. Cases, 1915, D., 211;
State Public Utilities Commission vs. Railroad Commission, 277 Ill., 574, 115 N. E., 519;
Brick Co. vs. Great Northern R. R. Co., 137 Minn., 314, 163 N. W., 656;
Woodenware Co. vs. Railroad Commission, 166 N. W., 435;
People vs. Public Service Commission, 159 N. Y. St., 977;
Railroad Company vs. Guano Co., 94 S. E., 763;
Railroad Company vs. State, 53 Okla., 712, 157 Pacific, 1039.

That a spur track intended primarily for the immediate use of a single shipper, but open upon reasonable terms to the use of all members of the public who may have occasion to use it, is a public use, and is sustained by an overwhelming authority.

Railroad Co. vs. Morehouse, 112 Wis., 1, 87 N. W., 849;
Railroad Co. vs. Porter, 43 Minn., 527, 46 N. W., 75;
De Camp vs. Hibernia Ry. Co., 47 N. J. L., 43;
Railroad Co. vs. Mont. Union R. R. Co., 16 Mont., 504, 41 Pacific, 232;
Chicago Dock, etc., Co. vs. Garrity, 115 Ill., 155, 3 N. E., 448;
Railroad Co. vs. Petty, 57 Ark., 359, 21 S. W., 884;

Kettle River Ry. Co. vs. Eastern Ry. Co., 41 Minn., 461, 43 N. W., 469;
National Docks Ry. Co. vs. Central Ry. Co., 32 N. J., 755;
Hays vs. Risher, 32 Pa. St., 169;
Zircle vs. Southern R. R. Co., 102 V. A., 78, 45 S. E., 802.

Now recurring to your question submitted.

"Has the Railroad Commission of Texas the authority under the law to require either the construction of a spur track in response to their (Dallas Cooperage Co.) application, or to require the Angelina organization operating this extension, to connect with a spur track for the Dallas Cooperage Co. and furnish it transportation facilities?"

In answer thereto, from our investigation of the law applicable thereto, we are of the opinion that if the railroad or tram-road is owned and operated by the Angelina County Lumber Company, and not the railroad company, that the Commission is without authority to require the building of a switch or spur track intersecting the same. The law only authorizes the Commission to deal with incorporated railroads, organized under the provisions of Chapter 115 of the Revised Civil Statutes. It has no authority or control over tram-roads serving saw mill companies, for the reason that the statutes of the State do not lodge any such powers in its hands.

However, if the railroad in controversy is owned and operated by the Angelina & Neches River R. R. Co., we are of the opinion that the Commission would have the authority to require the building of a spur track on the right of way of said railroad to connect with a private track of said industry, the Dallas Cooperage Company, provided that upon a hearing the evidence showed that such connection is reasonably practicable, can be put in with safety and that such industry will furnish sufficient business to justify the construction and maintenance of a spur track. These issues of fact will have to be determined upon a hearing had before the Commission, and the Commission's orders would necessarily have to be supported by the evidence. We beg to call your attention to the fact, however, that the last act of the Legislature, above quoted, does not authorize and empower the Railroad Commission to require a railroad company to build a spur track off of its right of way, and such an order, if granted, we believe would be unauthorized, since such law requires the building of "a switch connection with any such private side track or spur track" which has been or shall hereafter be constructed by any such shipper. It is contemplated by the Act that the shipper shall furnish his own private spur or side track adjacent to and touching the railroad right of way, and that the railroad company can be required, upon hearing in the manner hereinbefore stated, to connect with the said spur or side track of the private industry. The Commission is authorized to require the maintenance and operation of said side tracks or spur tracks when so constructed by railroads under such reasonable rules and regulations as it may promulgate, and it may prorate the cost of its construction, maintenance and operation.

Yours very truly,

W. J. TOWNSEND,
Assistant Attorney General.

Op. No. 2076, Bk. 53, P. 52.

RAILROADS, DEPOTS AND STATIONS.

(1) A railroad company may, by contract, bind itself to perpetually maintain a depot at a particular place until the interests of the public demand its removal to another location.

(2) The court may enjoin a railroad company from moving its depot located under a contract, provided the public interests do not demand its removal.

(3) Whether or not the interests of the public demand a removal of a depot located by contract raises an issue of fact in each case, to be determined alone by the proof offered.

(4) While the Railroad Commission has authority to enforce the law as to the removal of railroad depots it is not its duty to enforce contracts of railroad companies with private individuals as to the maintenance of depots.

(5) A judgment, restraining a railroad company from removing a depot from a tract of land, in violation of a covenant in the deed under which it obtained title to such land, will not prevent the removal of such depot in obedience to an order of the Railroad Commission when the public benefit requires such removal and the Railroad Commission orders it.

H. & T. C. R. R. Co. vs. Molloy, 64 Texas, 607;
Wooters vs. I. & G. N. R. R. Co., 54 Texas, 294;
M. K. & T. Ry. Co. vs. Doss, 26 S. W., 497;
S. A. & A. P. Ry. Co. vs. Mosel, 177 S. W., 1051;
S. A. & A. P. Ry. Co. vs. Mosel, 195 S. W., 621;
S. A. & A. P. Ry. Co. vs. Mosel, 180 S. W., 1138;
City of Tyler vs. Ry. Co., 99 Texas, 491, 21 S. W., 1;
Beasley vs. T. & P. Ry. Co., 115 Fed. 952, 191 U. S., 492;
T. & P. Ry. Co. vs. Seate, 77 Fed., 726;
T. & P. Ry. Co. vs. Marshall, 136 U. S., 393;
T. & P. Ry. Co. vs. Robards, 60 Texas, 545.

AUSTIN, TEXAS, May 30, 1919.

Hon. Allison Mayfield, Chairman Railroad Commission, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter of recent date, enclosing a petition filed with the Railroad Commission of Texas on behalf of the Director General of Railroads, in connection with the operation, by him, of the San Antonio & Aransas Pass Railroad, said petition having reference to the matter of depot facilities at Kerrville.

Accompanying your letter is an application on behalf of said Railroad Company to the Railroad Commission, asking for the permission and authority of the Railroad Commission of Texas to change the location of the depot on said Railroad at Kerrville, Texas, from the "old location" to the new location on Clay and Tchoupitoulas streets in the town of Kerrville; the new location being selected by the Railroad Company.

From the enclosures accompanying your letter it appears that many years ago, to-wit about the year 1892, one, Charles Schriner, conveyed to said Railroad Company 17.4 acres of land in the town of Kerrville, to be used for depot purposes; that the consideration for the conveyance of said land to the Railroad Company by Schriner was three thousand ($3,000) dollars cash and "the further consideration of the maintenance by said Railway Company of a depot on the tract of land hereinafter described," referring to the 17.4 acres of land, "and nam-

ing a passenger depot;" that said Railroad Company accepted the conveyance of land, above referred to, for the consideration expressed in the deed of conveyance and in compliance therewith afterwards established and maintained a depot thereon in compliance with the terms of said contract and conveyance. Afterwards, and within the past few years, the Railroad Company decided to abandon the "old location" and to establish and build a new depot at the location above referred to, to-wit, between Clay and Tchoupitoulas streets.

Citizens of Kerrville interested in the subject matter of the contract for the location of the depot in the first instance instituted in the District Court of Kerr County injunction proceedings to restrain the railroad company from the removal of the depot from the old to the new location. The Court of Civil Appeals, in the first appeal of the case, reversed the judgment of the lower court upon a technical ground; the merits of the case were not passed upon. Mosel vs. San Antonio & Aransas Pass Railway Company, 177 S. W., 1048.

Upon a second trial of the case, judgment was entered in the Trial Court, restraining the Railroad company from removing the depot from the old to the new location, in violation of its contract as aforesaid. This case was appealed to and affirmed by the San Antonio Court of Civil Appeals. San Antonio & Aransas Pass Ry. Co. vs. Mosel, 195 S. W., 621.

The Court, in this case, held in substance that a railroad company may, by contract, bind itself to perptually maintain a depot at a particular place unless the interests of the public demand its removal, thereby affirming judgment of the lower court. The railroad company thereafter filed its petition for writ of error in the Supreme Court of Texas, and said petition was refused on the — day of June, 1918.

In its petition to the Railroad Commission accompanying your letter, the Railroad Company states "that the new passenger depot, constructed by San Antonio & Aransas Pass Railway Company in the town of Kerrville, is in closer proximity to the majority of the people of Kerrville than the depot at the old location and more convenient of access than the depot at the old location; that it is more adequate and commodious for the public needs and contains more public conveniences and interests, and conveniences could be best served by removal of the depot from the old location to the new location between Clay and Tchoupitoulas streets;" and asks for an order of your Commission authorizing the removal of the passenger depot from the old to the new location. You desire to have the opinion of the Attorney General as to whether or not the Railroad Commission of Texas has the authority to authorize the railroad company to remove its depot from the old to the new location at Kerrville, in view of the decision of our higher courts in the above case as reported in 177 S. W., 1051, and 195 S. W., 621.

The question of the validity of a contract to establish and maintain a railroad station at an agreed point has been the subject of numerous adjudications, which in general turned upon the point as to whether or not such an agreement contravenes public policy, and while the results reached are widely divergent, the weight of authority, in our opinion, tends to establish the proposition that: the contract by the railroad company to locate a station at a given point is not per se

void. Such a contract is enforceable against the railroad company as long as it is possible for the company to discharge the duties owed by it to the public, and at the same time, discharge the duties incumbent upon it by the contract.

Such contracts, by railroad companies, for the location of depots at particular points on its line of railroad in consideration of cash and land donations are uniformly sustained by the higher courts of our State.

In the early case of Texas and St. Louis Railroad Company vs. Robards, 60 Texas, 545, the Court held in substance that a railroad company may bind itself to maintain a permanent depot at a particular place. In discussing the principles involved the Court, in part, used the following language:

"Railroad corporations are created with the twofold object of gain to those who engage in such enterprises, and for the accommodation of the public in travel and the shipments of freights; and, undoubtedly, it would be against public policy to allow them to so contract as to defeat the objects of their creation. This would be the result if they were so permitted to bind themselves that they could not establish stations at any point on the line that trade, travel and public convenience might require. But it is not perceived how it could work an injury to the public for a company to bind itself by contract to permanently maintain a station at any point on the road, provided it includes no prohibition against establishing such other stations as the management might deem necessary and convenient.

"Each station not only accommodates those who reside in its vicinity, but also the general public who may desire to leave or board the trains, or ship freights to or from such points. The fact that such contracts might work an inconvenience to the company would afford no reason for holding them to be against public policy. It is the public that must be injuriously affected, to have that effect upon contracts.

"These corporations are created with power to contract, and experience has not yet demonstrated any necessity for the courts to assume a sort of guardianship over them, so as to protect them against their improvident contracts. On the contrary, it is generally understood that they are able to deal in close quarters with natural persons in this particular."

The doctrine that a railroad company may bind itself to maintain a permanent depot at a particular place is sustained by the following authorities:

H. & T. C. R. R. Co. vs. Molloy, 64 Texas, 607;
Wooters vs. I. & G. N. R. R. Co., 54 Texas, 294;
M. K. & T. Ry. Co. vs. Doss, 26 S. W., 497;
S. A. & A. P. Ry. Co. vs. Mosel, 177 S. W., 1051;
S. A. & A. P. Ry. Co. vs. Mosel, 195 S. W., 621;
S. A. & A. P. Ry. Co. vs. Mosel, 180 S. W., 1138;
City of Tyler vs. Ry. Co., 99 Texas, 491, 91 S. W., 1;
Beasley vs. T. & P. Ry. Co., 115 Fed. 952, 191 U. S., 492;
T. & P. Ry. Co. vs. Seate, 77 Fed., 726;
T. & P. Ry. Co. vs. Marshall, 136 U. S., 393;
T. & P. Ry. Co. vs. Robards, 60 Texas, 545.

A Texas case involving the doctrine above announced, T. & P. Ry. Company vs. City of Marshall, 136 U. S., 393, was appealed to and passed upon by the Supreme Court of the United States, which construes contracts by railroads for the permanent locations of its depots, terminals, etc.

The City of Marshall, in this case, agreed to give to the T. & P. Ry. Co. three hundred thousand ($300,000) dollars in county bonds and sixty-six acres (66)) of land within the city limits for shops and depots; and the company, in consideration of the donation, agreed to permanently establish its Eastern terminus and Texas offices at the City of Marshall and to establish and construct at said city the main machine shops and car works of said railroad company. The city performed its agreements and the company on its part made Marshall its Eastern terminus and built depots and shops and established its principal offices there.

After the expiration of a few years Marshall ceased to be the Eastern terminus of the road and some of the shops were removed. The City of Marshall filed a bill in equity to enforce the agreement both as to the terminus and as to the shops. The Court held:

(1)

"That the contract on the part of the railway company was satisfied and performed when the company had established and kept a depot and offices at Marshall, and had set in operation car works and machine shops there, and had kept them going for eight years and until the interests of the railway company and of the public demanded the removal of some or all of these subjects of the contract to some other place;

(2)

"That the word 'permanent' in the contract was to be construed with reference to the subject matter of the contract, and that under the circumstances of this case it was complied with by the establishment of the terminus and the offices and shops contracted for, with no intention at the time of removing or abandoning them."

We quote this decision of the Supreme Court of the United States, giving its holding, to show what has been its construction of such contracts where the interests of the public are involved.

The case of I. & G. N. Ry. Company vs. Dawson, 62 Texas, 260, involves a contract of said railroad company, agreeing to the permanent location of a depot on a certain tract of land located in the City of Tyler and resultant damages sustained by the former owner of the land on account of the removal of such depot. The Plaintiff, Dawson, conveyed to the railroad company 12 acres of land, located in the City of Tyler, that at the time of making this conveyance an agreement was made between the parties, which was the consideration for the deed, that the railroad company should permanently locate its depots in the southern part of the City of Tyler; that they were accordingly so located, but afterwards removed, after which plaintiff sued the railroad company for the value of the twelve acres of land conveyed to it.

The plaintiff procured a judgment against the railroad company for the damages sustained by him, from which judgment the railroad company appealed. The Supreme Court held in the case "that as to the main question in the case, the present weight of authority is to the effect that a railroad corporation can, by contract, bind itself to perpetually maintain a permanent depot at a particular place," citing the case of Texas & St. Louis Railroad Company vs. Robards, 60 Texas, 545, with approval.

Where a railroad company obligated itself to locate its depot at the nearest practical point within one mile of the Court House the word "practical" is not synonymous with "possible" and therefore the company was only bound to locate its depot at the nearest point within one mile, which could be done at a reasonable cost with reference to all the circumstances, and in view of the objects and purposes inducing the contract. Wooters vs. I. & G. N. Ry. Co., 54 Texas, 291.

A contract by a railroad company to establish its depot "at" a specified town is complied with by locating it at a convenient distance from the business portion of town and is controlled more by the buildings composing the town than by the corporate limits as defined in the charter. Fry vs. Fort Worth & Rio Grande Ry. Co., 24 S. W., 950.

The measure of damage for breach of condition in a right of way grant, whereby the company agreed to build a depot on the land, is not the value of the land given but actual damages sustained. Railroad Company vs. Pheiffer, 56 Texas, 66.

The measure of damages for failure of the railroad to build a station within an agreed distance from plaintiff's residence is not the comparative value of the property but loss to plaintiff. H. & T. C. Ry. Co. vs. McKinney, 55 Texas, 176.

Where a railroad company, for a sufficient consideration, bound itself to maintain a station at a certain point in a suit by one damaged, by breach of the contract, the latter might show the depreciation in the rental value of his hotel there, caused by removal of the station. H. & T. C. Ry. Co. vs. Molloy, 64 Texas, 607.

Where there is a conflict of authority, as before stated, as to the validity and enforcibility of contracts to locate and maintain stations at particular places, the weight of authority in Texas is that such contracts are not void per se and that they are enforcible so long as they do not conflict or interfere with the duties of the railroad company to the public; but that where the rights of the public conflict with those of the contracting party under his contract, the latter must yield.

The issues involving the location of the depot at Kerrville have been before our higher courts in three appeals: 177 S. W., 1051; 180 S. W., 1138 and 195 S. W., 625. In the last case, 195 S. W., 625, writ of error was denied by the Supreme Court, thereby terminating the litigation. In the first appeal of the case, Mosel vs. San Antonio & Aransas Pass Ry. Co., 177 S. W., 1048, the court decided the following pertinent points:

(1)

A railroad company may, by contract, bind itself to perpetually maintain a depot at a particular place, unless the interests of the public demand a removal of the depot.

(2)

The court may enjoin a railroad company from moving its depot located under a contract provided public interests do not demand a removal of the depot.

(3)

A railroad company, acquiring land for a money consideration and for the further consideration of maintaining thereon perpetually a depot, does not perform the contract to maintain the depot by maintaining it for eight years and the contract is enforcible unless such interests demand a removal of the depot.

In the second appeal of the case San Antonio & Aransas Pass Railroad Company vs. Mosel, 180 S. W., 1138, the Court recognizes the validity of a contract by a railroad company obligating itself to erect and maintain a depot at a particular point and held that "where a railroad seeks to change its established depot on the ground that it is for public benefit, it (the railroad) has the burden of proving such benefit in an action to restrain such removal."

In the third appeal of the case, San Antonio & Aransas Pass Railroad Co. vs. Mosel, 195 S. W., 621, in which a writ of error was denied by the Supreme Court, the Court of Civil Appeals held:

(1)

Until the public interest requires the removal of a depot, the railroad company may be restrained from removing it in violation of a covenant.

(2)

When the public interest requires the removal of a railroad depot, it can be removed notwithstanding a cevenant with private individuals not to remove it.

(3)

Where the Railroad Commission has authority to enforce the law as to the removal of railway depots, it is not its duty to enforce contracts of railroad companies with private individuals as to the maintenance of depots.

(4)

In a suit to restrain the removal of a railway depot in violation of a covenant in the deed under which the railway company obtained title to the land on which the depot was erected, a jury, finding that the removal was not more to the interests of the citizens of the town would not be disturbed where, though the evidence showed that the biggest portion of the town was nearer the site of the new proposed depot, it was not clear that the removal was beneficial, and there was evidence of inconvenience from the proposed new site and no evidence that the present site was inconvenient or objectionable.

In light of the opinion of the Courts above quoted, we therefore conclude that the Railroad Company may be restrained from removing its depot at Kerrville in violation of its contract, unless the public interest requires its removal. As to whether the public interests at

this time require the removal of said depot raises an issue of fact to be determined by the Railroad Commission or by a court of competent jurisdiction upon a hearing for that purpose.

However, in the case under investigation, we beg to call your attention to the following statement of facts made by the Court of Civil Appeals in this case. as reported in 195 S. W., 623, quoting the language of the Court:

"The cause was tried with a jury, which found in answer to a single special instruction that the removal of the passenger depot to the new location was not more to the interest of the majority of the citizens of Kerrville than to maintain it on the 17.4 acre tract on which it was at the time this suit was instituted."

If such are the facts, the Railroad Commission's order authorizing the removal of the depot from the old to the new location, if granted. could not be sustained in court. However, if the facts are otherwise and the public interests required the removal of the depot from the "old" to the "new" location, then, in our opinion, such an order of the Railroad Commission authorizing its removal from the "old" to the "new" location could be sustained.

Yours very truly,

W. J. TOWNSEND,
Assistant Attorney General.

OPINIONS ON SCHOOLS AND SCHOOL DISTRICTS.

Op. No. 2218, Bk. 54, P. 204.

SCHOOLS AND SCHOOL DISTRICTS—TAXATION—CONSTRUCTION OF LAWS.

(1) An independent school district containing less than one hundred and fifty scholastics and having its own assessor and collector can assess property for purposes of school taxation at a valuation other than that made for state and county purposes.

(2) Contemporaneous and particular construction of a statute by those whose duty it is to carry it into effect, while not absolutely controlling, is entitled to great weight by a court.

ATTORNEY GENERAL'S DEPARTMENT, April 28, 1920.

Miss Annie Webb Blanton, State Superintendent Public Instruction, Capitol.

DEAR MISS BLANTON: We have your letter of the 16th inst., enclosing communication from Mr. H. E. Bell, Attorney-at-Law, Gatesville, Texas, in which he raises the question as to whether an independent school district containing less than one hunderd and fifty scholastics and having its own assessor and collector of taxes is bound by the valuation placed upon property therein for State and county purposes, and you request the opinion of this Department with reference thereto.

In Avery vs. Cooper, 180 S. W., 734, the Supreme Court (opinion by Chief Justice Phillips) held that an independent school district having an assessor and collector of its own can assess property for purposes of school taxation at a valuation other than that made for State and county purposes.

The specific question here presented is:

"Does this case apply to districts of less than one hundred and fifty scholastics?"

Chapter 16, of Title 48, R. S., 1911, deals with independent school districts, and Article 2856 thereof provides, in part, as follows:

". . . . All incorporated districts, having each fewer than one hundred and fifty scholastics according to the latest census, shall be governed in the general administration of their schools by the laws which apply to common school districts; and all funds of such districts shall be kept in the county depositories and paid out on order of the trustees approved by the county superintendent."

Article 2857 thereof relates to taxes and bonds, and Article 2862 reads, in part, as follows:

"When a majority of the board of trustees of an independent school district prefer to have the taxes of their district assessed and collected by said county assessor and collector, same shall be assessed and collected by said county officers, and turned over to the treasurer of the independent school district for which such taxes have been collected; provided, that the property of such districts having their taxes assessed and collected by the county assessor and collector shall not be assessed at a greater value than that assessed for county and state purposes. . . . ."

The opinion in Avery vs. Cooper, supra, contains the following language:

"The only provision of law which attempts to limit the assessment of property in such an independent school district for taxation for the benefit of the district to the valuation fixed for state and county taxation purposes is found in this proviso, and the operation of the proviso is by its terms plainly limited to such only as have their taxes assessed and collected by the county assessor and collector. The allegations of the petition disclose that the Brookshire Independent School District had its own tax assessor and collector, and had not sought to have the taxes in question assessed or collected by the county officials. The proviso in article 2862 is therefore without application to the assessment complained of, and the district was accordingly not bound by the valuation fixed by the county officials in its assessment of the plaintiff's property."

The laws relating to public education in this State are in the main taken from Chapter 124, Acts of 1905, Regular Session, which was an Act to provide for a more efficient system of public free schools for this State. Section 50 et seq. related to common school districts. Sections 149 et seq. dealt with towns and villages incorporated for school purposes only and generally known as independent school districts. This Act made no distinction between common school districts and independent school districts because of the number of scholastics.

In 1909, the Thirty-first Legislature, at its Regular Session, amended certain sections of Chapter 124, Acts of 1905, Regular Session, and added thereto a new section to be known as "Section 154," which provided that—

"All incorporated districts having each fewer than one hundred and fifty scholastics according to the latest census shall be governed in the administration of their schools by the laws which apply to common school districts and all funds of such districts shall be kept in the county treasury and paid out on order of the trustees, approved by the county superintendent."

The provision of this Section above quoted now appears in Article 2856, R. S. 1911, exécept the word "general" appears before the word "administration" in said article.

It was not the intention of the Legislature in the passage of Section 154a of the Act of 1909 to change the law as to the finances and taxation in independent school districts having less than one hundred and fifty scholastics, except that the funds of such districts are required to be kept "in the county depositories and paid out on order of the trustees approved by the county superintendent."

As to the general administration of schools in common school districts attention is directed to Articles 2823 to 2826, both inclusive. Article 2823 declares that the trustees shall have the management and control of the school buildings and school grounds; Article 2824 provides that the trustees shall determine how many schools shall be maintained, when the schools shall be opened and closed and shall contract with teachers and manage and supervise the schools "subject to the rules and regulations of the county and state superintendents," and shall approve all teachers' vouchers and other claims

against the school fund of the district; Article 2825 deals with the contracts with teachers and authorizes the trustees to enter into such contracts subject to approval "by the county superintendent before the school is taught," and the trustees are also authorized, "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," and Article 2826 provides that the amount contracted by the trustees to be paid a teacher shall be paid on check drawn by a majority of the trustees "on the county treasurer and approved by the county superintendent."

With respect to the assessment of property, the levy and collection of taxes, providing for taxes and bond elections and issuing bonds on the faith and credit of the district, the laws relating to independent school districts govern and control those independent school corporations that have less than one hundred and fifty scholastics.

In the construction of all civil statutes the ordinary signification applies to words "except words of art or words connected with a particular trade or subject matter." Art. 5502, R. S. 1911. The word "administration" means "the act of administering; direction; management; government of public affairs; the conducting of any office or employment." The Century Dictionary & Encyclopedia, Vol. 1, p. 77.

The term "general administration of their schools" means, therefore, the management and control of the school system; that is, the employment of teachers, approval of vouchers, etc., and as to such matters independent school corporations containing less than one hundred and fifty scholastics the law applicable to common school districts will control.

If it had been intended by the Legislature that the term "general administration of their schools" should cover the entire field of taxation and matters of finance, the trustees of an independent school district having less than one hundred and fifty scholastics would have no more power and authority as to such matters than the trustees of a common school district. Therefore, tax and bond elections for such districts could not be ordered by the board of trustees as that duty would devolve upon the county judge; the levy of taxes could not be made by the board of trustees as that duty would be required of the commissioners court of the county in which such independent school district would be situated. In fact, it would destroy the autonomy of such school corporations and make them "independent school districts" in name only, notwithstanding the fact that they had incorporated in obedience to the requirements and restrictions of the statutes relative to free school corporations.

We do not think that it can be contended with reason that Section 154a, Chapter 12, Acts of 1909, altered or changed the provisions of Section 161, of Chapter 124, Acts of 1905. The section last mentioned is now Article 2853, R. S. 1911, and applies to all independent school districts in this State and reads as follows:

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

The cases of Hall vs. Trotter, 160 S. W., 978, and Cain vs. Lumsden, 204 S. W., 115, do not throw any light upon the construction of Article 2856, R. S. 1911, with respect to independent school districts incorporated under the general law. In Hall vs. Trotter the district in question was created by a special Act of the Legislature in 1909 and in Cain vs. Lumsden the district in question was created by a special Act of the Legislature in 1917. However, in Hall vs. Trotter Judge Key, speaking for the Austin Court of Civil Appeals, said that "if the matter of holding the election and issuing the bonds in question is a special affair, and no part of the general administration of the schools in that district, then there is no conflict between the two statutes," that is, the special Act creating the district and Article 2856, R. S. 1911. We fail to see any conflict between Section 154 and Section 154a, of Chapter 12, Acts of 1909, Regular Session. Section 154 (now Article 2857) authorized the trustees of incorporated school districts to levy taxes and to issue school building bonds when authorized so to do by a majority of the qualified resident property taxpaying voters of such district at an election held therein for that purpose; and Section 154a (now Art. 2856) provides that the laws applicable to common school districts shall control free school corporations containing less than one hundred and fifty scholastics only in the "general administration of their schools," and the funds of such districts "shall be kept in the county depositories and paid out on order of the trustees approved by the county superintendent." If it had been intended to place such independent school districts on the same plane with common school districts relative to taxation and matters of finance, the Legislature would doubtless have expressed such intent by language clear and unmistakable. The requirement that the funds of such districts shall be kept in the county depository and paid out on order of the trustees approved by the county superintendent is the only provision in said article relating to matters of finance.

Independent school districts containing less than one hundred and fifty scholastics have heretofore issued school building bonds and the Attorney General has approved such bonds without raising any question as to the number of scholastics within such districts, because the holding of an election and the issuance of school house bonds is, as inferred by the court's opinion in Hall vs. Trotter, supra, "a special affair and no part of the general administration of the schools" of the district.

In this connection I will state that the contemporaneous and particular construction of a statute by those whose duty it is to carry it into effect, though not absolutely controlling, is entitled to great weight by the court. State vs. Railway Company, 209 S. W., 821. The views herein expressed are in keeping with the construc-

tion heretofore given Article 2856 by the State Department of Education and by the Attorney General. In Bulletin No. 70, "Public School Laws," issued by the Department of Education in 1917, the following notation will be found with respect to Article 2856:

"This provision does not destroy the autonomy of the small independent school districts with respect to number of members of their school boards and manner of taxation."

Some time ago an opinion of this Department was delivered to you apparently at variance with the views herein stated. At the time that opinion was prepared and approved, our attention had not been directed to a previous construction placed upon Article 2856 by the Department of Education and by the Attorney General, and also with reference to the issuance of bonds by such independent school districts, all of which are very largely controlling factors in construing statutes of doubtful import. The previous opinion of the Department, therefore, in so far as it may seem to conflict with this one, is withdrawn, and your Department should be governed by your previous rulings and the previous rulings of the Attorney General on this question, which are embodied, in substance, in this opinion.

Yours very truly,
W. P. DUMAS,
Assistant Attorney General.

Op. No. 2055, Bk. 52, P. 532.

INDEPENDENT SCHOOL DISTRICT—TAXATION.

1. The trustees of an independent school district have the same powers in respect to the assessment, equalization and collection of district taxes as are possessed by the city councils of incorporated cities and towns in respect to city taxes.
2. The board of trustees of an independent school district can not sit as a board of equalization for the district. They have only the power to appoint such a board for the district.
3. Where the trustees have selected the county assessor and collector to assess and collect the taxes of an independent school district the appointment of a board of equalization for the district is unnecessary.
4. Where the independent school district has its own assessor and collector its trustees should appoint a district board of equalization.

AUSTIN, TEXAS, May 3, 1919.

Hon. H. B. Stoneham, County Attorney, Anderson, Texas.

DEAR SIR: We are in receipt of a letter from Mr. W. E. Day, trustee of Anderson Independent School District, making certain inquiries and take the liberty of making reply to Mr. Day's letter through you, because of the fact that we are prohibited by law from rendering opinions to any persons except heads of departments and certain other State officials. Mr. Day's letter is as follows:

"Have we, as a School Board of Anderson Independent School District,

a right to sit as a board of equalization or appraisers and assess the property of said district at a higher value, for school purposes only, than the commissioners court values it for State and county taxes?"

The Legislature, by express terms, has given to certain officers of an independent school district the same powers in respect to the assessment and collection of taxes for each district as have been conferred by general law upon similar officers of an incorporated city in respect to the assessment and collection of city taxes. True, by the terms of Article 5801, the assessor and collector of taxes of an independent school district "shall have the same power and shall perform the same duties with reference to the assessment and collection of taxes for free school purposes that are conferred by law upon the city marshal of an incorporated town or village;.............. the president of the board of trustees shall perform the duties which devolve in each case upon the mayor of an incorporated city or town; and the county attorney of the county in which the independent school district is located shall perform the duties which, in such a case, devolve upon the city attorney of an incorporated city or town, under the provisions of Chapter 103, General Laws Regular Session, Twenty-fifth Legislature."

In respect to the powers conferred upon the board of trustees of an independent school district in the equalization, assessment and collection of taxes of the district, attention is called to Article 2883, R. S., which is as follows:

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

And also to the following provisions of Article 2861, R. S.:

"In the enforced collection of taxes, the Board of Trustees shall perform the duties which may devolve in such a case upon the city council of an incorporated city or town."

The powers of the city council of an incorporated city or town are thus set forth in Article 945, R. S., which is as follows:

"The city councils of the several cities and towns in this State incorporated under the general laws shall annually, at their first meeting, or as soon thereafter as practicable, appoint three commissioners, each being a qualified voter, a resident and property owner of the city or town for which he is appointed, who shall be styled the board of equalization; and at the same meeting with council shall, by ordinance, fix the time for the meeting of such board of equalization."

Succeeding articles of the statutes prescribe the duties of such board of equalization. The city council does not even have to approve the tax lists or rolls after the board has equalized the value. This duty devolves upon the board itself—Article 952, R. S. Outside of a general supervisory power, the city council seems to have nothing

else to do with the question of the collection of city taxes, except to prescribe the kind of notice to be given by the assessor and collector to the owners of property—Article 956, R. S.

It is plain from the provisions of the statutes referred to in respect to the powers of the city council in tax matters that a city council could not sit as a board of equalization. Therefore, in our opinion the board of trustees of an independent school district has not the power or authority to sit as a board of equalization in respect to the taxable property within an independent school district.

The only restriction placed by the statutes upon a board of equalization of an independent school district are those contained in the following portion of Article 2862, R. S.

"When a majority of the board of trustees of an independent school district prefer to have the taxes of their district assessed and collected by the county assessor and collector, same shall be assessed and collected by said county officers, and turned over to the treasurer of the independent school district for which such taxes have been collected; provided, that the property of such districts *having their taxes assessed and collected by the county assessor and collector, shall not be assessed at a greater value than that assessed for county and State purposes.*"

From this language it is plain that the Legislature intended that the property of an independent school district, having its own *board of equalization and its own assessor and collector,* might, for the taxing purpose of said district, be placed at a higher value than given it for state and county purposes, by the commissioners court, sitting as a board of equalization.

In providing that the property or an independent school district, which has its taxes assessed and collected by the county assessor and collector, "shall not be assessed at a greater value than that assessed for State and county purposes," the Legislature took a practical view of the subject. A great deal of bookkeeping is required in the assessment and collection of taxes. If the trustees of an independent school district should select the county assessor and collector to assess and collect the taxes of the district, and if the law at the same time permitted the property of the district to be assessed a a greater value for district purposes than for State and county purposes, it would be necessary for those county officers to keep two sets of books—one for State and county taxes and another for district taxes, whereas, if the district has its own board of equalization and its own assessor and collector, the books of the district would be kept by those district officers and the records of county officers would not be disturbed in the least, although the property of the district was assessed for district purposes at a greater value than placed on it for State and county purposes.

Having advised you that the trustees of an independent school district can not act as a board of equalization for the district, but only have the power to appoint such a board for the district, we will now indicate the opinion of this Department as to when this power of appointment should be exercised by the trustees.

Obviously, when the board of trustees have shown a preference to have the district tax assessed and collected by the county assessor and collector, the appointment of a board of equalization for the district becomes unnecessary, because such a board could not perform the

proper functions of a board of equlization, being inhibited by the pro visions of Article 2862, R. S. from placing a greater value on the property of the district for district taxation than placed thereon by the commissioners court for State and county purposes. Under such circumstances such a board could perform no useful or necessary purpose, and the law does not contemplate that the trustees shall be required to do a useless and unnecessary thing. Our Supreme Court so concluded in the case of Miller vs. Vance, 160 S. W., 739.

On the other hand if the district has its own assessor and collector the property therein can be assessed for district purposes at a greater value than placed thereon by the commissioners court for State and county purposes, and a board of equalization for the district becomes necessary and such a board should be appointed by the trustees. Article 2861 R. S., Avery vs. Cooper, 120 S. W., 734.

Hoping this gives the information desired, we are,

Yours very truly,

JNO. C. WALL,
Assistant Attorney General.

Op. No. 2160, Bk. 53, P. 466.

SCHOOLS AND SCHOOL DISTRICTS—TEXTBOOK COMMISSION—ADOPTION OF TEXTBOOKS.

Where the Textbook Commission has adopted textbooks covering specific subjects, they would be without power to adopt a different book, being a general treatise upon all the subjects theretofore adopted in separate books and no such general book could be substituted in the schools for the books upon specific subjects theretofore adopted.

The Textbook Commission, having adopted textbooks in physiology, physical geography, physics, chemistry and agriculture, would be without power to adopt a general science text covering each of these subjects if the same are to be substituted for either of the subjects covered by the textbooks upon specific subjects.

A textbook on general science might be adopted and put in use in the schools, provided it did not displace or be substituted for any one of the textbooks adopted upon the subjects heretofore named. General science might be used as a supplementary book after others adopted upon the subjects heretofore named. General science might be used as a supplementary book after others adopted upon the specific subjects had been used in good faith.

General science might be adopted and used in the schools as an elementary book, provided it did not displace or was not substituted for any other adopted book.

Chapter 44, Acts First Called Session, Thirty-fifth Legislature.

AUSTIN, TEXAS, December 10, 1919.

Mr. E. L. Dohoney, Secretary Textbook Commission, Building.

DEAR MR. DOHONEY: The Attorney General is in receipt of your letter of December 8th, reading as follows:

"I have been requested by the Textbook Commission to ask if they have authority to adopt a text in general science. As you doubtless know, the statute does not specifically authorize a text in general science, but does authorize physiology, physical geography, physics and chemistry and agricul-

ture. May the Commission adopt a general science, embracing all of these subjects and no other sciences? I would respectfully call your attention to the fact that the law prescribes general history and that the last Commission did not adopt a text on general history, but, in lieu of that, an ancient history and a modern history. The law also authorizes a text in algebra. The last Commission adopted two text books in algebra. They did the same on the subject of civics.

"May the present Commission, following that precedent, adopt a text on general science? The adoption of general science would serve the best interests of numerous small schools that are not financially able to secure laboratory equipment for all sciences."

In answering your inquiry this Department accepts and adopts your statement to the writer to the effect that the State Textbook Commission has adopted several separate textbooks upon physiology, physical geography, physics, chemistry and agriculture and that textbooks upon general science embrace each and all of these specific subjects.

The State Textbook Commission, having adopted books upon the specific subjects embraced in general science, then in the opinion of this Department the Textbook Commission would have no authority to adopt a text on general science, and the school authorities of this State would have no authority to put same in use in the public schools of this State if in so doing a prior adopted book upon any subject covered by general science would be displaced.

We understand from conversation with you and other members of your Department, especially Professor Marrs, that each of the texts named above are high school subjects and are not used in the elementary grades. We are further advised that works upon general science are of recent publication, the same having come into use within the past ten years, and are used and treated as elementary books for use in the first year of high school work.

If, therefore, the curriculum of the high school can be so arranged that a work upon general science may be used as an elementary book preceding the adopted texts upon specific subjects, and did not in any manner displace or be substituted for any adopted book, then we could see no objection to the adoption and use of such a work.

Again, under Section 6 of the Commission Act, the Textbook Commission has authority to adopt supplementary books. If a general science work could be used as a supplementary book following a bona fide use in good faith of an adopted book upon any of the specific subjects, then there would be no legal objections to its adoption and use.

Your Department further advises us that each of the texts adopted upon the specific subjects above mentioned were adopted by the Commission for a period of six years under the provisions of Section 4 of the Act, and that contracts have been entered into with the several publishing companies for the use of their publication for such period. It is stipulated in each of the contracts with these companies in effect that the books so adopted shall be introduced and used in the public free schools of this State to the exclusion of all others. This provision of the contract is clearly warranted by the letter and spirit of the law under which such adoptions were made. The purpose of the adoption of textbooks for use in schools is to establish and maintain uniformity of price and texts in the schools throughout the State, and it follows, therefore, that the adoption of one text upon a subject precludes the adoption of another.

It is the universal holding of the courts of this country, to which holding we find not a single dissent, that where an authorized board or commission has adopted textbooks for use in schools for a specific period of time that such books cannot be displaced by a subsequent adoption of a different book or series of books.

American Book Company vs. McElroy, et al., 76 S. W., 850;
Attorney General vs. Board of Education, City of Detroit, 95 N. W., 746.
State ex rel Dawson vs. Innes, 130 Pac., 677;
Rand McNally & Co. vs. Hartranft, 73 Pac., 401;
Jones vs. Board of Education, 50 N. W., 309;
Voorhees Law of Public Schools, Section 104.

In the case of American Book Company vs. McElroy, above cited, the school board had adopted Books 1, 2, 3, 4 and 5 of Baldwin's Readers. At a subsequent meeting the board attempted to substitute for Baldwin's Readers, Lights to Literature, Books 3, 4 and 5 published by Rand McNally & Company, and Graded Reader, Books 1 and 2, by Meynard Merrill & Company. The court held that the right of substitution did not exist and that the Baldwin Readers should be used in the schools.

In the case of Attorney General vs. Board of Education of Detroit, the board sought to substitute certain grammars for those theretofore adopted, holding that the adoption of the first texts was illegal as not in compliance with the law. The court, in holding the adoption legal, said:

"To uphold such a contention would be little short of a disgrace to the administration of law, and put it in the power of every school board in the State to virtually annual the law, as the defendant apparently has done in this case. We are therefore constrained to hold that the resolution in August, 1897, for the purchase and use of the Walsh Grammar School Arithmetic was a sufficient compliance with the law, and that it was not in the power of the defendant to change it within five years."

The other cases cited above are of like import, all holding that where texts have been adopted the Board has no power to substitute therefor other books subsequently adopted.

In Voorhees on the Law of Public Schools above cited, this author says:

"When a State Board of Education has in connection with the adoption of a series of textbooks contracted with the publisher for the use of such books for a period of five years in certain grades in the public schools, the Legislature has no power to impair the obligation of the contract, and the fact that the books adopted were found too advanced for the grade in which they were to be used is no excuse for the breach of such contract, and if such adopted book is not used at all for one of the years of such contract, a mandamus will lie to compel its use."

In support of this text, the author cites Rand McNally & Co. vs. Hartranft, above cited by us, and upon the last proposition announced, the case of Eaton & Company vs. Royal, 78 Pac. 1093.

In the case of Francis vs. Allegheny School District, 24 Pittsburg, L. J. (N. S.), 19, it is held that there is no authority to adopt more than one series of books covering the same studies, but it is also held in

these cases that all of the books in a series covering several grades in the same subject need not be by the same author, provided, of course, they may be so arranged as to be uniform in the sets in which they are used.

The volume in which these cases are reported is not accessible to us, but in the case of State Ex Rel. Simon vs. Fairchild, et al., 125 Pac., 40, we find a quotation from this case as follows:

> "Under the Pennsylvania law, there is no authority to adopt more than one series of books covering the same studies. But where there are several grades in the subject the books in the several sets need not all be by the same author. The different sets of the series may be by different authors, if they are so arranged as to be uniform in the sets in which they are used throughout the district. Francis vs. Allegheny School Dist., 24 Pittsb. L. J. (N. S.), 19."

If it is the purpose of the Textbook Commission to adopt a general science text to be substituted for either of the texts on specific sciences heretofore adopted, then we advise that the power does not exist, and that even though such a general science should be adopted the book could not be so used in the public schools that it would displace or be substituted for any other adopted book.

It has been suggested that general science being in the nature of an elementary work is essentially for use in the first year of high school work, and that at least some of the schools of this State propose to offer general science in lieu of, *first*—physical geography and physiology (being half-year books), or *second*—agriculture. This illustrates the vice we are endeavoring to point out in an adoption of a work on general science.

We, therefore, advise you:

(1) That a text on general science could not be adopted and used to displace texts upon specific subjects heretofore adopted;

(2) If it is possible in the operation of the schools to use a general science as an elementary study or as a supplementary book, such a course would be permissible under the law.

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

Op. No. 2171, Bk. 53, P. 512.

SCHOOLS AND SCHOOL DISTRICTS—TEXTBOOK COMMISSION.

The State Textbook Commission is prohibited from entering into a contract with any book publisher for books at a price in excess of the price such publishers are now furnishing or have offered to furnish and distribute the same book or books under contract with any other State, county or school district in the United States.

In event a publisher securing a contract with the State should at any time during the life of the contract sell any book or books mentioned therein to any other State, county or school district in the United States at a price lower than the price fixed in the contract, then it will be compelled to give to this State the benefit of the reduction.

Chapter 44, Acts of the First Called Session of the Thirty-fifth Legislature.

AUSTIN, TEXAS, January 6, 1920.

Miss Annie Webb Blanton, Superintendent of Education, Building.

DEAR MISS BLANTON: In your letter addressed to the Attorney General you call our attention to Section 14, Chapter 44, Acts of the First Called Session of the Thirty-fifth Legislature, being the Texas State Textbook Commission Act, and which Section appears in your digest as Section No. 280, and ask an opinion from this Department upon the following question:

> "If publishers made contracts before present conditions, they must sell their books at the specified prices during the duration of this contract. Does this section mean that they must furnish books as cheaply here as they offer to sell books in other states during the life of this contract? If they make no new contracts during the life of the Texas contract, at a lower figure than Texas contract, will this comply with Section 280?"

The section of the Act referred to contains two limitations,—one upon the Commission to contract, and the other to the effect that publishers securing the contracts shall give to this State the benefit of any reduction in price made to any other state, county, etc. This section reads in part as follows:

> "The Commission shall not in any case contract with the publisher for any book or books to be used in the public schools of this State at a price in excess of the lowest price at which said publisher or publishers furnish or have offered to furnish and distribute the same book or books under contract with any other State, county or school district in the United States, and all contracts with publishers for the furnishing of books hereunder shall further stipulate and bind such publishers that they will not hereafter during the life of the respective contracts furnish or offer to furnish and distribute the same book or books under contract with any other State, county or school district in the United States at a lower price than that at which said publishers agree to furnish and distribute the same books under the contracts executed pursuant to this Act, unless such publishers respectively shall immediately give such lower price to the beneficiaries of the contracts executed hereunder."

Subsequet portions of this section make it the duty of the Attorney General to institute suit upon the bond of the publisher for a recovery on behalf of the State to liquidate damages had thereunder for a violation of the above provisions.

The first limitation in that section of the article quoted above is upon the right of the Textbook Commission to enter contracts, while the second limitation or obligation is upon the contractors to give to the State the benefit of any reduced price at which it may sell the books to any other state, county or district, and the penalty imposed in subsequent provisions of the section in our opinión applies only to the reduced price given by the publisher after entering into a contract with this State, and we do not believe a suit could be maintained upon the bond in event a publishing company should continue to sell books at a lower price in some other state under a contract entered into prior to making the contract with this State, for the reason that this section provides:

"And in case that any contractor, who has a contract to furnish a book or books for the State under the provisions of this State, shall at any time during the period of this adoption contract with any other State, county or school district in the United States to furnish and distribute the same book or books at a lower price than fixed in accordance with the provisions of this Act under similar conditions of sale and distribution as may be decided by the Texas State Textbook Commission, such lower price shall immediately be given to the State of Texas."

It is further provided in this Act that for a breach of any of the conditions and stipulations herein contained or in the respective contracts, the contract may be forfeited and the contractors shall be liable to the State of Texas in liquidated damages in the full amount of the bond, and it shall be the duty of the Attorney General to bring suit on the bond for such damages.

We note that in all the contracts entered into by the Textbook Commission under the first adoption under this Act that Section 4 of the contract provides in part as follows:

"Said contractor represents and warrants that the prices hereinbefore mentioned are not in excess of the lowest price at which said contractor has agreed to furnish and distribute the same book under contract with any other State, county or school district within the United States."

This provision inserted in the contract is in pursuance of the plain mandate of the law, to the effect that the Commission is without authority to contract with a price in excess of the lowest price at which the publisher is furnishing or has offered to furnish and distribute the same book or books under contract with any other state, county or school district. The placing of this stipulation in the contract is a construction of the Act by the board charged with its enforcement, and is entitled to great weight in construing the Act.

This Department does not feel at liberty to advise the Board to disregard this plain provision of the Act, to the effect that they are prohibited from entering into a contract with any book publisher for books at a price in excess of the price at which it is now furnishing or has offered to furnish the same books to any other state, county or school district. We realize the cost of production of books has probably largely increased, and that there may be book publishers carrying out the contracts entered into three, four or five years ago, whereby they are furnishing books at a price at which they would not now enter into a contract running over a period of five years from this date, but this is not the condition to be relieved against by administrative officers. It is one for legislative action. The Legislature in its wisdom has placed this limitation on the Board, and we advise the Board to follow the law as it is written.

The answer to your second inquiry by stating that under the plain language of the Act, as well as the contracts and bonds to be entered into, book publishers obligate themselves to give to the State of Texas the benefit of any reduction in the price of books below that given to the State.

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

Op. No. 2007, Bk. 52, P. 185.

SCHOOLS AND SCHOOL DISTRICTS—FREE TEXT-BOOK LAW—PRICE OF BOOKS.

All school books sold to the State under the free text-book law, as well as all books sold to dealers and private individuals, should have printed on the back thereof the contract price as is provided by Section 22, Chapter 44, Acts First Called Session Thirty-fifth Legislature, which chapter is known as the Texas State Text-Book Commission Act.

AUSTIN, TEXAS, March 24, 1919.

Miss Annie Webb Blanton, Superintendent of Education, Building.

DEAR MISS BLANTON: In your favor addressed to the Attorney General you enclosed a communication addressed to Mr. Frank Barry, State Agent for Allyn & Bacon, asking for a ruling on the question of whether or not the free text-book law nullifies that provision of the Text-Book Commission Law wherein the book companies are required to print the price of the book on the back thereof, the contention of the book company being that the State under the free text-book law becomes the purchaser and owner of the book, and as the State is in possession of the contract and knows the terms thereof, it would be useless to print the retail and exchange prices on the back.

We cannot agree with the contention of the book company and will state our reasons for failing to agree with them. It is provided in the Act of the First Called Session of the Thirty-fifth Legislature, creating the Texas State Text-Book Commission, that the contract price of each book shall be plainly printed on the back thereof; Section 22 of this Act being in the following language:

"Section 22. The contract price of each book shall be plainly printed on the back of each book, together with the following notice, 'The price marked hereon is fixed by the State, and any deviation therefrom should be reported to the State Superintendent of Public Instruction.' First two years of the contract for new books the exchange price of each book shall be printed thereon, also."

Under the above section, every book sold under contract in the State of Texas must have the price printed thereon, together with the language required by the above-quoted section. Unless the above section of this Act has been, either expressly or by implication, repealed by some subsequent act of the Legislature, it remains in full force and effect.

We will now examine the free text-book act passed by the Regular Session of the Thirty-sixth Legislature to determine whether or not there is anything in that act that either expressly or by implication repeals that provision of the Text-Book Commission Law which requires the price of the book to be printed on the back thereof.

It is provided by Section 20 of the State free text-book law enacted by the Regular Session of the Thirty-sixth Legislature as follows:

"Section 20. Immediately upon the taking effect of this Act it shall be the duty of the State Superintendent of Public Instruction to notify all parties holding contracts for the sale of text books for use in the public schools of this State to the effect that the State of Texas has taken over

the contracts now existing and will purchase books thereunder according to their terms."

This section of the Act was inserted in pursuance of Section 31 of the Act creating the Texas State Textbook Commission, which in effect provides for the taking over by the State of all contracts with publishers for the sale of text-books in event of the adoption of the proposed amendment to Article 7 of the Constitution of Texas to be voted on in November, 1918. The proposed amendment mentioned was adopted and a clause was inserted in all contracts made with the book companies to the effect that the contract should inure to the benefit of the State of Texas upon the adoption of such amendment.

There is nothing in the free text-book law that either expressly or by implication repeals Section 22 of the Text-Book Commission Law, and it is only upon the theory that there is no necessity for printing the price of the book on the back thereof, because the books are delivered to the State in wholesale lots and no good reason exists for the printing of the price thereon To our minds, this is not a sufficient reason for holding this provision of the law inoperative, and is wholly insufficient upon which to predicate a holding that this requirement and provision of the former act is by implication repealed by the latter.

In the case of Conley vs. Daughters of the Republic, 156 S. W., 197, the Supreme Court of this State re-affirmed the doctrine so often announced by the courts of the country that repeals by implication are not favored. In order for there to be an implied repeal of a former statute by some subsequent enactment of the Legislature, there must be such an irreconcilable conflict or repugnancy between the two statutes that they can not both stand. Clearly there is no such conflict nor repugnancy between these two acts, and we therefore hold that there is no implied repeal of the provision requiring the printing of the price on the back of school books.

The free text-book law in no sense varies the terms of the contracts entered into between the State Text-Book Commission and the publisher. The prices fixed in these contracts remain the same, the only effect of the free text-book law being that the State becomes the purchaser of the book in lieu of the patrons and children of the school. It will also be noted in Section 6 of the free text-book law that any person or school not controlled by the State or dealer in any county in the State may order books from the State agency or depository, and the books so ordered shall be printed at the same rate and discount as are granted to the State. This contemplates that dealers may engage in the sale of books to the patrons and children of the schools, and that when so purchased the books become the property of the purchasers. The purchasers of these books from the dealers are entitled to know the contract price, both as to original purchase and for exchange. Certainly the law requires that books so handled should have the price printed thereon, and there is no provision of either act authorizing and requiring the printing of the price on the back of books sold by dealers and omitting the same from books sold to the State.

We, therefore, advise you that in our opinion all books sold either to the State or to dealers or private persons for use in the schools of this State should have the price thereof printed on the back as required by Section 22 of the Text-Book Commission Law herein cited and referred to.

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

Op. No. 2013, Bk. 52, P. 213.

SCHOOLS AND SCHOOL DISTRICTS—FREE TEXTBOOK LAW—ADOPTED BOOKS.

Under what is known as the State Free Text-Book Law, enacted by the Regular Session of the Thirty-sixth Legislature, it is the duty of the State Superintendent of Public Instruction under the direction and approval of the State Board of Education to purchase and furnish to the pupils of the free schools of this State all books that have been adopted and contracted for under the terms of the Text-Book Commission Act, passed by the First Called Session of the Thirty-fifth Legislature.

Under the terms of this Act, the Superintendent would have no authority and it would not be her duty to purchase and supply any book not adopted and contracted for under the terms of the Act of the Thirty-fifth Legislature.

AUSTIN, TEXAS, March 26, 1919.

Miss Annie Webb Blanton, Superintendent of Education, Capitol.

DEAR MISS BLANTON: The Attorney General has your communication wherein you desire an opinion from this Department as to whether or not it is your duty under the free text-book law to provide free text-books upon subjects for which no adoptions were made by the Texas State Text-Book Commission under the Act of the First Called Session of the Thirty-fifth Legislature.

It is the opinion of this Department that your authority in the purchase and furnishing to the school children of this State free text-books is limited to the purchase of those books that have been adopted and are contracted for in pursuance of the directions contained in Chapter 44, Acts of the First Called Session of the Thirty-fifth Legislature, creating the Texas State Text-Books Commission and authorizing the adoption of books upon certain subjects, and the making of contracts with publishers for the printing of such books.

The amendment to Section 3, Article 7, of the Constitution, which was adopted at the November election, 1918, makes it the duty of the State Board of Education to set aside a sufficient amount out of the ad valorem school tax to provide free text-books for the use of children attending the public free schools of this State. While this constitutional provision is broad enough to authorize the purchase and free distribution of all books used in the public schools of this State, it is not self-enacting, and therefore requires an act of the Legislature to put the same into effect by providing the

machinery and the procedure to be followed in the purchase and distribution of the books. By what is known as the Free Text-Book Law enacted at the Regular Session of the Thirty-sixth Legislature, the Legislature has prescribed the course to be followed in putting this amendment to the Constitution into effect. An analysis of this law discloses the fact that it is based entirely upon the idea that it is the duty of the State Superintendent of Public Instruction to purchase and distribute, free of charge to the patrons and pupils of the public schools of this State, only those books that have been adopted by the Texas State Text-Book Commission and contracted for with the publishers under the terms of the Act of the First Called Session of the Thirty-fifth Legislature.

As expressing the intention of the Legislature that it was only the books under contract that are to be furnished under the free text-book law, we cite the following sections of the Act.

Section 1. In this section the State Board of Education is authorized and empowered and it is made its duty to purchase books *from the contractors of textbooks* used in the public free schools of this State and distribute the same without other cost to the pupils.

Section 6. It is required by this section that all parties with whom book contracts have been made shall establish and maintain a State Depository where a supply of their goods shall be kept. It is further provided by this section that any person, school not controlled by the State, or dealer may order books from the said agency or depository, and upon the failure of any contractor to furnish books as provided for in the contract and in this Act, the county judge shall report the fact to the Attorney General, who shall bring suit in the name of the State of Texas and recover on the bond given by the contractor.

Section 13. By this section the State Superintendent, with the approval of the Board of Education, is authorized to make specific rules as to the requisition, distribution, care, use and disposal of the books, provided that such rules shall not conflict with the provisions of this Act or with the uniform text-book law, under the terms of which contracts are made with the publisher, or with the terms of said contracts.

Section 15. It is provided in this Section that any book may be purchased from the State depository designated by the contractor holding the contract for said book by any State institution or by private schools or church schools or by pupils or parents of the pupils attending the public schools of this State.

Section 16. This section provides for the making of complaints in regard to text-book service and stipulates that such complaints shall be made both to the State Superintendent and to the State depository designated by contractors of the books.

As said above, the entire Act discloses the intention of the Legislature that the books to be purchased and distributed by the State Superintendent are the adopted books that have been contracted for, but we cite the above sections as clearly indicating the purpose.

Recurring again to the Act of the Thirty-fifth Legislature, authorizing the adoption of the uniform textbooks of this State, it will be noted

that Section 5 of this Act limits the books to be adopted to certain texts enumerated in the Section. It is clear that this Section contemplates that there are other texts used in the public free schools of this State than those for which adoption is provided, but the Free Textbook Law does not comprehend such other books.

We, therefore, advise you that under the Free Textbook Law you are not authorized to purchase and distribute any book not adopted and contracted for under the Act of the Thirty-fifth Legislature. We might say in this connection that no procedure is laid down for you to follow in the purchase of any book not on the contract. Should you attempt to do so, we suspect that you would find your facilities wholly inadequate, and you would find yourself adrift without chart or compass to guide you.

We think your suggestion that this is a matter requiring legislative action is a good one and that this is the only method whereby other textbooks may be furnished if the Legislature so desires.

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

SCHOOLS—SCHOOL DISTRICTS—FREE TEXTBOOK LAW—CUSTODY OF BOOKS—BONDS OF CUSTODIANS.

Op. No. 2037, Bk. 52, P. 391.

Under the Free Text-Book Law, enacted by the Thirty-sixth Legislature, the school trustees of each district are authorized to designate one or more members of the board or employes of the board to have charge of the distribution and management of the books. The persons so selected are required to enter into bond in the sum of 50% in excess of the value of books assigned to the district.

Such bond is the personal undertaking and obligation of the principal and is not the obligation of the district.

Form of bond submitted.

AUSTIN, TEXAS, April 16, 1919.

Miss Annie Webb Blanton, Superintendent of Education, Building.

DEAR MISS BLANTON: You enclosed for an opinion thereon a communication addressed to Honorable A. E. Wilson, County Attorney of Brown County, by R. A. McLeskey, County Superintendent of that county, requesting an opinion on that provision of the State Free Textbook Law requiring one or more members or employees of each district board of trustees to enter into bond in the sum of fifty (50%) per cent in excess of the value of the books consigned to them by the State. You desire to know whether this bond is an individual bond of these members or employees, or is such bond the obligation of the school district?

What is known as the Free Textbook Law enacted by the Regular Session of the Thirty-sixth Legislature provides in Sections 7 and 8 for the custody, distribution and management of the books furnished to school districts for use of the children, such Sections being as follows:

"Section 7. The school trustees of each district shall be designated as the legal custodians of the books, and shall have the power to make such arrangements for the distribution of books to the pupils as they may deem most effective and economical; provided, that no district shall have the power to make any regulation in regard to text books which is at variance with the provisions of this Act, or with the regulation of the State, made by the State Superintendent of Public Instruction and approved by the State Board of Education.

"Section 8. Books shall remain the property of the State, and after purchase through requisition according to the provisions of this Act, shall remain in the charge of the district school trustees as the legal custodians of the books. The district school trustees shall have the power to delegate to their employes such power as to requisitions and distributions of books and the *management* of books as in their judgment may be best; provided, that such plans shall not be at variance with the provisions of this law, or with the State Rules for Free Text-Books, formulated by the State Superintendent of Public Instruction and approved by the State Board of Education."

The substance of the foregoing two sections is that the school trustees of each district are the custodians of the books, and that the district trustees shall have the power to make such arrangements for the distribution and management of the books as in their judgment may be best, provided, of course, the regulations so adopted shall not be at variance with the provisions of the Act.

Following these sections, it is provided in Section 9 of the Act that one or more members or employes of each district board shall enter into bond in the sum of fifty (50%) per cent in excess of the value of the books consigned to them by the State, such bond to be payable in Austin, Texas, to the Governor of the State, or his successors in office, and to be approved by the county judge of the county, and the State Superintendent of Public Instruction, after which it is deposited with the State Superintendent. Such bond shall be conditioned on the faithful discharge of the duties of the person so selected and that he will faithfully account for all books coming into his or their possession and for all moneys received from the sale of such books.

The above quoted provision of the Act in plain language made the school trustees of each district the legal custodians of the school books furnished the children of such district. It gives them the power to provide for an effective and economical distribution and management of such books. These Articles construed together clearly indicate a purpose on the part of the Legislature to authorize the school trustees of each district to select one or more of the members of such boards or employees of such boards to have actual charge of the distribution and general management of the books so assigned. Such action on the part of the board in selecting a person or persons to have charge and management of the books would not in any way conflict with the provisions of the Act, but would be in pursuance of the express authority vested in such board by the language of the Act. Having selected the persons to have charge and management of the books, then the Act requires that such persons enter into the bond above described. Such bond would be the individual undertaking of the parties executing it, and would not be the obligation of the district. To hold that such a bond was the obligation of the school district and not of the individual principals thereon would destroy the very purpose of the bond, to make the person having charge of the books responsible for their distribution and safe keeping.

We, therefore, advise you that in the opinion of this Department, the bond executed under the provisions of Section 9 of the Act is the individual undertaxing of the principal or principals thereto, and is not the obligation of the district.

As requested, we submit the following as a proper form for the bond to be used in such cases:

THE STATE OF TEXAS, }
County of.................} *Know all Men by These Presents:*

That, we.. and ....of the State of Texas and County of................, as principals, and................... and...........................of the County of............... of the State of Texas as sureties are held and firmly bound unto Honorable W. P. Hobby, Governor of the State of Texas, and his successors in office in the sum of $............., for the payment of which in Austin, Travis County, Texas, we bind ourselves, our heirs and legal representatives jointly and severally by these presents.

The condition of the above obligation is such that whereas the above bounden............ .... and .... were on the.........day of....................1919, selected by the board of school trustees of the........................School District of............... ......County, Texas, to have charge of the distribution and management of the free textbooks furnished to the children of such district under the provisions of what is known as the Texas Free Textbook Law enacted by the Regular Session of the Thirty-sixth Legislature.

Now, therefore, if the said................................and ....shall faithfully discharge all of their duties under such employment and under the act of the Legislature aforesaid and shall faithfully account for all books coming into their possession and for all moneys received from the sales of such books, then this obligation to be void, otherwise to remain in full force and effect.

In testimony whereof, we have hereunto set our hands, this the ....day of..................A. D. 1919.

....
....
....
....

Approved, this the.........day of................A. D. 1919.

....
County Judge of.............County, Texas.

Approved, this the.........day of................A. D. 1919.

....
State Superintendent of Public Instruction.

Filed this the..........day of.....................A. D. 1919.

....
State Superintendent of Public Instruction.

The above bond, of course, will be varied in accordance with the number of persons so selected. It will be noted that under the provisions of Section 9, the law does not designate the number of sureties that must sign this bond; therefore, any number of sureties, taking

into consideration their financial ability, that will make the bond a good and sufficient bond in the judgment of the county judge and State Superintendent, will meet the requirement of the law.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

Op. No. 2005, Bk. 52, P. 166.

SCHOOL AND SCHOOL DISTRICTS UNIFORM TEXTBOOK.

Where a contract is entered into under the law of 1917, renewing a contract made under the law of 1911 for supplementary readers, the readers called for in such contract should be first used in the schools whenever supplementary readers are used.

AUSTIN, TEXAS, March 22, 1919.

Miss Annie Webb Blanton, Superintendent of Education, Building.

DEAR MISS BLANTON: The Attorney General has your letter, which is as follows:

"The letter and papers which I am enclosing relate to a matter which is appealed to me by one of the text-book companies. I have examined the law on the subject and it seems to favor their contention. However, I was present at the discussion of the State Text-book Board at which they definitely decided that all supplementary readers should be on the same basis and that no one should be favored over others. I feel that I have no right to set aside the ruling of the Text-Book Commission. However, if your Department should rule that this contention of the text-book company, Scott, Foresman & Company, is in accordance with the law, I should have no choice in the matter, as it is my duty as a State officer to carry out the provisions of the law.

"Will you kindly examine these papers and give me your ruling as to the contention made therein. As many business matters depend upon this decision, I should be glad to have this ruling at your earliest convenience."

From an examination of the papers submitted by you, as well as a search of the records of your Department, it appears that Scott, Foresman and Company, publishers of Elson's Readers, insist that their readers for the Fourth, Fifth, Sixth and Seventh Grades should be used as the first supplementary readers out of the nine sets or series of supplementary readers adopted by the present Textbook Commission. Their contention arises by reason of the fact that under the Act of 1911, such readers were the supplementary readers adopted for these grades, and under the Act of 1917, their contract was renewed for a term of five years. They insist that under the Act of 1911, only one set of supplementary readers was adopted whereby an exclusive right arose, and as the Act of 1917 made it mandatory upon the present Board to renew any contract made under the former law upon the terms and conditions of the previous contract, when such contract was renewed, they have the prior right to supply supplementary readers before any of the eight other sets may be used.

We will first cite the various acts of the Legislature and then apply the same under the rules of construction to the facts as they exist in this case, which facts we will briefly state.

TEXTBOOK LAW OF 1911.

The First Called Session of the Thirty-second Legislature enacted a law providing for a uniform system of text-books to be used in the schools of this State. After providing for the adoption of certain text-books to be known as basal books, this Act in Section 5 thereof provides that:

"The Text-Book Board shall also select and adopt a set of supplementary reading books for the primary and intermediate grades, and each bidder presenting such reading books shall state at what price the readers are offered as supplementary readers. No supplementary books, however, shall be purchased and used to the exclusion of the books prescribed under the provisions of Section 4 of this Act, but full use must be made in good faith of the books selected by said board under Section 4 before any of the supplementary books provided for in this section shall be required to be purchased and used; and no other supplementary readers shall be required to be purchased and used in the schools until the readers provided for in this section shall be used in good faith."

It was under the above section that the contract of Scott, Foresman & Company was entered into under which Elson's Readers have been used as supplementary readers for the past six years in the Fourth, Fifth, Sixth and Seventh Grades.

THE TEXTBOOK LAW OF 1917.

The contracts entered into under the Act of 1911, expiring on August 31, 1919, it became necessary that the Legislature should enact legislation providing for a new adoption, beginning with September 1, 1919, if a uniform text-book system should be continued in this State. The Thirty-fifth Legislature, therefore, at its First Called Session enacted Chapter 44 of the printed acts of such session, which Act creates a permanent text-book commission with power to adopt text-books for use in schools. Section 4 of this Act provides in part as follows:

"Provided no book or books in the present list of State adopted text-books shall be changed if the contractor furnishing same will, when said Commission meets, agree to enter into contract and bond to continue to furnish such book or books at the price and of the quality and upon the conditions specified in the current contract for a period of time not less than one year and not more than six years, as may be determined by the Commission * * *; and provided further, that persons holding present contracts shall continue to furnish said books of as good yuality and at as low price, as at present, and upon the same conditions as contained in existing contracts."

We will now discuss the facts as they appear from the records submitted. It appears that this question arises by reason of an action of the Texas State Text-book Commission on January 18th, which is

fully shown by the following copy of the minutes of the Commission for that date:

"OFFICE OF STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

"January 18, 1919—Continued—10:00 A. M.

"The Texas State Text-Book Commission was called to order at 10:00 a. m. by Mr. O'Banion with the following members present: J. W. O'Banion, Acting Chairman; Ella F. Little, W. T. Lofland, R. E. Wallace and Lizzie M. Barbour.

"The purpose of the meeting as stated by Mr. O'Banion was to determine whether or not the sets of supplementary readers should be placed on the same basis.

"A motion was made by Mr. Lofland and seconded by Miss Barbour that the nine sets of supplementary readers be placed on an equal basis. *Motion carried unanimously.*

"*W. T. Lofland*, "Acting Secretary.

J. W. O'Banion, Acting Chairman."

On pages 421 to 426 inclusive of the minutes of the State Textbook Board, created under the Act of 1911, will be found the contract of Scott, Foresman & Company to furnish Elson's Fourth, Fifth, Sixth and Seventh Grade Readers for use as supplementary readers in the public schools of Texas for the grades indicated and at the prices named in the contract. This contract stipulates in the third paragraph from the last to the effect that the Board, by virtue of the authority vested in it by the Act of the Legislature and on behalf of the State of Texas, agrees and covenants that the text-books mentioned shall be introduced into and used in the public free schools of this State to the exclusion of all others for the period of time covering six scholastic years beginning September 1, 1913. This is a contract that was renewed by the present Texas State Text-book Commission as will hereinafter appear.

It appears from the minutes of the Texas State Text-book Commission created under the Act of 1917 that said Commission met on August 15, 1918, and among other things directed the Governor to advertise for bids as follows:

"The Governor stated that he would submit to the Attorney General for official interpretation any question that might arise in the minds of the members of the Commission regarding any of the terms and provisions of the law; that it was his purpose to render the Commission any helpful assistance that would facilitate the work of the Commission in the adoption of suitable text-books for the schools of Texas.

"Upon motion of W. F. Doughty, duly seconded by Miss Winkler, the Commission authorized the Governor to advertise for bids as follows:

"1. For new adoptions to include text-books of Oral English, History of English Literature, History of American Literature, High School Civics, Solid Geometry, Chemistry, Drawing Books, Latin, eight Supplementary Readers for each grade from first to seventh, inclusive.

"2. For renewal of all present contracts for adoption for a period of time not less than one year and not more than six years, as authorized by the Text-Book Law.

"3. For approval of all other texts than adopted text-books for use in the public schools of Texas."

There is copied in these minutes the Governor's proclamation, complying with the direction of the Commission as to the advertis-

ing of bids. At a subsequent meeting of the Commission held on October 22, bids were received in response to the advertisement of the Governor. Among the bids so received was that of Scott, Foresman & Company for the renewal of their contract on Elson's Readers as above set out, which appears on page 99 under date of September 24, 1918.

It appears that the Commission accepted the bid of Scott, Foresman & Company for a renewal of their contract on Fourth, Fifth, Sixth and Seventh Grade Elson Readers for a period of five years as is shown by the following extract from the minutes at page 123:

"It was moved by Mr. Wallace that the contract with Scott, Foresman & Company for the publication of readers fourth, fifth, sixth and seventh grade, by Elson, be renewed for a period of five years, beginning September 1, 1919. Mrs. Little seconded the motion and it was so ordered by the Commission."

On page 291 of the minutes of the present Commission, the renewal contract of Scott, Foresman and Company is recorded, and in such contract it is provided that the contract of December 2, 1912, is renewed upon the conditions specified in the current contract executed as aforesaid.

It appears that the renewal contract entered into with Scott, Foresman and Company was the first adoption of a supplementary reader under the Act of 1917. At subsequent meetings of the Commission, there was adopted eight other sets of supplemental readers as is shown in the minutes of the Commission for December 16th and 18th, beginning at page 217 of the minutes of the Commission.

It further appears from the data submitted to us that before Scott, Foresman and Company presented their bid for a renewal of their contract on Elson Readers, they submitted the question to Honorable W. F. Doughty, the then Superintendent of Education, for his construction of renewal contracts. Six questions were propounded to Mr. Doughty by Honorable Marshall Hicks, Attorney for Scott, Foresman & Company, each of which questions sought an expression of the opinion of the Superintendent upon the effect of the prospective renewal of Scott, Foresman and Company's contract, and whether or not such a renewal would give the readers therein enumerated a preference right. The reply of Mr. Doughty is as follows:

"I am in receipt of your letter of the twenty-fourth instant, in which you propound six questions, requesting an opinion from me as to the meaning of a certain part of the current advertisement of the State Text-Book Board for new adoptions and for renewals of contracts for text-books, which contracts will begin September 1, 1918.

"In the first place you ask 'If the Board should adopt "eight supplementary readers for each grade from first to seventh, inclusive," can such supplementary readers or any of them be used in the schools (or any of them) until the "series of supplementary readers for the elementary grades, which are required to be adopted by Section 6, have been purchased and used in good faith?"' In reply to this question, I desire to say that, in my opinion, none of these texts can be used until the series of supplementary readers for the elementary grades, which are required to be adopted by Section 6, have been purchased and used in good faith.

"In the second place you ask 'If the adoption by the Board of eight sup-

plementary readers for each grade, as proposed, in any manner take the place of or interfere with the compulsory purchase and use in good faith of the series of supplementary readers now in use, or which may be in use in future, if the present contracts for supplementary readers are extended.' In reply to this question, I desire to say that, in my opinion, the adoption by the Board of eight supplementary readers for each grade, as proposed, will not in any manner take the place of or interfere with the compulsory purchase and use in good faith of the series of supplementary readers now in use, or which may be in use in future, if the present contracts for supplementary readers are extended.

"In the third place you ask, 'If eight supplementary readers for each grade are adopted as proposed will pupils be required to purchase and use the books of the series of supplementary readers as now used in the respective grades before any of the eight supplementary readers for each grade can be used?' In reply to this question, I will state that it is my opinion that the pupils will be required to purchase and use the books of the series of supplementary readers as now used in the respective grades before any of the eight supplementary readers for each grade can be used.

"In the fourth place you ask, 'Will the Board adopt the eight supplementary readers for each grade under the power given in Section 6 to adopt "a series of supplementary readers for the elementary grades," or will the eight supplementary readers for each grade be adopted under the power given in Section 6 to adopt "such other supplementary books as it may deem advisable for use in the public schools?"' In reply, I will state that, in my opinion, the eight supplementary readers will be adopted by the Board for each grade under the power given in Section 6 to adopt such other supplementary books as it may deem advisable for use in the public schools.

"In the fifth place you ask 'If a contractor should be awarded a contract for furnishing the "series" of supplementary readers for the elementary grades as provided in Section 6, or a part of such series, could he rely upon the fact that such books of such series so awarded would be purchased and used in the respective grades before any of the eight supplementary readers advertised for would be purchased and used?' In reply, will state that, in my opinion, a contractor awarded a contract for furnishing the series of supplementary readers for the elementary grades as provided in Section 6, or a part of such series, could rely on the fact that such books of such series so awarded would be purchased and used in the respective grades before any of the eight supplementary readers advertised for would be purchased and used.

"In the sixth place you ask 'Would the "series" of supplementary readers for the elementary grades mentioned in Section 6 and as now in use be treated as *basic* supplementary readers and required to be used as such in the respective grades before any of the eight supplementary readers for each grade, proposed to be adopted, could be used?' In reply, will say that it is my opinion that the series of supplementary readers for the elementary grades mentioned in Section 6 and as now in use would be treated as basic supplementary readers and that their use would be required as such in the respective grades before any of the eight supplementary readers for each grade, proposed to be adopted, could be used."

It will thus be seen that it was the construction of the department that if Scott, Foresman & Company's contract was renewed the Elson Readers therein provided for should be used as supplementary readers before any of the other eight sets were used, and it was upon this condition, as well as upon the conditions expressly provided in the contract, that Scott, Foresman & Company offered their bid and entered into the renewal contract.

Not only by the express terms of the contract, but by express provisions of the law, the renewal contract of Scott, Foresman & Company is upon the same terms and conditions as that of the former

contract entered into under the law of 1911. Under the former contract, the supplementary readers therein contracted for were the only supplementary readers used in schools. The present Commission having adopted a total of nine sets of supplementary readers, if the Elson Readers published by Scott, Foresman & Company are placed upon the same basis as the other readers and are used only at the option of the teachers in the various schools, then it is manifest that the contract of Scott, Foresman & Company, which was an exclusive contract, has not been renewed although the law makes it mandatory upon the Commission to renew the same where an offer is made on the part of the contractor as was done in this case.

The Act of 1917 expressly provides in substance that no book or books in the present list of State adopted books shall be changed if the contractor agrees to enter into a contract to furnish such book at the price and of the quality and upon the conditions specified in the current contract. This condition Scott, Foresman & Company have complied with and have agreed to furnish the Elson Readers at the price and of the quality and upon the conditions specified in their former contract. One of the conditions of the former contract is, as has been seen above, that the Elson Readers are to be used in the public free schools of this State to the exclusion of all others. Having renewed the contract upon the same terms and conditions, then we are of the opinion that the Elson Readers should be used first as supplementary readers and that after such readers have been used then others of the eight sets may be used.

To our minds, this is the only construction that will harmonize Sections 4 and 6 of the present textbook law, Section 4 making it mandatory upon the Commission to renew existing contract, and Section 6 authorizing the Commission to adopt a series of supplementary readers for the elementary grades and such other supplementary books as it may deem advisable for use in the public free schools of the State. Any other construction of these two sections would result in attributing to the Legislature a purpose to renew a contract upon its terms and conditions, and at the same time destroy the conditions of that contract. The former contract of Scott, Foresman & Company was an exclusive one. Their readers were the only supplementary readers adopted and no others could be used until they, in good faith, had been used. Now, if under a renewal of this contract, their readers are to be used upon the same basis as the eight other sets, it clearly appears that the value of their contract has been greatly reduced, for where under their former contract their readers were used where any supplementary readers were used, they now have only one chance in nine to place their books in the schools because the teachers have the option of selecting the supplementary books to be used. To our minds, this construction would violate Section 6, Article 1, of the Constitution, which provides among other things that no law impairing the obligation of contracts shall be made. Therefore, the construction placed upon this law by the Commission when it entered an order placing all supplemental readers upon an equal basis was in effect placing the construction upon the act that would make it void.

The doctrine is well established that where two constructions can be placed upon an act, one constitutional and the other violative of the Constitution, it is the duty of the court to place a construction upon the act that would make it constitutional.

G. C. & S. F. Ry. Co. vs. State, 120 S. W., 1028;
State vs. Post, 169 S. W., 401;
Class vs. Pool, 166 S. W., 375;
Camp vs. State, 135 S. W., 146.

We, therefore, advise you that in the opinion of this Department the action of the Commission placing all supplementary readers upon the same basis is unwarranted in so far as the renewal contract of Scott, Foresman & Company is concerned, and that supplementary readers contracted for by the renewal of this contract should be used as the first supplementary readers where supplementary readers are used in the schools.

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

Op. No. 2164, Bk. 53, P. 540.

PUBLIC EDUCATION—TRANSFERS—SCHOOL DISTRICTS—COUNTY TRUSTEES—COUNTY SUPERINTENDENT.

County Superintendents of Public Instruction, acting upon the recommendation of the county school trustees may transfer children from a common school district to an independent school district, or from a common school district to another common school district at any time, provided the necessity for such transfer arises, because of the classification of the school district, in which the child resides, by the county school trustees.

School children, transferred from a common school district to an independent school district, under the provisions of Article 2749c, Revised Civil Statutes, are only entitled to attend the school in the independent school district for the length of time that the school in that district is able to run from the funds derived from the State and county available school fund; thereafter, such children must pay tuition, if demanded.

Articles 2760, 2761, 2762 and 2749b, 2749c, Revised Civil Statutes;

Chapter Thirty-six, Acts of the Second Called Session of the Thirty-sixth Legislature.

AUSTIN, TEXAS, January 17, 1920.

Miss Annie Webb Blanton, Superintendent Public Instruction, Capitol.

DEAR MADAM: Your letter of November 25th, addressed to the Attorney General, has been received. The delay in answering this communication has been occasioned by an unusual rush of business in this office. We regret the delay and hope to be able to give your inquiries immediate attention in the future.

Your letter reads as follows:

"In keeping with our conversation, I am referring to you a letter from Mr. T. L. Price, superintendent of schools, Goldthwaite, Texas. I would

like to have your ruling on the authority of the county board of education to make transfers after August first.

"1. Have they authority to transfer children for high school purposes after the above mentioned date?

"2. Have they authority to transfer from a common school district to an independent district in the same county?

"3. May such transfers be made, even though the independent district is crowded and not in a position to offer school advantages to the transferred children?"

I will attempt to answer your inquiries in the order in which they come.

First, you desire to know if the County Board of Education has the authority to transfer children for high school purposes after the above mentioned date. In order to answer this question, as well as the other questions submitted, it will be necessary to go into a full discussion of all of the statutes pertaining to the transfer of school children from one district to another. These statutes must be construed together so as to give the full purport and meaning to them as was intended by the Legislature.

Article 2760, 2761 and 2762 are the general statutes dealing with the transfer of children. These articles read as follows:

"Art. 2760. Any child lawfully enrolled in any district, or independent district, may be transferred to the enrollment of any other district, or independent district, in the same county, upon the written application of the parent or guardian or person having the lawful control of such child, filed with the county superintendent; but no child shall be transferred more than once; provided, the party making application for transfer shall state in said application that it is the bona fide intention of applicant to send child to the school to which transfer is asked. Upon the transfer of any child, its portion of the school funds shall follow and be paid over to the district, or independent district, to which such child is transferred; provided, no transfer shall be made after August first, after the enrollment was made.

"Art. 2761. Any child specified in the preceding article, and its portion of the school fund, may be transferred to an adjacent district in another county, in the same manner as is provided in said article for the transfer of such child or children from one district to another in the same county; provided, that it must be shown to the county superintendent that the school in the district in which such child or children reside, on account of distance or some uncontrollable and dangerous obstacle, is inaccessible to such child or children.

"Art. 2762. Except as herein provided, no part of the school fund apportioned to any district or county shall be transferred to any other district or county; provided, that 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 districts interested."

By the provisions of Article 2760, it is provided that any child lawfully enrolled in any district, common or independent, may be transferred to any other district, common or independent, in the same county upon proper application being made; and when the transfer is made, the child's portion of the school funds shall follow

and be paid over to the district, with the further provision that no transfer shall be made after August 1st, after the enrollment was made.

Article 2761, quoted above, provides for the transfer of a child, together with its apportionment, to an adjacent district in another county, when it is shown to the County Superintendent that the school in the district in which such child resides, on account of distance or some uncontrollable and dangerous obstacle, is inaccessible to such child or children. Children, under this article, cannot be transferred after the 1st of August, after the enrollment has been made.

By the provisions of Article 2762, quoted above, the transfer of any part of the school fund apportioned to any district or county is prohibited from being transferred to any other district or county, except 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 fund of one county shall be transferred to the county in which the principal school building for such consolidated district is located.

It is also provided that all of the children residing in a school district may be transferred to another district, either common or independent, on such terms as may be agreed upon by the trustees of said districts interested.

These were all of the articles governing the transfer of children from one school district to another until the adoption of Chapter 36, Acts of the 34th Legislature, which Acts are further known as Articles 2749-a to 2749-l, inclusive, Vernon's Sayles' Civil Statutes. These articles deal exclusively with county school trustees and are amendments to Chapter 26, Acts of the Regular Session of the Thirty-sixth Legislature, dealing with the same subject

Article 2749-b deals with the classification of schools, and the course of study for schools, and, among other things, it is provided:

"The county trustees shall not so classify any school as to deprive any child of scholastic age of its right to receive instruction in the grades in which it belongs in the proper school of the district in which it resides, unless arrangements are made by the county school trustees for said child to attend a school of proper classification, free of charge, in some district which is within reasonable walking distance of the home of said child; that is, a school of proper classification which is not more than three miles from the home of said child; the distance to be computed according to the route or road commonly traveled in going from the home of said child to the school building, or unless the county school trustees shall arrange for the free transportation daily of said child to and from the school of proper classification, in which case, the expense of such transportation shall be paid for by the district trustees out of the funds of the district in which the child actually resides; to the end that no child shall be deprived of its right to attend school."

That portion of Article 2749-c which deals with the transfer of children from one district to another reads:

"In providing better schooling for the children and in carrying out the provisions of Section 2 of this Act (Art. 2749a), the county superintendent of public instruction shall, on the recommendation of the county school

trustees, transfer children of scholastic age from one school district to another and the amount of funds to be transferred with each child of scholastic age shall be the amount to which the district from which the child is transferred is entitled to, receive."

The paragraph just quoted was enacted for the purpose, as stated herein, of carrying out the provisions of Section 2 of said Act, Article 2749-a. The Legislature evidently intended to say for the purpose of carrying out the provisions of Section 3 of said Act, Article 2749-b, because that is the article which more specifically deals with the purposes of the Act than does Section 2.

The provisions of Article 2749-b, Section 3, of the Act, quoted above, provide that the county school trustees in classifying the schools of the county, under the rules prescribed by the State Superintendent of Public Instruction, shall not so classify the same as to deprive any child of the privilege of attending school and be instructed in the grades to which it properly belongs in the public school of the district in which it resides. And then it provides that if such a classification is made, and the child is prohibited from attending the school in the district in which it resides, because no grade is taught in said school of the grade in which such child properly belongs, then the county trustees shall make arrangements to send said child, free of charge, to another district where there is a school of proper classification for said child, and which is not more than three miles from the home of said child; and said trustees are further prohibited from so classifying any school as to prohibit the attendance of a child who resides in said district from attending its schools, unless the county trustees shall arrange for the free transportation, daily, of said child to and from a school of proper classification. The expenses of such transportation shall be borne by the district trustees out of the funds of the district in which the child actually resides.

It is the opinion of the writer that that portion of Article 2749-c, quoted above, and dealing with the transfer of children by the county superintendent of public instruction, upon the recommendation of the county school trustees, was enacted for the purpose of meeting the conditions and emergencies which would arise under the provisions of Article 2749-b, as outlined above. That is, where the county school trustees so classified a school that some child who lived in that school district could not attend the school, as classified, because no grades were being taught in which the child properly belonged. This classification might be made at any time of the year, and in order to provide for the attendance of such a child to a proper school, it was provided that such child should be sent to some school within three miles of its home and if no such school could be found within three miles of its home, then the child is entitled to be sent to any convenient school within the county where it can be properly taught; and said child would be entitled to free transportation from its home to such school, daily; and the expense borne by the trustees of the school district where said child resides.

This law, with reference to the transfer of children upon the recommendation of the county trustees and by the county superintendent of public instruction, was enacted for the purpose of meeting

the emergencies, arising from the proper classification of a public school by the county trustees and only applies to such emergencies. The Thirty-sixth Legislature, at its Second Called Session, passed a calamity transfer act which is known as Chapter 36. This Act can in no wise apply to the question we have under consideration and it is, therefore, unnecessary to quote its provisions.

It is the opinion of this Department, and you are so advised, that the county superintendent of public instruction, acting upon the recommendation of the county board of trustees, may make transfers at any time during the year, under the provisions of Article 2749c, where the emergency is such as to have arisen by virtue of the classification of some school or schools under the provisions of Article 2749b, but unless such emergency had arisen such transfer cannot be made after the first of August, after the apportionment has been made.

By your second question you desire to know if county trustees have authority to transfer a child from a common school district to an independent school district in the same county.

By the provisions of Article 2760, quoted above, it is made very plain that the county superintendent may transfer children from a common to an independent school district and in that portion of Article 2749-c, quoted above, it is provided:

"* * * the county superintendent of public instruction shall, on the recommendation of the county school trustees, transfer children of scholastic age from one school district to another and the amount of funds to be transferred with each child of scholastic age shall be the amount to which the district from which the child is transferred is entitled to receive."

At the time of the adoption of the provisions of Article 2749-c, quoted above, article 2760 was the only statute dealing with the transfer of children from a common to an independent district or from an independent district to a common district. This the Legislature is presumed to have known. It is a well-known principle of statutory construction that in interpreting a statute the intent of the Legislature is to be ascertained, if possible. What then was the intention of the Legislature in adopting that portion of Article 2749c quoted above? The Legislature was enacting a new law which made it possible for a County Board of Education to classify schools in such a manner that the greatest good would result to the greatest number of school children. By this system of classification and grading it might be possible that some child, or children, residing in a common school district, would be deprived of a proper classification, so that it could not attend the school in the district in which it resided. If no arrangement was made whereby such child could attend some other school of proper classification, a great injustice would be done it. The Legislature then evidently had in mind the purpose and spirit of our Constitution and laws to the effect that no child should be deprived of an equal opportunity to attend the public schools of our State. In order to meet this emergency, they wrote into the provisions of the law that portion of Article 2749, quoted above. If a child could not attend the district in which it resided because there was no suitable grade taught in said school then the child was to

be sent to a school of proper classification, free of charge, in another district which is within reasonable walking distance of the home of the said child. If no school of proper classification was within three miles of the home of such child, then it became incumbent, under the provisions of Article 2749b, for the county school trustees to arrange for the free transportation, daily, of said child to and from a school of proper classification and the expenses of such transportation to be paid by the district wherein the child resides. If these things cannot be done for the child then the statute inhibits the County School Trustees from making a classification that will deprive such child of the right to attend school in its own district. There is nothing in the statute which inhibits the County Superintendent from acting upon the recommendation of the County Trustees, from transferring such a child to an independent school district. This is as it should be. If it were otherwise there might be no common school district of proper classification for said child to attend. Under those conditions the county trustees could not properly classify a common school district.

You are, therefore, advised that it is the opinion of this Department that County Superintendents of Public Instruction may, upon the recommendation of county trustees, transfer a child from a common to an independent school district at any time, provided the necessity arises by reason of the classification of a school, under the provisions of Article 2749b, but such child, after being transferred to an independent school district, would only be entitled to attend said school for the length of time that said school was able to run upon State and County Available Funds. Thereafter such pupil would have to pay tuition, if demanded. It would not be entitled to attend such school during that portion of the school year which was being financed from local taxes alone without paying tuition. You are further advised that this provision of the statute does not repeal the provisions of Article 2760, which is the general statute governing the transfer of children from a common to an independent or from an independent to a common school district.

In reply to your third question, beg to advise that the Legislature has made no provision whereby the Board of Trustees of an independent school district may refuse to accept a child transferred to it under the provisions of Article 2749c, or any of the other articles dealing with the transferring of children, because of the crowded conditions of the schools in said independent district; neither is there any limitation placed upon the authority of the County School Superintendent to make said transfers because of said conditions.

Yours very truly,

BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 2230, Bk. 53, P. —.

I. SCHOOLS AND SCHOOL DISTRICTS:
(a) Chapter 65, Acts Second Called Session, Thirty-sixth Legislature,

providing for consolidation of school districts, does not repeal former laws on same subject.

(b) A common school district, after consolidation, under Chapter 65, above, with its geographical center more than 4½ miles from its farthest boundary line, is a legal district, notwithstanding the express provision in Article 2815, Revised Statutes, 1911.

(c) If an independent school district, after consolidation, under Chapter 65, above, contains more than 25 square miles, it is a legal district.

II. STATUTES:

(a) For a later statute to repeal an earlier one on same subject, by implication, there must be such a repugnance between the two laws that they cannot stand together.

(b) Chapter 65, Acts Second Called Session, Thirty-sixth Legislature, does not conflict with former laws providing for the creation of common school districts and the incorporation of independent school districts.

III. WORDS AND PHRASES:

(a) The phrase "all laws and parts of laws in conflict herewith are hereby repealed" is substantially useless for the reason that any former laws in conflict with the Act containing this phrase are, by implication, repealed.

AUSTIN, TEXAS, June 7, 1920.

Miss Annie Webb Blanton, State Superintendent of Public Instruction, Capitol.

DEAR MISS BLANTON: In your communication of the 5th inst., addressed to the Attorney General, you request to be advised—

(1) Whether the new law for the consolidation of common and independent school districts repeals all the existing laws on the consolidation of school districts.

(2) Whether a common school district, after consolidation, having its geographical center more than 4½ miles from its most remote boundary line, is a legal district.

(3) Whether an independent school district, after consolidation, containing more than 25 square miles, is a legal district.

Answering the above questions in their order, you are advised:

(1) The statute (Chapter 65, Acts 2nd Called Session Thirty-sixth Legislature) providing for the consolidation of common school districts and for the consolidation of common school districts with independent school districts, does not repeal all existing laws on the consolidation of school districts.

While Section 10 of this Chapter contains a general clause to the effect that "all laws and parts of laws in conflict with this Act are hereby repealed," yet it is a well established proposition of law that for a later statute to repeal an earlier one on the same subject, by implication, there must be such a repugnance between the two laws that they cannot stand together; and repeals by implication are never favored.

Davidson vs. Schmidt, 124 S. W., 552;
Baldan vs. State, 127 S. W., 134;
Sayles vs. Robinson, 129 S. W., 346;
Austin vs. State, 135 S. W., 1167;
Dallas County Levee District No. 2 vs. Looney, 207 S. W., 310;
Lasater vs. Lopez, 217 S. W., 375, 377;
Veltman vs. Slator, 217 S. W., 378.

In Lasater vs. Lopez, supra, the Supreme Court held:

"There is no more valuable rule for the guidance of courts than that which expresses the disfavor with which the law regards the implied repeal of a statute. The reason for the rule is the reluctance of the law to have imposed upon the courts of the land what in its essence is a legislative province. In clear cases of repugnancy between statutes the courts must exercise it, but only in clear cases should they exercise it. The antagonism between the two statutes must be absolute—so pronounced that both cannot stand, before a court is warranted in holding, as a mere matter of construction, an earlier law, or a power conferred by such a law, repealed by implication."

By Chapter 36, Acts of 1915, Regular Session, county school trustees were authorized to subdivide the county into school districts and to make changes in school district lines, and also "to consolidate two or more common school districts into a larger common school district where a majority of the qualified electors of each common school district at interest shall petition the county school trustees for consolidation in order that a high school may be established." This law is a general statute dealing with the establishment of and the general supervision over common school districts. It is another well recognized rule of construction that statutes relating to the same subject should be considered as if incorporated in one Act and construed together, if possible, so as to give effect to each. (See Conley vs. Daughters of the Republic, 156 S. W., 197.) In this case the Supreme Court, speaking through Chief Justice Brown, held as follows:

"There is no express repeal of the former law. Hence if repealed it must be by implication, which is not favored. The new laws relate to the same subject and should be considered as if incorporated into one act. If, being so considered, the two can be harmonized and effect given to each, there can be no repeal. Neal vs. Keeze, 5 Texas, 23. 'These statutes being in parti materia and relating to the same subject, are to be taken together and so construed in reference to each other as that, if practicable, effect may be given to the entire provisions of each. Thus considered, there is no repugnancy between the provisions of these statutes. They may stand together and effect may be given to the entire provisions of each. And thus to construe and give effect to them is in accordance with the established rule of construction,'" Brown vs. Chancellor, 61 Texas, 438.

This Department, in an opinion to the Comptroller of Public Accounts, dated November 2, 1915, construed the phrase "all laws and parts of laws in conflict herewith are hereby repealed" and held as follows:

"This is a broadcast assertion commonly inserted at the close of bills, which in effect has but very little meaning, and is substantially useless, for the reason that any laws in conflict with the Act containing this clause are by implication repealed, as in conflict with the Act." (See 1914-'16 Attorney General's Opinions, page 526.)

(2) Where two or more contiguous common school districts in a county having less than 10,000 inhabitants are consolidated at an election held for that purpose under Chapter 65, Acts Second Called Session Thirty-sixth Legislature, and results in a consolidated common school district with a geographical center more than 4½ miles from its farthest boundary line, the same, in our opinion, would be a legal

district. The law which declares that no common school district in a county containing a population of less than 10,000 inhabitants shall have its geographical center more than four miles from the farthest boundary line of the district applies only to common school districts organized or established by the county school trustees under Article 2815 R. S. 1911, as amended by Section 4, Chapter 36, Acts 1915, Regular Session.

(3) Where an independent school district consolidates with one or more adjacent common school districts at an election held for that purpose under Chapter 65, Acts Second Called Session Thirty-sixth Legislature, and such district after consolidation contains more than 25 square miles, the same is nevertheless a legal district. The provision in the law restricting the area of independent school districts to 25 square miles applies only to those districts incorporated for free school purposes under the provisions of Article 2851, R. S. 1911.

We find no conflict between the Act providing for the consolidation of common and independent school districts and former laws on the subject of the creation of common school districts and the incorporation of independent school districts; nor do we see any conflict between the new consolidation Act and the Act of 1915 authorizing the county school trustees to consolidate common school districts for the purpose of establishing a high school. However, districts organized or incorporated under either of the laws referred to must be controlled by the law of their creation until changed in a manner provided by the statute.

Very respectfully,

W. P. DUMAS,
Assistant Attorney General.

Op. No. 2002, Bk. 52, P. 158.

COMMON SCHOOL DISTRICTS—COUNTY TRUSTEES—
CHANGING BOUNDARIES.

County school trustees may change the boundaries of a common school district whenever it is necessary for the best interests of the school children who are to be served, provided they do not reduce the area of any common school district that has voted bonds, and the same are an outstanding indebtedness against the district.

The action of the county school trustees in changing the boundaries of a common school district is subject to review by the district court.

Article 2815, Vernon's Sayles' Civil Statutes, 1914;
Article 2749c, Vernon's Sayles' Civil Statutes, 1918 Supplement;
Article 2749d, Vernon's Sayles' Civil Statutes, 1918 Supplement;
Article 2816, Vernon's Sayles' Civil Statutes, 1914.

AUSTIN, TEXAS, March 19, 1919.

Miss Annie Webb Blanton, State Superintendent of Education, Capitol.

DEAR MISS BLANTON: I have your letter of March 18th addressed to the Attorney General, wherein you propound to this Department the following question:

"Has the county board of trustees the authority to change the boundaries of a school district and move the school house without giving the patrons of the school a hearing?"

In reply, your attention is respectfully directed to Article 2749c Vernon's Sayles' Civil Statutes, 1918 Supplement, wherein it is provided that:

"The county school trustees are authorized to exercise the authority heretofore vested in the county commissioners court with respect to subdividing the county into school districts and to making changes in school district lines * * *"

The power heretofore vested in the county commissioners' court with respect to changing the boundaries of common school districts is to be found in Article 2815 Vernon's Sayles' Civil Statutes 1914, wherein it is provided that:

"It shall be the duty of the county commissioners courts of all organized counties not already subdivided to subdivide their respective counties into convenient school districts. * * * The county commissioners court may reduce the area of any common school district and create such additional school districts as may be necessary for the best interest of the school children. * * *"

And by Article 2816 Vernon's Sayles' Civil Statutes, 1914, it is provided that:

"It shall be the duty of the commissioners court at any time they deem necessary to re-district a part of all of said county; and they may at any time consolidate two or more adjacent school districts or may subdivide any school district or districts. * * *"

By considering the quotations taken from Articles 2815 and 2816, it will be seen that under the old law the commissioners' court had the right at any time they deemed it necessary to change the boundaries of any common school district, provided that such changes were necessary for the best interests of the school children.

Section 4a of Chapter 36 Acts Thirty-fourth Legislature passed at its Regular Session, and being a part of the same law that provides for the county school trustees to exercise the authority heretofore vested in the commissioners' court with respect to changing the boundaries in common school districts, and which is Article 2749d Vernon's Sayles' Civil Statutes, 1918 Supplement, provides that:

"The district court shall have general supervisory control of the actions of the county board of school trustees in creating, changing and modifying school districts."

In most and perhaps in every other matter pertaining to the schools of the common school districts of the county, appeals are taken from the county superintendent of public instruction to the county school trustees, and from the county school trustees to the State Superintendent of Public Instruction, and from the State Superintendent to the State Board of Education, and the finding of the State Board of Education ordinarily is final. However, the Legislature has seen

fit in its wisdom to give to the district court supervisory control of the actions of the county school trustees in matters pertaining to creating, changing and modifying school districts.

It is now the law that the county school trustees have the authority to change the boundaries of common school districts, whereas formerly it was the law that the commissioners' court had and exercised the same authority as that now exercised by the county school trustees, and in the case of Clarke et. al. vs. Hallem et. al., 187 S. W., 964, the Court of Civil Appeals at Fort Worth, speaking through Chief Justice Conner, held that under Acts Thirty-fourth Legislature, Chapter 36, providing for organization of public high schools in common school districts by Section 4a giving the district court "general supervisory control of the actions of the county board of school trustees in creating, changing and modifying school districts," and by Section 10, providing that appeals from the county superintendent of public instruction shall lie to the county school trustees, and from them to the State Superintendent of Public Instruction, and thence to the State Board of Education. Appeals to the district court may be made direct from action of the county board of school trustees in consolidating districts, since the specific provisions of Section 4a construed with Section 10 control the general provisions of the latter.

In the case Price vs. County School Trustees, 192 S. W., 1140, the substance of the facts alleged was that about July 11, 1892, the commissioners' court of Navarro County upon a petition of a majority of the legal voters having a voice therein lawfully created Common School District No. 82, containing about 4,000 acres of land; that on or about May 20, 1916, upon petition of certain taxpayers, voters and patrons in Common School District No. 60, the county school trustees of Navarro County added to School District No. 602,600 acres out of School District No. 82, and the remaining 1,300 acres in said District No. 82 were added to School District No. 45 and District No. 82 was ordered abolished. In passing on these facts the Court of Civil Appeals at Dallas, speaking through Justice Rasbury, discussed the law applicable to the facts in that case and quoted from the various statutes which we have quoted from in this opinion and then concluded as follows:

> "Some contention is that with reference to the failure of the county trustees to submit the question of annexing the territory constituting appellant's districts to Districts No. 60 and 45, to a vote of those to be affected. We have been unable to find in the many Acts on the subject as they now exist any such requirement, and it would seem that as the law now stands the trustees are vested with a broad and flexible discretion in the exercise of their authority, with the concurrent right on the part of those interested to review their acts in the district court."

You are, therefore, advised that the county board of trustees has the authority to change the boundaries of a common school district without giving the patrons of the schools or the taxpayers of the district a hearing, provided that it is for the best interest of the school children who are to be served to have the boundaries of the school district changed, provided further that the county school trustees do not reduce the area of any common school district that has voted bonds and the same are an outstanding indebtedness against

the district. The county school trustees may increase the area of a common school district that has outstanding bonds, but it cannot reduce the area, and in the event the patrons of the school and the taxpayers living within the school district where the boundaries are so changed are dissatisfied and are convinced that the changes ordered to be made by the county school trustees are in fact not for the best interests of the school children who are to be served, they may have the action of the county school trustees reviewed by the district court, for an appeal will lie direct from the action of the county board of trustees to the district court.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 1951, Bk. 51, P. 395.

SCHOOLS AND SCHOOL DISTRICTS.

Where schools are closed by school boards, health officers, or by county councils of defense on account of epidemics, teachers are entitled to receive their salaries, unless expressed provision to the contrary is made, either in the teacher's contract or by agreement.

AUSTIN, TEXAS, November 7, 1918.

Hon. W. F. Doughty, Superintendent of Public Instruction, Building.

DEAR SIR: You state that on account of the prevalence of influenza throughout the State, numerous schools have been forced to suspend work because of the action of the school boards, health officers and County Councils of Defense; that there has arisen the question of whether or not teachers are entitled to their salaries during the time schools are so suspended. It appears from your letter that you have advised that where the school board suspends the schools, the teachers are entitled to their compensation, following decisions of Randolph vs. Saunders, 54 S. W., 621, and Singleton vs. Austin, 56 S. W., 696.

You ask this Department to answer the following question:

"Are teachers entitled to receive their salaries if no provision has been made to the contrary during such time as schools may be dismissed on account of epidemic (a) by school boards, (b) by health officers, (c) by county councils of defense?"

Our opinion is based upon the assumption that there is no provision in the teachers' contracts covering the subject and that no arrangement or agreement had been reached with the teachers at the time the schools were suspended. Unless the contract contained such provision, or agreement had been reached between the school trustees and the teachers at the time of such suspension, to the effect that the teachers should not receive their usual salaries during the time of such suspension, then the teachers are entitled to their salaries and vouchers should be drawn therefor.

The authorities cited by you in support of your advice support the proposition here announced. In Randolph vs. Saunders, payment of

teachers' vouchers was refused, on the ground that the school was suspended on account of the epidemic of smallpox for the entire period covered by the vouchers. The teacher's contract provided that the school board might cancel same and close the school under certain conditions; but the court held that the school had not been closed. On the contrary, it was only temporarily suspended and liable to open at any time. The plaintiff was notified that she was to be ready to work when school was resumed, which might have occurred any day. It was no dereliction or fault on her part in any respect. The court said that had the schools been closed permanently, that she would have been able to seek other employment; but, as it was, she was held as teacher under her contract and that the city could not in justice claim that her time, so spent, was not in actual service of the schools. The court held that the warrant was in conformity with the ordinance requiring that the services be rendered and the salary due for which it should issue.

There are numerous cases to the effect that where schools are closed on account of some epidemic, the teachers are entitled to their salaries.

Greer vs. Gray, 37 N. E., 1069;
Libby vs. Inhabitants of Douglass, 175 Mass., 128;
McKay vs. Barnett, 50 L. R. A., 371.

The authorities have gone even further than the rule above announced, in holding that teachers are entitled to their salaries during the time which the school suspended. In School Directors vs. Krews, 23 Ill. Appeals, 367, the court held that where a school house is destroyed by fire and the directors fail to furnish another room, a teacher can recover under his contract to teach for five months, although he has kept no schedule and can furnish none.

Of like import is Cora vs. Board of Education, 39 Ill. Appeals, 446.

In the case of Dewey vs. Union School District, 43 Mich., 480, the court held, in substance, that the act of God that will excuse the performance of the contract must be one rendering the performance impossible, so that where schools are suspended on account of smallpox the teacher, remaining ready to perform his contract, is not by reason of such suspension precluded from his right to compensation during the period of suspension.

In our opinion, the true rule is that where a school is merely suspended by whatever authority is authorized to suspend same and the teacher holds himself, or herself, ready to resume work on notice of the suspending authority, such teacher is entitled to compensation for the time the school is suspended. Of course, if the school is closed permanently and the teacher discharged, the rule would be different.

It is immaterial by what authority the schools in this State have been closed during the epidemic of influenza. The school board is the proper authority to close schools, but it is not necessary in this opinion for us to determine whether or not a local council of defense or a county health officer in this State has authority to close schools on account of an epidemic not quarantinable. If the county health officer, or council of defense, has the authority to close the schools; then when such authority is exercised, the teachers are entitled to their compen-

sation. If neither the health officer nor the council of defense have such authority, then where schools have been closed we must assume that it was either by order of the board of trustees, or they assented to and acquiesced in such temporary suspension out of deference to the suggestion by the health officer or council of defense. In either case, the teachers held themselves in readiness to perform their part of the contract. They were not at liberty to seek employment elsewhere, for at any day they might be called upon to resume their work in the schoolroom. We, therefore, advise you that where schools have been closed during the epidemic of influenza, by order of either the trustees, county health officer, or the council of defense, and there is no provision in the teacher's contract to the contrary and no agreement was had with the teacher, then such teacher is entitled to his full salary for the period of such suspension.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

Op. No. 1986, Bk. 52, P. 62.

SCHOOLS AND SCHOOL DISTRICTS—SCHOOL PROPERTY LEASES.

(1) District trustees have the control and management of school property.
(2) District trustees may lease a portion of a school lot for oil and gas purposes when same is not needed for school purposes and the conduct of the school is not interefered with.

AUSTIN, TEXAS, March 1, 1919.

Hon. Mr. Speaker and Members, House of Representatives, Capitol.

GENTLEMEN: In response to the inquiry embodied in a Resolution of the House, adopted on February 21, 1919, as follows:

"Resolved by the House of Representatives, that the State Attorney General be and he is hereby called upon to say who has authority to lease district school lots,"

we find that in order to answer same it is first necessary to determine whether or not anyone has authority to give such lease.

By Articles 2846 and 2847 the control and management of all school property, including grounds, is vested in the district trustees of such district, and Articles 2853 and 2854, relating to towns, villages and organized school districts, provide that the control and management of the property of said district is vested in its school board.

It his been repeatedly held, in this and other states, that school boards and municipal corporations may lease unused portions of school premises when by so doing they do not interfere with the conditions of the school nor the use of the property for school purposes.

In the case of Gottlieb-Knabe and Company of Baltimore County, et al., vs. Charles F. Machlin, et al., 31 L. R. S., N. S., 580, 71

Atlantic, 949, the Maryland Court of Appeals held that the City of Baltimore could lease property not needed for school purposes, for private use.

In Royse Independent School District, et al., vs. Rinehart, et al., 159 S. W., 110, Judge Rainey, Chief Justice, speaking for the court, said:

"An independent school district, such as appellant, is a quasi corporation under the laws of this State with its administrative powers vested in the board of trustees. This board of trustees, by the statute under which the school district is organized, is given exclusive power of management, regulation, and control of the schools and school property of the corporation. The powers thus conferred seem to be analogous to the powers granted to a city or town over the public property of such city or town. It has been held that a municipal corporation, having erected a building in good faith for municipal purposes, has the right when such building is no longer used by the municipality, or when parts of it are not used for public use, or when at intervals the whole building is not so used, and when it does not interfere with its public use, to permit it to be used either gratuitously or for a compensation for private purposes. * * *"

In this case the trustees of the Royse Public School District had leased a portion of the school campus for the use of a baseball club and the court held that such lease was valid, and that such contract not ultra vires.

In a former opinion of this department, of date October 28, 1915, it was held that a school board could lease the upper story of a school building for lodge purposes. Opinions of Attorney General, 1914-16, page 585. For other authorities on this view see:

Batts vs. Bassit, 1 L. R. A., 166, 15 Atlantic, 200;
Warden vs. New Bedford, 41 Am. Rep., 185;
Falls County vs. DeLany, 73 Texas, 453, 3 Dillon, Section 997.

This last case simply holds that even though the Constitution of this State required the public school lands to be sold the county should have the power to derive a revenue from their lands by lease, if such disposition should be deemed best for the interests of the public schools.

In the case of John Herald et al. vs. Board of Education, 31, L. R. A., N. S., 588; S. E., 102, the Supreme Court of West Virginia, by divided opinion, held that a school board had no power to lease a portion of the school land for oil and gas purposes, but the majority of the Court seemed to base their opinion on the theory that in so leasing such property the school board would be engaging in the oil and gas business, and, therefore, exceeding their functions as a school board. They argue at length on the question that a school board is organized for school purposes only, and can carry on no other business than that of running the schools and for that reason are precluded from leasing a portion of the school lot for oil and gas, but Miller, Presiding Justice, in his dissenting opinion more nearly covers the point at issue, and follows more accurately the bulk of the opinion as to the powers of the school board. He uses these words:

"Having title and power of disposition, and, in the language of the statute, 'deemed the owner of the real and personal property of their district,' can it be possible that a board of education, because it is a board, is so surrounded by legal barriers and limitations on its powers that it cannot lawfully preserve the property of which it is so possessed, and to which it is entitled? * * * Here we must assume is a rich and valuable mine underlying this schoolhouse lot. If oil and gas exist there, it is as much property of the owners of the soil as the earth, rock, or any other mineral or mineral substance existing there. Is the school board to stand by with its hands tied, powerless to protect the public property in its keeping, and allow adjoining owners and lessees to drain the public land of this valuable product? * * * Suppose in place of oil it was a stone quarry, or a gold mine, or timber, or some other product of the land, would not this board on the principles of the opinion be powerless to utilize the wealth thus found imbedded in the public land? * * * The controlling question here is: Had this board the power to preserve the public property invested in it from deportation and spoliation by others? I think there can be no question that it had such power, if we regard the oil and gas surplus property, not needed for school purposes, and proper to be disposed of, and the money covered into the proper fund * * *"

And to support his opinion, Justice Miller quotes authorities above referred to, and in addition thereto Bryant vs. Logan, 49 S. E., 21; 3 Am. & Eng. Ann. Cases, 1011, in which the same Court held that a municipality had the right to let to private individuals a large portion of the public land for horse-racing purposes to the exclusion of the public in general.

Therefore, I would answer the inquiry of the resolution as follows: That the School Board, having the control and management of the lot or premises, is the proper person to execute a lease of said premises for oil and gas purposes; that said lease can be executed and said property turned over to the other persons for use only on condition that same is not needed or used for school purposes and that the use to which same is to be put shall not interfere with the conduct of the school or with the use of the premises for school purposes.

With the reference to the power of local school boards to lease lots for oil and gas or any other purposes, there is an apparent conflict in the statute that deserves the attention of the Legislature

Article 2846, Vernon's Sayles' Revised Statutes, provides that "the trustees of any school district, on the order of the Commissioners' Court prescribing the terms thereof, when deemed advisable, may make a sale of any property belonging to said school district."

Article 2849-f, Vernon's Sayles' Revised Sttutes, provides that "all rights and powers pertaining to public free schools of the county that have heretofore been vested in the Commissioners' Court, and that are not prescribed by this Act, shall hereafter be vested in the County School Trustees," and

Article 2849-g provides "the title to any school property belonging to the county, the title of which has heretofore been vested in the County Judge and his successors in office, or any school property that may be acquired, shall vest in the county school trustees and their successors in office for public free school purposes."

These last two articles quoted were passed by the Thirty-second

Legislature. The Regular Session of the Thirty-fourth Legislature passed an Act entitled "an Act to amend Chapter 26 of the Acts of the Regular Session, Thirty-second Legislature," including in said Act of the Thirty-fourth Legislature the two articles last above quoted, and in said Act purporting to amend said last two articles. In Chapter 36, Section 4 of the General Laws, Thirty-Fourth Legislature, being House Bill 217, Article 2948-f, was made to read as follows:

"Section 4. County school trustees are authorized to exercise the authority heretofore vested in the county commissioners court with respect to subdividing counties into school districts and to making changes in school district lines," and

Section 7 of said Act repeats the provisions of Article 2849-g, Vernon's Sayles' Revised Civil Statutes, with reference to title to school property.

By referring to these several statutes it will be readily seen that there is at least an apparent conflict as to whether or not the district school trustees should have the consent of the county commissioners' court or of the county board of trustees, or either of them, in making sales or leases of school property.

It is difficult to determine this question, in view of these statutes, and I would, therefore, recommend to the Legislature that a bill be passed, clarifying and making definite as to who should approve such sale or lease by the local trustees, whether the county commissioners' court or the county school board, as in the judgment of the Legislature is wisest and best.

Yours very truly,
JOHN W. MAXWELL,
Assistant Attorney General.

Op. No. 1992, Bk. 52, P. 79.

MUNICIPAL CORPORATIONS—CITIES AND TOWNS—SCHOOLS AND SCHOOL DISTRICTS.

(1) The tax limit for school purposes in an independent school district created by general or special law is 50 cents on the one hundred dollars valuation of taxable property therein.

(2) The Legislature would be authorized to create the City of Marshall into an independent school district, but the taxing powers of such district could not exceed the 50-cent limit.

(3) No city or town operating under special charter can levy taxes for any purpose in excess of $2.50 onthe one hundred dollars valuation of taxable property therein.

AUSTIN, TEXAS, March 8, 1919.

Hon. F. M. Scott. County Attorney, Marshall, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of the 22nd ultimo, in which you submit the following:

"Will you please give me an opinion as to what the tax limit for school purposes is in an independent school district?

"Can the City of Marshall be organized as an independent school district?

"It is the desire of the citizenship of Marshall to organize as a separate independent school district and vote taxes beyond the 2½ per cent. limit in the Constitution if possible to do so upon the vote of the people.

"There is a difference of opinion among good lawyers of Marshall as to whether or not an independent school district can exceed the 2½ per cent. limit provided by the Constitution."

Replying, I beg to say:

First: The tax limit for school purposes in an independent school district created by general or special law is 50 cents on the $100 valuation of taxable property therein.

Constitution, Sec. 3, Art. 7;
Vernon's Sayles' Texas Civil Statutes, Art. 2857.

Second: The Legislature would be authorized to create the city of Marshall into an independent school district, but the taxing powers of such district thus created could not exceed the 50-cent maximum prescribed by Section 3 of Article 7 of the Constitution.

By Section 3 of Article 7, above, authority is conferred upon the Legislature to

"Provide for the formation of school districts by general or special law without the local notice required in other cases of special legislation."

By Section 10 of Article 11 of the Constitution, the Legislature is authorized to constitute a city or town a separate or independent school district, and which was done in the enactment of the special law which now forms the Special Charter of the City of Marshall. (Ch. 6, Special Acts, 1909.)

Third: No city or town operating under a special charter can levy taxes for *any purpose* in excess of $2.50 on the $100 valuation of taxable property therein.

The effect of the so-called "Home Rule Amendment" to the Constitution (Section 5 of Article 11) was to confer upon municipalities of a certain class the full power of local self-government. This amendment had a distinct purpose. It was never intended that it should interfere with the authority of the Legislature in the creation and the control of school districts. Therefore, no inconsistency exists between the "Home Rule Amendment" and Section 3 of Article 7 and Section 10 of Article 11. Consequently, the Legislature may continue to exercise its "free hand" with reference to all school districts in this State, subject only to the limitations and restrictions prescribed by the Constitution.

"The 'Home Rule Amendment' declares that 'No tax for any purpose shall exceed 2½% of the taxable property of such city.'"

This restriction is applicable to city school taxes as well as *other city taxes.*

While it is true that the city of Marshall has been constituted a

separate and independent school district, yet such district is under the jurisdiction to a large extent of the city authorities. Taxes levied for the maintenance and support of the schools are city taxes. All school buildings are public buildings of the city and form a part of its public improvements.

The Peck-Snead Co. vs. City of Sherman, 63 S. W., 340;
Hamilton vs. Bowers, 146 S. W., 629.

Bonds issued to construct or repair and equip such buildings would undoubtedly be "city bonds," the taxes levied therefor by the city commission would be "city taxes" and the purchasers or holders thereof would be required to look to the city for the payment of such bonds at their maturity.

In our opinion, therefore, Section 3 of Article 7, should be considered in connection with Section 5 of Article 11 of the Constitution. Furthermore, we think the provision in Section 3 of Article 7 to the effect that the 50-cent limitation is not applicable to "cities and towns constituting separate and independent school districts" authorizes *such* cities and towns to vote a school tax which, together with the taxes authorized by Section 5 of Article 11, cannot exceed $2.50 on the $100 valuation of taxable property. In other words, the city of Marshall can vote a school tax in excess of the 50-cent limit prescribed for school districts of another class by Section 3 of Article 7, but such school tax, *plus other city taxes*, cannot exceed the $2.50 limit expressly prescribed by Section 5 of Article 11.

Yours very respectfully,
W. P. DUMAS,
Assistant Attorney General.

Op. No. 2058, Bk. 52, P. 538.

SCHOOL DISTRICTS, TAX IN ADDED TERRITORY.

Where territory has been added to school districts and where, before such addition is made, such district has voted a tax of 50c on the $100.00 valuation, all property situated in such district in order to subject the property in the added territory to such tax, the matter must be submitted to the qualified voters of the said school district so increased, and a majority of the qualified tax paying voters of such district as enlarged must vote in favor of such tax.

SECTION 3, ARTICLE 7, TEXAS CONSTITUTION.

May 5th, 1919.

Miss Annie Webb Blanton, State Superintendent Education, Capitol.

DEAR MISS BLANTON: I have your letter of May 1st wherein you request an opinion from this Department concerning the question contained in a letter which you enclose from E. L. Blair, County School Superintendent of Jackson County. Superintendent Blair's letter reads as follows:

"Will you please advise me as to the following matter?
At a recent meeting of the county school board of this county, a change was made in the boundary line of a school district. The north boundary line was changed so as to take in more territory. The change was made at the request of the people of the territory affected. The district into which this strip of land was thrown has levied in the past a tax of not exceeding fifty cents on the one hundred dollar valuation. Can this tax continue to be collected or must another election be carried? I am aware of the fact that had two districts been consolidated a new election would have had to have been carried, but when only a small change is made in the boundary lines of two districts, both districts keeping their old names and old officers, is it essential?"

In reply your attention is respectfully directed to Section 3, Article 7 of our State Constitution, which in part reads as follows:

"And the Legislature may authorize an additional ad valorem tax to be levied and collected within all school districts, heretofore formed or hereafter formed, for the further maintenance of public free schools, and 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 50 cents on the $100 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 or towns, constituting separate and independent school districts."

This identical question has been passed upon by our Supreme Court in the case of Crabb et al. vs. Celeste Independent School District, 146 S. W., 528.

The suit in the above case was filed during the time that Section 3, Article 7 of our State Constitution, which was adopted September 25th, 1883, was in force. Under provisions of said sections, at that time the minimum tax that could be voted n a school district for the maintenance of the schools and the erection of school buildings was 20 cents on the $100 valuation of the property subject to taxation in such district. Since the above suit was filed, said Section 3 of Article 7 has been amended three times and at present school districts may vote a tax of 50 cents on the $100 valuation of property subject to taxation in such district. I state these facts so that the opinion of the court which we hereinafter quote from may be the more easily understood.

On May 24, 1907, upon a petition of the majority of inhabitants qualified to vote for members of the legislature, certain new and additional territory was annexed to the Celeste Independent School District. Certain persons residing in this additional territory brought suit against the defendant Celeste Independent School District for the twofold purpose of declaring void the action of the Board of Trustees of the Celeste Independent School District in annexing the territory in which such persons resided to such independent school district, and to enjoin the collection of a special tax of 20 cents on the $100 valuation of their property subject to taxation in such territory which had been assessed by proper authority the year 1908. It was conceded by all parties that the tax sought to be collected was voted by a two-thirds majority of the taxpaying voters of the Celeste Independent School District before the territory in question was annexed and that after the annexation no vote was had authorizing the tax.

The Court in passing upon this question said in part:

"By the terms of Section 3, Art. 7, of the Constitution, above quoted, the power is given independent school districts to levy and collect a tax of 20 cents on the $100 valuation of all the property subject to taxation situated within its limits; and the mode of levying and collecting such tax is limited to a vote of two-thirds of the qualified property taxpaying voters of the district, voting at an election held for that purpose. The mode thus prescribed excludes all others; and it may be said that, not only is no authority conferred by the Constitution to otherwise levy and collect such special tax, but that any other method of so doing is positively prohibited. Making a practical application of this rule, where an independent school district is incorporated with a fixed area, and as thus formed votes the tax, and afterwards takes in additional territory and levies a tax on the property in such territory, it seeks in effect to collect a special tax by the method of territorial extension. This is clearly in violation of the Constitution; and hence cannot be done. The language of the Constitution is clear that independent school districts are permitted to levy the tax of 20 cents on the $100 valuation of property within its limits by submitting the proposition to the qualified taxpaying voters of such district, and then only upon a vote of two-thirds of such qualified voters. If the tax may be levied and collected on the property subject to taxation within the new territory without submitting the proposition to a vote of he qualified taxpaying voters of the district as altered and enlarged, then that which may not be done directly may be done indirectly. This is true, for the reason that, under the law, addition territory may be taken in by the independent school district by a petition, signed by a bare majority of the inhabitants of such new territory qualified to vote for members of the Legislature. Sayles' Supp. to Texas Civ. Stat. 1916, p. 441.

It is no answer to this objection to say that two-thirds of such qualified voters have signed such petition (although such was not shown to be the fact in this case), for the reason citizens residing in such district are entitled, under the Constitution, to have this issue determined by the ballot, with its safeguard of ascertaining the qualification of the electors, its secrecy, so essential to a free and untrammeled expression of opinion, freedom from intimidation and persuasion at the time of voting, and many other substantial rights growing out of the regulation of the polls. * * *

It must be borne in mind that, in cases where the Constitution authorizes the levy of a special tax by the qualified taxpaying voters, such tax is not levied by the municipality or quasi municipality, but by the delegated taxing power of the owners of property. The exercise of such power must alone be by such property owners; and by no subterfuge, indirection, or the exercise of collateral legislative grants can this delegated and restricted power be taken from the property owner. It is safe and proper to say that no special tax authorized by the Constitution to be levied by the vote of the qualified taxpaying voters of any municipality or school district can ever lawfully be levied without offering the opportunity to such property owners resident in such territory of exercising their privilege of the ballot. Cooley on Taxation, 569; Fulilove vs. Police Jury, 51 La. Ann. 359, 25 South, 302." * * *

"It follows from the construction here placed upon the provision of the Constitution in question the judgments of the district court and Court of Civil Appeals will have to be reversed and rendered, in so far as they hold the tax in question valid."

You are therefore respectfully advised that where territory has been added to a school district, and where before such addition is made such district has voted a tax of 50 cents on the $100 valuation of property situated in such district, in order to subject the property in the added territory to such tax, the matter must be submitted to the qualified voters of the said school district so increased and a majority

of the qualified taxpaying voters of such district as enlarged must vote in favor of such tax.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

Op. No. 2188, Bk. 53, P. ——.

CENSUS TRUSTEES—COMPENSATION—SCHOOL TRUSTEES.

School trustees cannot supplement the compensation allowed by law to census trustees for enumerating scholastics.

School trustees cannot pay the transportation expenses of a census trustee.

The law makes no provision for the payment of an interpreter to accompany the census trustee for the purpose of assisting him in enumerating scholastics whose parents cannot speak the English language.

Section 44, Article 3, of the Constitution;
Articles 2774, 2778, Revised Civil Statutes;
Article 2772 of the Revised Civil Statutes, as amended by Chapter 122 of the Acts of the Regular Session of the Thirty-sixth Legislature;
Hendricks vs. The State, 49 S. W., 705;
Buchannan vs. Graham, 81 S. W., 1257;
Mechem on Public Offices and Officers.

AUSTIN, TEXAS, March 11, 1920.

Hon. G. C. Jackson, County Attorney, Crystal City, Texas.

DEAR SIR: Your letter of the 8th instant addressed to the Attorney General has been received. It reads as follows:

"Will you please advise me whether school districts having local tax may pay a census enumerator more than 4 cents per capita?

"If we cannot pay him more than 4 cents can we, in sparsely settled communities, pay for transportation, and if we cannot do this can we pay for an interpreter where a portion of the population is Mexicans?"

Article 2774 of the Revised Civil Statutes authorizes the County Superintendent of Public Instruction to appoint one of the trustees of each school district, or other qualified person, to take the scholastic census, who shall be known as the census trustee of the district, and prescribe the time within which the school census shall be taken. It also provides for the manner of taking the census and authorizes the census trustee to administer oaths for certain purposes.

Article 2778 of the Revised Civil Statutes, in part, reads as follows:

"For their services, the census trustees shall receive four cents per capita of the children of scholastic age taken by them in county districts, and three cents per capita in towns of 2500 inhabitants and upwards to 5,000 inhabitants, and two cents per capita in cities of more than 5,000 inhabitants. * * *"

Article 2772 of the Revised Civil Statutes, as amended by Chapter 122 of the Acts of the Regular Sesion of the Thirty-sixth Legislature, reads as follows:

"The public free school funds shall hereafter not be expended except for the following purposes:

"(a) The State and county available funds shall be used exclusively for the payment of teachers' and superintendents' salaries, fees for taking the scholastic census, and interest on money borrowed on short time to pay salaries of teachers and superintendents when these salaries become due before the school funds for the current year become available; provided that no loans for the purpose of payment of teachers shall be paid out of funds other than those for the then current year.

"(b) Local school funds from district taxes, tuition fees of pupils not entitled to free tuition and other local sources may be used for the purposes enumerated for State and county funds and for purchasing appliances and supplies, for the payment of insurance premiums, janitors and other employes, for buying school sites, buying, building and repairing and renting school houses, and for other purposes necessary in the conduct of the public schools to be determined by the board of trustees, the accounts and vouchers for county districts and communities to be approved by the county superintendent; provided, that when the State available school fund in any city or district is sufficient to maintain the schools thereof in any year for at least eight months, and leave a surplus, such surplus may be expended for the purposes mentioned herein."

Section 44 of Article 33 of our Constitution provides:

"The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors not provided for in this Constitution."

This provision of the Constitution was thoroughly discussed in the case of State vs. Moore, 57 Tex., 320, where the Supreme Court held:

"In actions between man and man for services rendered by the one at the request of another, in the absence of a contract fixing the compensation, the courts have the power to inquire what will be a reasonable compensation for the services performed, and to render judgment for such sum; but no such power is believed to exist in regard to the fees of public officers, in the absence of an express grant of such power.

"The Constitution provides that 'the Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors not provided for in this Constitution,' and this power can be exercised by the Legislature alone.

"A failure of the Legislature to exercise the power thus conferred cannot clothe the courts with it. * * *

"In pursuance of the constitutional requirement, the Legislature has enacted laws fixing the compensation of public officers in cases civil and criminal; and if there be nothing in the laws evidencing a contrary intention, it would probably have to be held that an officer was not entitled to any compensation for such services as it is made his duty to perform, but for which no compensation is provided by law; but as we have already said, Article 257, R. S., does recognize the right of a county attorney to fix the rate of such commission, and until the Legislature does so, neither the courts nor the interested party, nor any officer of the government can fix it."

A person who accepts office for a fixed salary (or fixed fees) cannot legally charge additional compensation for the performance of his official duty. City of Decatur vs. Vermillion, 77 Ill. 315.

In the case of Buchannan vs. Graham, 81 S. W. 1237, it was held that school trustees are officers, within the Constitution, Article 16, Section 1, prescribing and requiring all officers to take an oath before entering on the duties of their office. School trustees have been held by the courts of this State to be county officers within the meaning of

the Constitution and statutes. See Hendricks vs. The State, 49 S. W. 705.

Under the provisions of Article 2774, quoted above, it will be observed that it is the duty of the county superintendent to appoint one of the trustees or some other suitable person to take the school census and who shall be known as the census trustee.

The census trustee has authority to administer oaths. He is an officer or an agent of the State charged with the performance of an important duty. For the purpose of this opinion, we deem it unnecessary to determine whether a census trustee is an officer or an agent of the State. He may be paid from State funds which have been set apart for the credit of the available school fund. The question for us to determine is whether the compensation of a census trustee may be greater than that provided for by statute, or, if it may be supplemented, out of funds derived from taxation belonging to the district.

Mechem in his work on Public Offices and Officers, Section 374, lays down this rule:

> "It is the presumption of the law that the salary, fees or other compensation which it has fixed as the reward for the performance of official duty was adequate, and the officer, by accepting the office, impliedly agrees to perform its duties for the reward so prescribed. To permit him to exact more as a condition to the performance of his duty would be to countenance and encourage official exaction and oppression. To enforce a voluntary promise to pay him more would be to countenance and encourage bribery and corruption in respect to public officials.
>
> "All contracts, therefore, whether made by the public or by individuals, and whether voluntary or exacted, to pay a public officer for the performance of an act which the law makes it his duty to perform without pay, or to pay him a compensation in addition to that which the law has fixed, are opposed to public policy and void."

It is immaterial whether a census trustee is an officer or an agent of the State. He is appointed to perform a service for the State. The Legislature has seen fit to prescribe the amount of compensation that may be paid him for his services. The school trustees are without authority to supplement this compensation or to grant him additional compensation even out of local funds belonging to the district.

It is the opinion of this Department, and you are so advised, that the amount of compensation to be paid census trustees for the enumeration of scholastics is limited by the provisions of Article 2778 of the Revised Civil Statutes.

You also desire to know if school trustees may pay the transportation expenses of the census trustee, or if they may pay the expenses of an interpreter to accompany him. We presume from the nature of this inquiry that the object of an interpreter is to assist the census trustee in the performance of his duty with the Mexican population who are unable to speak the English language.

The school fund of this State is held and deemed to be a sacred fund. It is appropriated for a special and specific purpose. The Legislature has limited the purposes for which the State funds may be expended by the provisions of Article 2772, as quoted above, and this limitation is to be considered as a prohibition against expenditure of State funds for any other purpose or purposes than those enumer-

ated in Section a of said Article. The Legislature has not seen fit to authorize the expenditure of funds belonging to the public children of this State for the purpose of paying the expenses of an interpreter or for the transportation of the census trustee, but, on the other hand, by the provisions of Article 2778, it has fixed the amount of compensation that may be paid to census trustee for enumerating scholastics. This Article limits the amount of compensation that may be paid to census trustees for their services.

It is the opinion of this Department, and you are so advised, that school trustees are without authority to pay for the services of an interpreter to assist a census trustee in the enumeration of scholastics, nor are such trustees authorized to pay the transportation charges of the census enumerator while in the performance of his duty.

Yours very truly,
BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 2156, Bk. 53, P. 441.

DISTRICT CLERK—FEES.

The district clerk is entitled to a fee of fifty cents only for recording each account of sheriffs as provided for in Article 1132, Code of Criminal Procedure. His charge is fifty cents for recording each account of the sheriff and not fifty cents for each case disposed of. The sheriff's account, approved by the district judge and recorded by the clerk, may include the fee accruing in several felony cases.

An account is defined to be strictly no more than a list or catalogue of items, whether of debits or credits.

Cyc. Vol. 1, p. 362; Articles 1127, 1129 and 1132, Code Crim. Procedure.

December 6, 1919.

Hon. L. W. Tittle, Comptroller of Public Accounts, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter of recent date desiring to have his construction of those provisions of the Code of Criminal Procedure fixing the fees of the district clerk of a county for recording a sheriff's account in felony cases. You desire to know whether or not the fee provided for by law of fifty cents for each account applies to each felony case finally disposed of or to each account of the sheriff recorded by said district clerk.

Accompanying your communication is a statement of account of Honorable J. J. Cox, District Clerk of Montague County, Texas, in which he charges a fee of fifty cents for the recording of the account of a sheriff in that county in each case finally disposed of in the district court of said county, rather than the charge for recording the account of the sheriff at the close of each term of court.

Replying to your inquiry, we beg to advise that, in our opinion, the district clerk is not entitled to charge a fee of fifty cents for the recording of the account of the sheriff in each case finally disposed of, but that only a lawful charge of fifty cents can be collected by him for recording the whole account filed by the sheriff.

Article 1132 of the Code of Criminal Procedure of this State pro-

vides that before the close of each term of the district court, the sheriff of said court shall make out a bill of account of the costs claimed to be due him by the State, respectively, in the felony cases tried at that term; the bill or accounts should show (1) the style and number of cases in which the costs are claimed to have been accruing; (2) The offenses charged against the defendant; (3) The term of the court at which the case was disposed of; (4) The disposition of the case, and that the case was finally disposed of and no appeal taken; (5) The name and number of defendants, and if more than one whether they are tried jointly or separately. Besides these requirements, there are others which for the purposes of this opinion are unnecessary to mention.

Under the provisions of Article 1133, it is made the duty of the district judge, when any such sheriff's bill is presented to him, to examine same carefully and to inquire into the correctness thereof and to approve the same in whole or in part or to disapprove the entire bill as the facts and law may require and such bill or account with the action of the judge thereon shall be entered on the minutes of said court.

The sheriff is required to swear that the account presented by him is just, true, correct and unpaid.

An account has been defined to be strictly no more than a list or catalogue of items, whether of debits or credits. Cyc. volume 1, p. 362. We have had occasion to examine the account of Sheriff E. W. Perryman of Montague County, for which the clerk of the district court of that county files his claim and fees for recording same. His account for fees in felony cases tried or otherwise disposed of at the January term, 1917, of said court amounted to the sum of $40.70, which involved fees accruing in sixteen felony cases enumerated in said account. This account covering the fees in sixteen felony cases, as aforesaid, was sworn to by the sheriff of said county, approved by the district judge for the sum of $40.70 and is certified to be recorded by the clerk and a copy furnished which is asserted to be a true and correct copy of said account giving the book and page of the minutes of said court where the account is recorded by said clerk. The statute provides that the district clerk of the district court shall receive, "for recording each account of sheriff, the sum of fifty cents." We construe this to mean that the clerk is entitled to this sum of money only for recording each account of the sheriff as provided for in Article 1132, which account is the total account filed by the sheriff at the close of each term of the court, and that the clerk is not entitled to fifty cents in each case finally disposed of.

Article 1127 and 1129, Code of Criminal Procedure.

It may be urged that this is inadequate consideration for the service rendered, in view of the fact that the sheriff's accounts in some instances include fees accruing in fifty and seventy-five cases or more. Our answer to this contention is that this is the fee fixed by the Legislature for this service. If inadequate for the service rendered, the Legislature ought to be appealed to to grant a larger remuneration for the service rendered.

Yours very truly,
W. J. TOWNSEND,
Assistant Attorney General.

FEES OF OFFICE—TAX COLLECTOR—COUNTY CLERK.

1. The county tax collector and the county clerk are each entitled to a fee of one dollar provided in Article 7591, R. S., on each tract of land assessed to the same person for each year taxes are delinquent, no matter whether said tracts are assessed separately or included in one assessment unless the lands are unimproved city or town lots.

2. Where taxes are delinquent against unimproved city or town lots owned by the same person in the same city or town, the tax collector and the county clerk are entitled to only one fee of one dollar, no matter how many lots are involved.

3. The publisher's fee of twenty-five cents should not be taxed against delinquent owner unless the publication contemplated by Article 7691 has actually been made. Where the property involved consists of unimproved city or town lots owned by the same person in the same city or town, and publication has actually been made, a publisher's fee of only twenty-five cents should be charged for every ten lots or any number less than ten.

4. The tax collector and county clerk are not entitled to the fees provided in Article 7691, unless they have performed all the services for which such fee is provided.

April 29, 1919.

Hon. Oscar C. Dancy, County Attorney, Brownsville, Texas.

DEAR SIR: We are in receipt of a letter from Mr. James J. Fox, Tax Collector, Brownsville, Texas, enclosing copy of a letter to him from Mr. John C. Myrick, Brownsville, Texas, and asking the opinion of this Department on the matters inquired about in Mr. Myrick's letter. Since we are not permitted to render opinions to the tax collector, we take the liberty of rendering this opinion to you and sending a carbon copy of the same to Mr. Fox. The Myrick letter is as follows:

"W. M. Booth of Gonzales, Texas, gives me a tax receipt for the taxes for the year 1918 on lots 3 to 12, Block A, and 1 to 12, Block B, and 1 to 12, Block C, Lakeside addition to Harlingen, Texas. This receipt is for $16.84, taxes for the year 1918. He gives to me at the same time a statement with unpaid taxes on the same lots for the 1917 which shows an amount of $132.94. Those taxes are not in suit and I find costs attached in the sum of $2.25 for each of the 34 lots. These lots as you will see are all in one body and it seems an exceeding burden for my client to pay $76.50 before suit of any kind has been filed. If this is the law it certainly ought to be changed, if it is not the law, I shall appreciate any relief you gentlemen can render us."

The fees amounting to two dollars and twenty-five cents ($2.25) assessed against each of the thirty-four lots, referred to by Mr. Myrick, are evidently the fee of one dollar ($1.00) to the collector, one dollar ($1.00) to the county clerk and twenty-five cents ($0.25) for advertisement, provided in Article 7691 R. S. in the following language:

"The collector of taxes for preparing the delinquent list and separating the property previously sold to the State from that reported to be sold as delinquent for the preceding year, and certifying the same to the commissioners' court, shall be entitled to a fee of one dollar for each correct assessment of the land to be sold, said fee to be taxed as costs against the delinquent * * * and the county clerk for making out and recording the data of each delinquent assessment, and for certifying the same to the commissioners' court for correction, and for noting the same in the minutes of the commissioners' court, and for certifying the same with corrections to the Comptroller and noting the same on his delinquent tax record, shall receive the sum of one dollar, to be taxed as costs against the land in each suit; providing, that in no case shall the State or county be

liable for such fees, but in each case they shall be taxed as costs against the land to be sold under judgment for taxes and paid out of the proceeds for sale of same if the taxes, penalty and interest due thereon to the State are paid; provided that where two or more unimproved city or town lots, belonging to the same person and situated in the same city or town, shall all be included in the same suit for costs, except those of advertising which shall be twenty-five cents for every ten lots or any number less than ten taxed against them collectively just as if they were one tract or lot."

The foregoing language, in many respects, is ambiguous. It first received construction by our higher courts in the case of State vs. Wolfe, 51 S. W. 658, the question there involved being whether the tax collector and the county clerk were entitled to only one fee of one dollar each where taxes were delinquent against a tract of land for seven years, or were entitled to the fee of one dollar each for each of the seven years. The Court of Civil Appeals held that each of these officers was entitled to a fee of one dollar for each year the tax was delinquent.

It later received construction in the case of Houston Oil Company of Texas vs. State, 141 S. W. 805; the question involved being whether the tax collector and county clerk were entitled to a fee of only one dollar each where three hundred and ninety-seven tracts of land were rendered for a certain year in one rendition, or were entitled to one dollar each for each of the three hundred and ninety-seven tracts. The court held that each of said officers was entitled to a fee of one dollar for each of said tracts of land, among other things saying:

"While the aggregate fees allowed the officers in this case appear large, this is only because it is taxed against the property of one taxpayer, the owner of a large number of tracts of land, each of which, as before said, was required to be separately assessed, though rendered at the same time. If there had been a diferent owner for each tract of land, the responsibilities of the officers in preparing and certifying the records would have been the same, and their labor but little more, and their compensation, while the same, would have appeared much smaller."

The case of Raht vs. State, 106 S. W. 900, is a case where it was sought in one suit to foreclose tax lien again four *unimproved* lots in the town of Archer City, all owned by the same person but separately assessed as the property of unknown owner for the years from 1891 to 1906, inclusive. There was no controversy as to the amount of the tax, but it was claimed that the judgment for costs in the sum of seventy-one dollars ($71.00) was erroneous in that the four unimproved lots should have been treated as one tract or lot of land which would have reduced the costs to fifteen dollars and seventy-five cents ($15.75). The court held:

"We agree with the appellant that the following provision in Section 9 of the act under which the suit was brought was applicable to the facts of this case, and that the court erred in not applying it, to-wit: 'Provided, that where two or more unimproved city or town lots belonging to the same person, and situated in the same city or town, shall be included in the same suit and costs, except those of advertising, which shall be twenty-five cents for every ten lots, or any number less than ten, taxed against them collectively, just as if they were one tract or lot.' The cases cited and relied on by the appellee were not cases of town lots at all, and therefore not authority for the judgment in question, since the proviso above quoted applies only to unimproved city or town lots. The fact that

these lots had been separately assessed in the name of 'unknown owner' can make no diference, since the proviso requires (all being included in the same suit) the costs to be taxed on the basis of their being one tract or lot. This is a statutory proceeding, and the right of the state to recover is limited by the terms of the act itself, excluding the contention urged by the appellee that the officer making the assessments was entitled to a fee for each assessment, although all of the lots were included in one suit. If he has any such right, it is not enforceable in this proceeding.

"The judgment as to the costs will therefore be reversed and rendered for $15.75, and affirmed as to the taxes."

The decision in the Raht case was reaffirmed by the Court of Civil Appeals in the case of Houston Oil Company of Texas vs. State, supra, the court using the following language:

"The article of the statute, before cited, contains the further provision: 'That where two or more unimproved city or town lots belonging to the same person and situated in the same city or town shall all be included in the same suit and costs, except those of advertising, which shall be twenty-five cents for every ten lots, or any number less than ten, taxed against them collectively just as if they were one tract or lot.' Like many of the other provisions of the act of 1897 (Acts Twenty-fifth Leg. c. 103), from which this article of the statute is taken, the language of this provision, if construed literally, is unintelligible; but we think it can properly be construed as directing that, when two or more unimproved city or town lots belonging to the same person, and situated in the same city or town, are included in the same suit, the costs, except the costs of advertising, shall be taxed against them as one lot. This is the construction given it in the case of Raht v. State, 48 Tex. Civ. App. 106, 106 S. W., 900. * * *

"We think that the fact that the Legislature deemed it necessary to provide that only one fee could be charged, where the property assessed consisted of several unimproved city or town lots, shows that in the preceding provisions of the article fixing the fees of the officers they intended that the officers named should be paid for each tract of land assessed."

The effect of these decisions then is that if a number of tracts of land are included in the same suit the tax collector and the county clerk are entitled to a fee of one dollar each for each tract of land for each year taxes involved in the suit were delinquent, but if a number of unimproved town lots, owned by the same person and situated in the same city, are included in the same suit then the tax collector and the county clerk would each be entitled to only a fee of one dollar.

This still leaves undecided the question of whether the tax collector and the county clerk are each entitled to a fee of one dollar for each unimproved town lot, owned by the same person and situated in the same town, for each year taxes have been delinquent, when suit has not been instituted or when all of said lots *have not been included* in one suit to foreclose the tax lien. We think, however, it would be unreasonable to say that the Legislature intended that more costs should be taxed against a delinquent owner who paid his delinquent taxes before suit was filed than should be taxed against him if he failed or refused to pay the same and caused the State the delay and uncertainty attending the suit to foreclose the tax lien.

Your attention is also called to the fact that by the provisions of House Bill No. 40, Chapter 147 of the printed General Laws of the Regular Session of the Thirty-fourth Legislature, it clearly appears that the Legislature intended, where suit became necessary for the collection of delinquent taxes against an owner of lands or lots, that

the suit should include all lands and lots against which taxes were delinquent for each year they appear to be delinquent according to the delinquent tax record.

Thus in Section 1 of said act it is provided that the tax collector shall:

"* * * mail to the address of every record owner of any lands or lots situated in such counties a notice showing the amount of taxes appearing delinquent or past due and unpaid *against all such lands and lots* according to the delinquent tax records of their respective counties on file in the office of the tax collector. * * * * Such notes shall also contain a brief description of the lands or lots appearing delinquent for various sums or amounts due against such lands or lots *for each year* they appear to be delinquent according to such records."

In Section 3 of the act it is provided:

"It shall be the duty of the county attorney, or the district attorney, if there be no county attorney, to file and institute suits as otherwise provided by law for the collection of all delinquent taxes due at the time of filing such suit on land or lots situated in such county, together with interest, penalties and costs then due as otherwise provided by law; provided that for the work of filing such suits, the county or district attorney shall receive a fee of five dollars ($5.00) for the *first tract of land* included in each suit, and one dollar ($1.00) for *each additional tract* included therein; provided, that where unimproved town lots are sued upon or included in a suit with other lands or improved town lots in the same town, only one such additional fee shall be added for each twenty lots or any number less than twenty, etc."

By this language the Legislature shows an intention that all property of an owner against which taxes are delinquent shall be included in the same suit, and again expressly shows an intention that unimproved town lots should be treated collectively in the same suit so far as officers' costs are concerned.

You are, therefore, advised that this Department is of opinion that only one fee of one dollar ($1.00) each to the tax collector and the county clerk should be taxed against an owner of unimproved town lots for each year taxes are delinquent. This applies only to unimproved town lots, and the rule announced in the cases of the State vs. Wolfe, and Houston Oil Company of Texas vs. the State, supra, apply to all other character of real estate.

You are further advised that neither the collector nor the county clerk would be entitled to the fee for any year they failed to perform the duties imposed by this article of the statute. See Houston Oil Company vs. State, bottom second column, page 806.

Of course, no publisher's fee of twenty-five cents should be taxed against or charged the delinquent owner, unless the publication contemplated by Article 7687 of the Revised Statutes has been actually made. If the lands involved consist of unimproved city or town lots owned by the same person in the same city or town, and publication is actually made, the charge shall be only twenty-five cents for every ten lots or any number less than ten.

Yours very truly,
JNO. C. WALL,
Assistant Attorney General.

Op. No. 2215, Bk. 53, P. —.

APPOINTMENT OF DEPUTY COUNTY CLERKS—COMPENSATION FOR SUCH CLERK.

Commissioners courts have only such powers as are conferred by the Constitution or laws. Commissioners court has not by Constitution or statutes power to authorize payment of a deputy county clerk out of moneys voted for the purpose of building and maintaining public highways.

Commissioners court has not power to fix compensation for the services of county officers, except as declared by statute for certain ex-officio services.

Money derived from the sale of road bonds cannot be used except for the definite and specific purpose for which such bonds were voted.

Articles 1748-1749, 1753, 3903, 3893, 3862 Vernon's Sayles' Texas Civil Statutes.

AUSTIN, TEXAS, April 26, 1920.

Hon. Delmas Givens, County Attorney, Corpus Christi, Texas.

DEAR SIR: This Department is in receipt of your letter of April 22, 1920, together with enclosed letters of the County Clerk and County Auditor of Nueces County. The letter of the County Auditor, Mr. F. A. Tompkins, reads as follows:

"By reason of road building program now being carried out it devolves an extra amount of work on the county clerk as the commissioners court is in session two or three days in each week instead of monthly as heretofore, and it is necessary for the county clerk to have an extra clerk to attend these meetings, write up minutes and other work in connection with the road building.

"At a recent meeting of the commissioners court the county clerk was authorized to employ an additional clerk at $1,500.00 per annum, said salary to begin in February and to be paid out of the special road bond issue fund, said clerk to be retained during the construction of the new roads.

"Please give me your opinion as to the legality of paying for this extra clerk's salary out of the special road fund.

"If you say this can not be paid from the above fund then is it legal to pay this salary from the general fund?

"If you say this can not be paid from the general fund then is there any way in which the county clerk may be reimbursed for this expense?

"In the event this $1,500.00 per annum can be paid from the general fund please give me your opinion as to whether it should be taken into consideration under the excess fee bill as passed by the Thirty-sixth Legislature."

The writer will only set out here that portion of the County Clerk's letter addressed to you that contains the resolution passed by the commissioners court of Nueces County; said resolution reads as follows:

"Moved, seconded and carried, that by agreement with the county judge and some of the commissioners, Mr. McGloin was authorized to employ as an assistant, Mr. C. J. Macmanus, at a salary of $125.00 per month, during process of road construction, and by omission, an order had not been passed, and that said action of county judge and commissioners be, and is hereby ratified, and that warrants be issued at the rate of $125.00 per month, monthly, beginning February 10, 1920, when this agreement was made and to continue until ordered discontinued by this court."

The questions above propounded will be answered in the order in

which they are presented, and you are respectfully advised that Article 1748 Vernon's Sayles' Texas Civil Statutes provides that:

"The clerk of the county court, after elected or appointed, shall have power to appoint one or more deputies, by a written appointment under his hand and seal of the court, which appointment shall be recorded in the office of such clerk of the county court, and shall be deposited in the office of the clerk of the district court."

Article 1749 Vernon's Sayles' Texas Civil Statutes provides that:

"Such deputies shall take the oath of office prescribed by the Constitution. They shall act in the name of their principal, and may do and perform all such official acts as may be lawfully done and performed by such clerk in person."

Article 1753 Vernon's Sayles' Texas Civil Statutes provides:

"Such clerks shall be ex officio clerks of the commissioners court of their respective counties; and it shall be their duty to attend upon each term of said court, to issue all notices, writs, and other process required by said courts, to keep the records, books, papers and proceedings of said courts, and see that the same are properly indexed, arranged and preserved, and generally and to do and perform such other duties as are, or may be, imposed upon them by law as clerks of said courts."

Article 3903 Vernon's Sayles' Texas Civil Statutes in defining the manner of appointment and compensation of county clerks and deputy county clerks makes the following provision:

"Whenever any officer named in articles 3881 to 3886 (county clerks are named in these articles) shall require the service of deputies or assistants in the performance of his duties, he shall apply to the county judge of his county for authority to appoint same; and the county judge shall issue an order authorizing appointment of such a number of deputies or assistants as in his opinion may be necessary for the official performance of the duties of said office. The officer applying for the appointment of deputy or assistant, or deputies or assistants, shall make affidavit that they are necessary for the efficiency of the public service, and the county judge may require, in addition, a statement showing the need of such deputies or assistants; and in no case shall the county judge attempt to influence the appointment of any person as deputy or assistant in any office. * * * The maximum amount allowed for deputies or assistants for their services shall be as follows, to-wit: First assistant or chief deputy, a sum not to exceed a rate of $1,200 per annum; others not to exceed a rate of $900 per annum. Provided, however, that in counties having a population of 37,500 or over, the maximum salaries allowed for deputies or assistants for their services shall be as follows: First assistant or chief deputy, a sum not to exceed a rate of $1800 per annum; heads of each department not to exceed the sum of $1500 per annum; others not to exceed a rate of $1200 per annum. The county judge, in issuing his order granting authority to appoint deputies or assistants, shall state in such order the number of deputies or assistants authorized and the amount to be paid each; AND THE AMOUNT ALLOWED SHALL BE PAID OUT OF THE FEES OF OFFICE TO WHICH SAID DEPUTIES OR ASSISTANTS MAY BE APPOINTED, and shall not be included in estimating the maximum salaries of officers named in Articles 3881 to 3886."

Article 3893 Vernon's Sayles' Texas Civil Statutes makes this provision:

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

Article 3862 Vernon's Sayles' Texas Civil Statutes, providing for compensation for ex officio services of the county clerks and their deputies, provides as follows:

"For all ex officio services in relation to roads, bridges and ferries, issuing jury scrip, county warrants, and taking receipts therefor, services in habeas corpus cases, making out bar dockets, keeping county convict book, keeping record of trust funds, filing and docketing all papers for commissioners court, keeping road overseer's book and list of hands, recording all collection returns of delinquent insolvents, and list of lands sold to individuals for taxes, recording county treasurers' reports, recording reports of justices of the peace, recording reports of animals slaughtered, and services in connection with all elections, and all other public services not otherwise provided for, to be paid upon the order of the commissioners' court out of the treasury, the clerk shall receive the sum of not less than ten dollars nor more than twenty-five dollars per annum for each one thousand inhabitants of his county; provided, that the total amount paid the clerk in any one year shall not be less than fifty nor more than five hundred dollars, said amount to be paid quarterly. * * *

"Acts Seventeenth Leg. c. 87, in so far as it was mandatory, is repealed by Acts Twenty-fifth Leg. Ex. Sess. c. 5, entitled 'An Act to fix certain civil fees to be charged by certain county officers. * * * to limit and regulate the compensation of the * * * clerk of the county court * * * and to repeal all laws in conflict herewith,' fixing, by Section 10, the maximum fees that may be retained by the clerk of the county court at $2,500 per annum, and, in addition thereto, one-fourth of the excess fees collected by him, but providing in section 15 that the commissioners' court shall not be debarred from allowing compensation for ex officio services not to be included in estimating the maximum provided in the act, when, in their judgment, such compensation is necessary; such compensation not to exceed the amount now provided by law for such services. Navarro County v. Howard (Civ. App.) 129 S. W., 857."

It is the well-settled law of this State that commissioners courts have not general control over county business, but only such control as is conferred by the Constitution itself and the laws of the State. It might be well to first look to the entire Constitution and see what powers by it are conferred on commissioners' courts. An examination will show, as was stated in Bland vs. Orr, 90 Texas, 495, that the powers therein conferred merely relate "to the filling of certain vacancies in offices and some other minor functions." Nowhere is any power conferred which would enable the commissioners' court to employ a special deputy county clerk and provide for the compensation of such deputy county clerk in any manner, except as provided for by our statutes. As Section 44 of Article 3 of our Constitution provides:

"The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors, not provided for in this

Constitution, but shall not grant extra compensation to any officer, agent, servant or public contractor, after such public service shall have been performed or contract entered into for the performance of the same."

The Supreme Court of Texas, construing this last provision, in the case of The State vs. Moore, 57 Texas, 320, holds:

"A failure of the Legislature to exercise the power thus conferred can not clothe the courts with it. It is not believed that any well-considered case can be found in which a public officer has been permitted to collect fees, unless the same are provided for and the sum thereof declared by law."

Looking next to the laws of this State, we find that the Legislature has nowhere conferred upon commissioners' court the general powers over county business. On the contrary, as is stated in the case of Collingsworth County vs. Meyers, 35 S. W., 416, Title 32 R. S., especially Chapter 2, shows that their powers and duties are almost entirely political—such as dividing the counties into districts and precincts; fixing the time and place for holding elections; laying out, establishing, building and controlling highways, bridges, ferries, etc.; auditing and settling accounts against a county, and directing their payment; providing for the support and burial of paupers; building courthouses, jails and public buildings; and levying taxes."

Title 32, above referred to, is now Title 40 of the Revised Statutes of 1911. Chapter 2 of this Article prescribes the power and duties of the commissioners court, but it nowhere confers upon such courts the powers to employ or appoint deputy county clerks or to provide for their compensation for services rendered as such deputy county clerk. Article 3903 does provide for their appointment and the manner in which they shall be appointed. It also provides for their compensation for such services as deputy county clerk, and further provides that the amount of compensation allowed shall be paid out of the fees of office to which such deputies or assistants may be appointed, and that portion of the resolution passed by the commissioners' court of Nueces County, wherein they ordered "that warrants be issued at the rate of $125 per month, monthly, beginning February 10, 1920, and this agreement was made and to continue until ordered discontinued by the court" is wholly invalid and not warranted by any provision of our statute, either expressed or implied. The commissioners' court has no authority, legal or otherwise, to fix the compensation of a county clerk or a deputy county clerk, except as for ex officio services and this has been provided for by law. However, if they were permitted to fix such compensation, they could not authorize the payment for such services out of funds created by the qualified voters and taxpayers of such county for a separate, distinct and definite purpose as was done when the road bonds were voted for Nueces County, as the issuance of such bonds was distinctly and specifically for the purpose of building, improving and maintaining public highways and the appurtenances necessary thereto.

Moore vs. Coffman, 200 S. W., 374.

In pursuance of the Constitutional requirement, the Legislature has enacted laws fixing the compensation of county clerks, deputy county clerks and other public officers, and a person who accepts public office

in this State for a fixed salary or for fixed fees is not legally entitled to additional compensation and should not accept same for the performance of his official duties. City of Decatur vs. Vermillion, 77 Ill., 315.

You are therefore advised that the hiring or employment of such deputy county clerk as provided for in the resolution entered on the minutes of the commissioners' court of Nueces County is illegal, and the law would prohibit the county auditor from approving or ordering a warrant issued for that purpose to be paid, as the only legal compensation for such county clerks or deputy county clerks is that compensation provided for by law, and there is no provision of our statutes that would authorize the issuance of a warrant for $125, or any other amount as a monthly salary for such deputy county clerk.

Yours very truly,

C. L. STONE,
Assistant Attorney General.

Op. No. 2035, Bk. 52, P. 376.

FEES OF OFFICE—DISTRICT ATTORNEY.

In judicial districts of more than two counties, the district attorney is only entitled to his per diem compensation during the time the district court is in session, and then only for the number of days he is actually engaged in the necessary discharge of his official duty and for each day he represents the State at examining trials, inquest proceedings and habeas corpus proceedings in vacation.

Article 1120 Code of Criminal Procedure as amended by Chapter 127 Acts Thirty-fourth Legislature passed at its Regular Session.

AUSTIN, TEXAS, April 14, 1919.

Hon. J. E. Leslie, District Attorney, Falfurrias, Texas.

DEAR SIR: I have your letter of April 12th addressed to the Attorney General, wherein you state that you are the District Attorney of the 79th Judicial District of Texas and that your District is composed of six counties. You state that the District Court of Brooks County convened on April 7th and the grand jury was impaneled on that date and remained in session for a period of two days and returned one indictment for an offense of the grade of a felony. The defendant had been previously arrested and was confined in jail at the time the indictment was returned and could not furnish bail. The State was ready for trial, but the defendant asked for a postponement of the case until April 16th and the court set the case for that date, discharged the jury until that date, and there being no further business before the court, he left the county and returned to his home. You further state that you had no other business and returned to your home, but that you will have to return to Brooks County on the 16th to try said cause. You state that you could return to your home with less expense than you could remain in Falfurrias during the period of time the court had recessed. You then propound to this Department the following query:

"I would like to know whether I am entitled to my $15 per day from the 7th of April until this case is tried on the 16th. I had nothing to do with the postponement and was ready for trial when the case was reached and it is no fault of mine that the case was not tried promptly."

You follow your query with an able argument showing that it is necessary in order for you to receive an adequate compensation for your services that you be allowed your per diem for the time intervening between the time court recessed and the date on which it will re-convene.

In reply to your inquiry, your attention is respectfully directed to Article 1120 Code of Criminal Procedure as amended by the Thirty-fourth Legislature at its Regular Session, which in part reads as follows:

"In addition to the five hundred dollars now allowed them by law, district attorneys in all judicial districts of this State composed of two counties or more shall receive from the State as compensation for their services the sum of fifteen dollars for each day they attend the session of the district court in their respective districts, in the necessary discharge of their official duty, and fifteen dollars per day for each day they represent the State at examining trials, inquest proceedings and habeas corpus proceedings in vacation; said fifteen dollars per day to be paid to the district attorneys upon the sworn account of the district attorney, approved by the district judge, who shall certify that the attendance of the said district attorney for the number of days mentioned in his account was necessary, after which said account shall be recorded in the minutes of the district court; provided, that the maximum number of days for such attendance and service for which the said commission is allowed shall not exceed one hundred and thirty-three days in any one year;"

In an opinion prepared by Honorable C. A. Sweeton, Assistant Attorney General, of date December 10th, 1913, this Department in construing that part of said Article 1120 which is hereinabove quoted said:

"We believe that the language 'for each day they attend the session of the district court in their respective districts in the necessary discharge of their official duty' conveys the idea that a term of court must be in session and that the district attorney must be in attendance upon such court before he would be entitled to receive the compensation prescribed in said statute."

We can and do appreciate the fact that in the instant case you will in all probability receive, after paying your expenses, but little compensation for the services you will render the State. Yet, under the plain provision of the statute above quoted, in order to have your account for services rendered approved and paid, you must make affidavit that said services were rendered during a session of the district court of your district, and this, of course, you could not do, if, as a matter of fact, the court had recessed and the judge returned to his home. It is clear to our minds, and we are sure that it will be to yours, that three things must be shown before the District Attorney could lawfully claim the per diem provided for in the statute which we have hereinabove quoted from.

First.—That a term of the district court was in session in some county in his judicial district:

Second.—That the District Attorney was in attendance on such term of court and was actually engaged in the necessary discharge of his official duty;

Third.—The District Attorney must be present and represent the State at examining trials, inquest proceedings and habeas corpus proceedings in vacation.

This Department is therefore of the opinion and you are so advised that in districts of more than two counties the district attorney is only entitled to his per diem compensation during the time the district court is in session and then only for the number of days he is actually engaged in the necessary discharge of his official duty and for each day he represents the State at examining trials, inquest proceedings and habeas corpus proceedings in vacation.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2142, Bk. 53, P. 377.

INHERITANCE TAXES—FEES OF COUNTY AND DISTRICT ATTORNEYS AND COUNTY JUDGES—CONSTRUCTION OF STATUTES.

The fees of county and district attorneys and county judges provided for under Articles 7490 and 7491 as amended by Chapter 164 of the Acts of the Regular Session of the Thirty-sixth Legislature providing for certain fees in the collection of inheritance taxes are cumulative of all other fees allowed them by law and need not be accounted for as fees of office.

AUSTIN, TEXAS, October 15, 1919.

Hon. H. L. Washburn, County Auditor, Houston, Texas.

DEAR SIR: Your letter of the 2nd instant addressed to the Attorney General has been received. It reads:

"The Legislature passed an amendment to the Inheritance Tax Law to be found on page 318 of the General Laws of the Regular Session of the Thirty-sixth Legislature which became effective 90 days after adjournment.

"(1) In amending Article 7490 as to the fees of district attorney, you will note it provides 'which compensation shall be in addition to all other fees and compensation provided by law.'

"On page 83 of the Acts of this same Legislature, same session and effective at the same time, is the Act providing for the compensation of the district attorney in counties of 100,000 population or more, and with reference to Section 2 thereof it has been noted that it provides 'that salaries, fees, commissions and perquisities so earned and received by such office in excess of $6,000.00 during each and every fiscal year shall be paid in to the county treasurer, etc.'

"Question: Are the fees in inheritance taxes to be considered as belonging to the district attorney in addition to the $6,000.00?

"(2) In amending Article 7491, page 319, of the same Acts, the compensation provided for the services of the county judge is set out in this language: 'Which fees shall be cumulative of all other fees and compensation provided by law.'

"Article 3889 was amended by the same Legislature, page 300, and provides that with respect to the excess fees 'that all amounts received by

such officer as fees of his office, besides those which he is allowed to retain by the provision of this chapter, shall be paid in to the treasurer of such county.'

"Question: Are the fees in the inheritance tax matters of the county judge to be considered in addition to the maximum excess provided in this article?"

Section 2, Chapter 47, of the Acts of the Regular Session of the Thirty-sixth Legislature, fixing the salary of district attorneys, their deputies, assistants, and stenographers in counties having a population of more than 100,000, reads as follows:

"Sec. 2. That in any county having a population in excess of one hundred thousand inhabitants, according to the last census of the United States, and according to any United States census which may hereafter be taken, the district attorney of such county shall receive a salary of $500.00 from the State of Texas, as provided in the Constitution of Texas, and all fees, commissions and perquisites earned by such office; provided, that the amount of such salary, fees, commissions and perquisites to be so received and retained by him shall not exceed the sum of $6,000.00 in any one year; and provided further, that all salaries, fees, commissions and perquisites so earned and received by such office in excess of $6,000.00 during each and every fiscal year shall be paid into the county treasury of said county in accordance with the terms and provisions of the maximum fee bill, except as to such portion of such excess as shall be used and expended in the payment of salaries to deputies, assistants and stenographers as hereinafter provided."

Article 7491 of the Revised Civil Statutes as amended by Chapter 164 of the Acts of the Regular Session of the Thirty-sixth Legislature makes it the duty of the county attorney of each county of this State to carefully investigate and keep informed concerning estates subject to payment of inheritance taxes and requires them under certain conditions to file a report showing the condition of said estate with the county judge of the county in which said decedent resided at the time of his death, of where the principal part of his estate was located, and provides a compensation for his services as follows:

"For his services in making investigation and making report herein required the county attorney shall receive a commission of eight (8%) per cent. of the taxes payable under this chapter, not to exceed in any one estate the sum of Sixty ($60.00) Dollars, and the county judge shall receive a commission of two (2%) per cent. of the taxes collected under this chapter, not to exceed in any one estate the sum of Fifteen ($15.00) Dollars, which fees **shall be cumulative of all other fees and compensation provided by law."**

Article 3389 of the Revised Civil Statutes as amended by Chapter 158, Acts of the Regular Session of the Thirty-sixth Legislature, and as amended by Chapter 20 of the Acts of the Second Called Session of the Thirty-sixth Legislature, fixing the amount of excess fees of county officers in general that such officers may retain. The last clause of said Article reads:

"All amounts received by such officer as fees of this office, besides those which he is allowed to retain by the provisions of this chapter, shall be paid into the county treasury of such county."

These three separate acts were all passed by the Thirty-sixth Legis-

lature and all went into effect at the same time, and an inspection of the journal of the House and Senate shows that these three bills were all considered at practically the same time, and the contents of each of said bills must have been in the minds of the Legislature at the time of their enactment into law.

Section 268 of Sutherland on Statutory Construction reads:

"The presumption is stronger against implied repeals where provisions supposed to conflict are in the same Act or were passed at nearly the same time. In the first case, it would manifestly be an inadvertence for it is not supposable that the Legislature would deliberately pass an Act with conflicting intentions; in the other case the presumption rests on the improbability of a change of intention, or if such change had occurred, that the Legislature would express it in a different Act without an express repeal of the first. 'Statutes enacted at the same session of the Legislature should receive a construction, if possible, which will give effect to each. They are within the reason of the rule governing the construction of statutes in pari materia. Each is supposed to speak the mind of the same Legislature, and the words used in each should be qualified and restricted, if necessary, in their construction and effect, so as to give validity and effect to every other Act passed at the same session.' The presumption is that different Acts passed at the same session of the Legislature are imbued by the same spirit and actuated by the same policy, and that one was not intended to repeal or destroy another, unless so expressed. Where two Acts are passed or go into effect the same day it is strong evidence that they were intended to stand together. So where the later law was the first to be introduced an amendment of a law shows that the Legislature did not intend to repeal it by a prior law."

And farther on, in the same section, the author further shows:

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

The author quotes a great mass of authorities supporting these positions. In State vs. McCurdy, 62 Minn. 509, 516, 517, 64 N. W., 1133, the court says:

"Repeals by implication are not favored. The question is one of legislative intent, and its intent is to be ascertained, as legislative intent is ascertained in other respects when not expressly declared, by construction. Considerations of convenience, justice and reasonableness, when they can be invoked against the implication of repeal, are always very patent. Where a general intention is expressed, and also a particular intention is expressed which is incompatible with the general one, the particular intention shall be considered an exception to the general one. Thus, when the Legislature enacts a statute in general terms it is not reasonable to suppose that they intended to abrogate particular legislation, to the details of which they had previously given their attention, unless the general act shows a plain intention to do so. The general law can have full effect beyond the scope of the particular or special act, and, by allowing the latter to operate according to its special aim, the two Acts can stand together."

This is the construction our higher courts have given in cases similar to this one. See:

Houston & Texas Central Railway Co. vs. Ford, 53 Tex., 364;

Cain vs. State, 20 Tex., 355;
Lovett vs. Casey, 17 Tex., 594;
Laughter vs. Seela, 59 Tex., 177.

Prior to the amendments to Articles 7490 and 7491 of the Revised Civil Statutes by the Acts of the Thirty-sixth Legislature, it was the duty of the Comptroller to employ some suitable person or persons to look specially after, sue for and collect inheritance taxes, and such persons were entitled to receive for their services the sum of ten per cent of the amount of such taxes collected, but by the amendment to these articles the Thirty-sixth Legislature took away from the Comptroller the authority to appoint such person or persons to collect inheritance taxes and placed certain duties upon the county attorney with reference to these matters.

In the case of Ellis County vs. Thompson, 96 Texas, 22, the Supreme Court stated the rule by which county officers were to be guided as to whether certain fees came within the provisions of the fee bill as follows:

"Every fee or compensation provided to the officers mentioned in the fee bill should be considered in determining the maximum amount such officers should receive unless the same is excepted from the provisions of the fee bill by the Act fixing the fee, or by the fee bill itself."

The question then arises, did the Legislature intend to exempt from the fees allowed county and district attorneys under the provisions of Chapter 47, Acts of the Thirty-sixth Legislature, from the provisions of the fee bill, as amended by Chapter 158 of the Thirty-sixth Legislature, and did the Legislature intend for the fees of county judges, provided for under said chapter, to be exempt from the provisions of the fee bill. It is clear from the provisions of Section 1, Chapter 47, Acts of the Thirty-sixth Legislature, and from Article 3889 as amended by Chapter 158, Acts of the Thirty-sixth Legislature, that county and district attorneys and county judges must account for all fees collected by them, including fees collected in inheritance tax cases, unless the same is excepted from the provisions of the fee bill by the act fixing the fee, or by the fee bill itself.

Keeping in mind the rule of statutory construction, heretofore quoted, and the rule of our Supreme Court, as laid down in the case of Ellis County vs. Thompson, supra, we quote the latter part of Article 7490, as amended:

"The county attorneys and the district attorneys of this State are authorized at any time after the expiration of the time above mentioned to institute suit in behalf of the State in any court of competent jurisdiction for the recovery of such tax and the penalties owing thereon under this chapter, and he shall receive as compensation therefor ten per cent. on the amount of the taxes payable hereunder, not to exceed in any one case the sum of two hundred dollars, which fee shall be added and collected from said estate in addition to the taxes and penalties herein provided for, *which compensation shall be in addition to all other fees and compensation provided by law;* provided that the aggregate of fees received under this chapter shall not exceed in any one year the sum of two thousand dollars and any fees earned in addition to said sum shall be considered a portion of the tax and penalties collected, and be distributed in the same manner."

Again quoting a portion of Article 7491, as amended:

"For his (county attorneys and district attorneys) services in making the investigation and making the report herein required, the county attorney shall receive the commission of eight per cent. for the taxes payable under this chapter not to exceed in any one estate the sum of sixty dollars, and the county judge shall receive a commission of two per cent. of the taxes collected under this chapter, not to exceed in any one estate the sum of fifteen dollars, which fees shall be cumulative of all other fees and compensation provided by law."

These provisions bring us clearly within the rule laid down in the case of Ellis County vs. Thompson. Here the act itself fixes the fee and exempts the same from the provisions of the fee bill.

It is therefore made very clear that the Legislature did intend that the fees allowed county attorneys, district attorneys and county judges, under the provisions of Articles 7490 and 7491, as amended by Chapter 164 of the Acts of the Thirty-sixth Legislature, to be cumulative of all other fees allowed said officers by law, and that the Legislature did not intend that said officers should be required to account for said fees as fees of office, as provided for under the provisions of said Article 3889, as amended by the Acts of the Thirty-sixth Legislature. or under Chapter 47 of the Acts of the Thirty-sixth Legislature. This is true regardless of the population of the county.

You are, therefore, advised that the fees of county attorneys, district attorneys and county judges, provided for under Articles 7490 and 7491, providing for certain fees in the collection of inheritance taxes, as amended by Chapter 164 of the Acts of the Regular Session of the Thirty-sixth Legislature, are cumulative of all other fees allowed them by law and need not be accounted for by them as fees of office.

Yours very truly,

BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 2150, Bk. 53, P. 422.

COUNTY AND DISTRICT ATTORNEYS—COMMISSIONS.

Where the defendant is charged with pursuing a taxable occupation without license and avails himself of the provisions of Article 133 of the Penal Code, and before conviction procures a license to pursue or follow the occupation for the pursuing of which, without license, a prosecution was instituted, and pays all costs of said prosecution, the county or district attorney is not entitled to, and cannot collect any commissions.

Articles 130, 133, of the Penal Code, and Article 1193 of the Code of Criminal Procedure.

November 28, 1919.

Hon. J. Carroll McConnell, County Attorney, Palo Pinto, Texas.

DEAR SIR: Your letter of the 19th instant addressed to the Attorney General has been received. It reads as follows:

"In event some person or persons are arrested under a complaint for failing to pay their occupation tax or for failing to take out license as a

plumber and the person or persons subsequently pay their tax and the costs to get the case dismissed as the law directs, is the county attorney allowed a ten per cent. commission of the tax? For instance let us suppose that a gas company fails to take out an occupation tax, $20 State and $10 county, does a county attorney receive a ten per cent. commission in addition to his five or ten dollars fees?"

Your inquiry evidently relates to a prosecution had under Article 130 of the Penal Code, but the defendant before trial availed himself of the provisions of Article 133 of the Penal Code, which provides "any person prosecuted under Article 130 of the Penal Code of the State of Texas shall have the right at any time before conviction to have such prosecution dismissed upon payment of the tax and all costs of said prosecution, and procuring the license to pursue or follow the occupation for the pursuing of which, without license, the prosecution was instituted. * * * *"

Article 1193 of the Code of Criminal Procedure provides:

"A district or county attorney shall be entitled to ten (10%) per cent. of all fines, forfeitures or moneys collected for the State or county, upon payments recovered by him * * *"

In the instant case, prosecution was instituted under the provisions of Article 130 of the Penal Code, but before trial the defendant took out license permitting him to pursue the occupation which he had been pursuing without occupation license, and because of his failure to take out said license the prosecution was instituted. He then went to the court, and in accordance with the provisions of Article 133, he paid all the costs of said prosecution, which included all costs of whatever nature, except his fine which he did not have to pay because he had taken out the license required before trial. Then there was no judgment had for any fine, but only for the costs of prosecution thus far incurred. If there were no fine, there could be no commissions collected by the county attorney or other officers, because under the provisions of Article 1193 quoted above, county and district attorneys, and the clerk of the court are only entitled to commissions upon judgments on fines, forfeitures or moneys recovered by the district and county attorney.

You are, therefore, advised that under the statement of facts as contained in your letter you would not be entitled to any commission whatever in this case.

Yours very truly,
BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 2152, Bk. 53, P. 428.

DISTRICT ATTORNEYS—FEES—COMMISSIONS—
FELONIES—FINES.

District attorneys in districts composed of two or more counties are not entitled to collect commissions on fines and forfeited bail bonds.

Where defendant is convicted of a felony and his punishment assessed

at a fine, the fine when collected should be paid into the county treasury after the commission of ten (10%) per cent allowed district attorneys has first been deducted. This commission should be paid by the officers to the district clerk and remitted to the State Treasurer.

Articles 1120, 1150, 1193, of the Code of Criminal Procedure. Chapter 70, Acts Thirty-sixth Legislature.

November 29, 1919.

Hon. Fletcher S. Jones, District Attorney, Wichita Falls, Texas.

DEAR SIR: Your letter of the 20th instant addressed to the Attorney General has been received. It reads as follows:

"I wish you would please advise me under this state of facts whether I am entitled to a commission on fines collected and forfeit of bonds collected.

"Where I will make the one hundred and seventy days allotted to me as district attorney. There has been paid unto the clerk of the district court of Clay County, Texas, the sum of $500, same being a fine assessed against one Ben Easley, who was charged with the offense of an assault with a prohibited weapon, Articles 1024a and 1024b of the Penal Code, and the jury found him guilty of an aggravated assault and assessed his judgment at the sum of $500. There was also another charge against the same defendant, charging him with the same offense, that is to say an offense of a similar nature, but being committed on a different person. In this case the jury found the defendant guilty and assessed his punishment at a fine of $100 and ten days' confinement in the county jail.

"The sum of $100 has been paid and the clerk of the court is in doubt as to whether he should remit it to the State Treasurer or the county treasurer, and I would like for you to advise me as to whom he should remit. It is my opinion that the defendant stands convicted of a felony, and the sum of $100 should be remitted to the State."

You first desire to know under the above state of facts whether you are entitled to a commission on fines collected and forfeited bail bonds collected. In the first case cited by you, the defendant was charged with a felony and convicted of a misdemeanor, and his punishment assessed at a fine of $500. The question is then with reference to this case: Are you entitled to a commission on this $500 under the provisions of Article 1193 of the Code of Criminal Procedure?

Article 1120 of the Code of Criminal Procedure, as amended by Chapter 70 of the Acts of the Thirty-sixth Legislature, prescribes the salary or compensation allowed to district attorneys in all judicial districts of this State composed of two counties or more. This Article is substantially the same as the same Article of Title 15 of Chapter 2 of the Code of Criminal Procedure, which it amends; the material difference being that by the last amendment, district attorneys are permitted to receive $15 per day not to exceed 170 days in any one year, whereas under the old Article they were limited to 133 days.

This Department in construing this Article has held that it was the intention of the Legislature to allow district attorneys $15 a day in lieu of all fees and commissions heretofore allowed them. This ruling was had in an opinion of this Department prepared by Hon. C. W. Taylor, Assistant Attorney General, under date of September 6, 1917, and addressed to Hon. Louis Seay, District Attorney, Groesbeck, Texas. The identical question raised, and which was the basis of that opinion, was whether the district attorney in a district composed of two or more counties was entitled to a commission upon sums collected

upon forfeited bail bonds under the provisions of Article 363 of the Revised Civil Statutes, but in said opinion the general question of compensation allowed to district attorneys in two or more counties was fully discussed. I herewith enclose you a copy of that opinion for your information.

It is the opinion of this Department, and you are so advised, that district attorneys in two or more counties are not entitled to commissions received on fines where the defendant is indicted for a felony and convicted of a misdemeanor.

The question then arises under the provisions of Articles 1120 and 1193 of the Code of Criminal Procedure, whether a commission of ten (10%) per cent should be collected in cases of this kind, and if so, what disposition should be made of the same. It is provided in Article 1120 "that all fines in misdemeanor cases and commissions and fines heretofore allowed district attorneys under the provisions of Article 1118 of the Code of Criminal Procedure, and the Chapter 5 of the General Laws passed at the Special Session of the Twenty-fifth Legislature, in districts composed of two or more counties, shall, when collected, be paid to the clerk of the district court, who shall pay the same over to the State Treasurer. * * *" It is, therefore, the duty of a district clerk to collect a commission of ten (10%) per cent on all fines collected under conditions of this kind and to remit the same to the State Treasurer. We are also of the opinion that a like procedure should be had in all cases of forfeited bail bonds.

In the second case you cite, the defendant was charged with a felony and convicted of a felony, but his punishment was assessed at a fine of $100 and ten days confinement in a county jail. What has been said with reference to your commissions in the first case applies with equal force to this case; you not being entitled to any commission in either case, but a commission of ten (10%) per cent should be charged and when collected paid to the district clerk, whose duty it is to remit the same to the State Treasurer under the provisions of Article 1120 of the Code of Criminal Procedure, as quoted above.

Your next question, then, is as to what disposition should be made of the remainder of this $100 after the commission of ten (10%) per cent had been remitted to the State Treasurer. Article 1050 of the Code of Criminal Procedure provides "Money collected by an officer upon recognizance, bail bonds, and other obligations recovered upon in the name of the State, under the provisions of this Code, and all fines, forfeitures, judgments and jury fines, collected under *any* of the provisions of this Code, shall be forthwith paid over by the officers collecting the same to the county treasurer of the proper county, after first deducting therefrom the legal fees and commissions for collecting the same."

You are, therefore, advised that it is the duty of the clerk of the court in this particular case to pay over the money to the county treasurer, after first having deducted a commission of ten (10%) per cent, which should be by him remitted to the State Treasurer.

Yours very truly,
BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 2119, Bk. 53, P. 274.

DISTRICT ATTORNEYS—FEES OF OFFICE—STATUTORY CONSTRUCTION—COMMISSIONS.

1. A district attorney, whether in a district composed of one county or in a district composed of two or more counties, is entitled to the compensation fixed in Article 363, Vernon's Sayles' Revised Civil Statutes, on all moneys collected by him in an escheat proceeding in behalf of the State of Texas. However, a district attorney in a district composed of two or more counties would not be entitled, at the same time, to receive a per diem from the State as is provided in Article 1122, Code of Criminal Procedure, for the days he was in attendance upon the court during such escheat proceedings.

Vernon's Sayles' Revised Statutes, Article 353, 363;
Code of Criminal Procedure, 1911, Articles 1120 and 1193;
See also, Wharton County vs. Ahlday, 84 Texas, 15, 19 S. W., 292;
Austin vs. Johns, 62 Texas, 183;
State vs. Norrell, 52 Texas, 430.

July 18, 1919.

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

DEAR SIR: We have yours of July 14, addressed to this department, in which you ask whether or not a district attorney is entitled to a commission on moneys collected for the State in an escheat proceeding. I presume that the reason of your inquiry is that your district is composed of two or more counties.

There are several statutes relating to the fees of district attorneys, to which I shall call your attention.

The first statute is the one contained in the Code of Criminal Procedure, being number 1120 of the Code of Criminal Procedure, 1911, or Article 1117-b, Vernon's Sayles' Crim. Statutes, 1916, Vol. 2.

This article, as you know, provides a per diem of fifteen dollars per day for one hundred and thirty-three days for district attorneys in districts composed of two or more counties, and has this further provision

"* * * and provided further that all fees in misdemeanor cases and commissions and fees heretofore allowed district attorneys under the provisions of Article 1118, Code of Criminal Procedure, and in Chapter 5 of the General Laws, passed at the Special Session of the Twenty-fifth Legislature, in districts composed of two or more counties, shall, when collected, be paid to the clerk of the district court, who shall pay the same over to the State Treasurer."

Article 1118 here referred to and Chapter 5 of the General Laws of the Special Session, Twenty-fifth Legislature, are identical with each other and are the same as Article 1118 of the Code of Criminal Procedure of 1911.

I call your attention to another Article relating to the fees of district attorneys, to-wit, Article 363 of the Revised Civil Statutes, which reads as follows:

"Whenever a district or county attorney has collected money for the State, or for any county, he shall, within thirty days after receiving the same, pay it into the treasury of the State, or of the county to which it belongs, after deducting therefrom and retaining the commissions allowed

him thereon by law. Such district or county attorney shall be entitled to ten per cent. commission on the first thousand dollars collected by him in any one case for the State or county from any individual or company, and five per cent. on all sums over one thousand dollars, to be retained out of the money when collected, and he shall also be entitled to retain the same commissions on all collections made for the State or for any county; provided that ten per cent. shall be allowed on all such sums heretofore collected since the adoption of the Revised Statutes. This article shall also apply to money realized for the State under the escheat law."

This brings us to the question as to whether the compensation provided in Article 1120, Code of Criminal Procedure of 1911, is exclusive of all other compensations for district attorneys in districts composed of two or more counties. This identical question does not seem to have been discussed by the courts of this State, but one analogous thereto has been frequently discussed.

In the case of State vs. Moore, 57 Texas, 307, et seq., the question arose as to whether or not a county attorney was entitled to a commission in addition to his regular fees for money recovered on the bond of a defaulting tax collector and his sureties.

The statute under which the county attorney endeavored to recover was what is now Article 1193 of the Code of Criminal Procedure and which reads as follows:

"The district or county attorney shall be entitled to ten per cent. on all fines, forfeitures or moneys collected for the State or county, upon judgments recovered by him; and the clerk of the court in which such judgments are rendered shall be entitled to five per cent. of the amount of said judgments, to be paid out of the amount when collected."

The opinion in this case was given by Associate Justice Stayton. After disposing of other questions involved the court discussed at length the question of whether or not a provision in the Code of Criminal Procedure relating to fees and compensations of the county attorney would apply in civil cases.

At the time of the writing of this opinion, Article 363 of the Revised Civil Statutes did not provide for the amount of commission to be paid county and district attorneys in civil cases, and the county attorney endeavored to establish his case under Article 1193 of the Code of Criminal Procedure.

I will quote for you some excerpts from the opinion of Judge Stayton:

"This article, in so far as the rights of a clerk to receive commissions in such cases as those in which the county attorney in this cause claims the right to retain them, was considered in the case of the State of Texas vs. Norrell, 53 Texas, 430, and it was therein held that that article had no application to moneys other than such as were collected under the Penal Code and Code of Criminal Procedure.

"The language is in no material respect different in respect to the clerk to that applicable to a county attorney, except in the per cent. which each are therein declared to be entitled to.

"It is true that there is an omission to provide in the Revised Statutes for commissions, in civil cases in which the State is a party, to county or district attorneys, and that the same does provide fees for clerks in all civil cases, and this in construction is entitled to some weight, for it is not to be presumed that officers are to work without compensation.

"Article 1112, Code Criminal Procedure, as it now stands, was not contained in the code as it came from the hands of the commission to revise the laws, and as the same was adopted; but the article as it then stood was amended by the insertion of that part thereof which applies to clerks, by the Act of April 22, 1879, which by its title professes to be an amendment to 'An Act to adopt and establish a penal code and a code of criminal procedure for the State of Texas.'

"While Sections 36 and 35 of Article 3 of the Constitution, by section 43 of that article are inoperative upon the revision required to be made by the last named article, yet those sections are operative upon any amendment to a Civil or Criminal Statute contained in either the Civil or Criminal Codes as revised; and it may well be questioned if any presumption could be entertained that the Legislature, in the face of Sections 35 and 36, Article 3, intended to give Article 1112, Code Criminal Procedure, any effect whatever in reference to the collection of money in suits in every respect civil in character, and which in no manner are connected with the administration of the criminal law.

"A fair construction of that article may limit its operation to such moneys as are collected in the name of the State under the provisions of the Code of Criminal Procedure, which, however, when collected, are by law to be paid into the county treasury; for there is nothing in its language which makes it applicable to money which must be paid into the treasury of the State, Article 257, Revised Statutes, does recognize the fact that county attorneys are entitled to commissions upon moneys collected, which must be paid into the State Treasury, but none of its provisions fix the rate of commission.

"If, after Article 1112, Code Criminal Procedure, became operative, and before the Revised Statutes took effect, a question had arisen as to the rate of commission which a county or district attorney was entitled upon collections made from a tax collector, no one would have thought to look, or would have felt authorized to look to that article for the measure of compensation, but would have looked to the civil statutes then in force.

"Past legislation will illustrate the question. The Act of 1848 (Pasch Dig., 3274) provided for commissions in all suits prosecuted by district attorneys for the State in which money was collected, without any distinction between suits which were strictly civil and such as were connected with criminal procedure, at the rate of five per cent. upon all sums not exceeding $5,000, and upon all sums in excess of that amount two and a half per cent. The Code of Criminal Procedure allowed its provisions, without reference to the amount collected. (Pasch Dig. 3274.) The rate of commission was again changed under the Code of Criminal Procedure in 1870 (Pasch. Dig. 5842), and as thus changed, district attorneys were entitled to a fee of ten per cent. on all sums not exceeding $1,000, and five per cent. in excess of that.

"Under these laws, the Act of 1848 would have regulated the rate of commission in civil cases, so long as it remained in force.

"From this it will be seen that the rate of commission in civil and in criminal proceedings has not been the same at all times.

"In fact, all of the provisions of the Code of Criminal Procedure regulating commissions have been confined to collections made under its authorization, unless Article 1112 is an exception.

"When we consider that in making amendments to the Penal Code or Code of Criminal Procedure the title to the amending Act, under Section 35, Article 3, of the Constitution, must show the subject of the amendment and that that subject must be one connected with the criminal law, it cannot well be conceived that the Legislature intended to make that article applicable to civil suits or to commissions in civil cases, which can only be regulated by the Revised Statutes or law amendatory thereof. An amendment purporting in its title to be an amendment to the Code of Criminal Procedure, which should attempt to regulate fees in actions in no manner connected with the administration of the criminal laws, would be void under the Thirty-fifth Section of Article 3 of the Constitution, and it could not be presumed that the Legislature intended to do indirectly what it could not have done directly. Cannon vs. Hemphill, 7 Tex., 207.

"The Revised Statutes declare that "The duties and powers of district and county attorneys shall be such as are prescribed in this title and in the Code of Criminal Procedure of this State (R. S., 250), but carefully abstains from attempting to designate those powers any further than the same apply to matters essentially civil in their character. But this article cannot be construed to mean that the rights of a county attorney are the same in collections made in civil cases as in collections made in criminal cases; if the Legislature had so intended, a few plain words would have expressed that intention; besides, it would require a meaning to be given to the words 'duties' and 'powers,' which they do not ordinarily have, to make them reach the question now under consideration.

"It is claimed, however, that if Article 1112, Code of Criminal Procedure, does not regulate the rate of commission which a county attorney is entitled to in civil cases, that the same may be looked to, and the rate of commission in such cases, by analogy, may be determined.

"In actions between man and man for services rendered by the one at the request of another, in the absence of a contract fixing the compensation, the courts have the power to inquire what will be a reasonable compensation for the services performed, and to render judgment for such sum; but no such power is believed to exist in regard to the fees of public officers in the absence of an express grant of such power.

"The Constitution provides that 'The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors not provided for in this Constitution,' and this power can be exercised by the Legislature alone.

"A failure of the Legislature to exercise the power thus conferred cannot clothe the courts with it."

In reading this opinion bear in mind that Article 1112, Code Crim. Procedure, therein referred to is identical with Article 1193 of the present Code of Criminal Procedure; that Article 250 therein referred to is identical with the present Article 353, Revised Civil Statutes, but since said opinion was rendered Article 257, R. S., has been amended and now is brought forward in its present form in Article 363, R. S.

You will observe from this case that the Supreme Court held that the compensation in the Code of Criminal Procedure for a county attorney related only for services rendered in cases criminal in their nature, and that for cases of a purely civil nature the county attorney could receive compensation only as it was provided for in the civil statutes. At that time the Civil Statutes provided no compensation for county attorneys for civil actions, and the Court held that for that reason, while it was the duty of the county attorney to bring the actions, yet he could receive no special compensation therefor.

Since that opinion the Civil Statutes have been amended as is shown in the present Article 363, formerly Article 257 of the Revised Statutes.

This action again came before the court in State vs. Hart, District Clerk, 96 Texas, 102; 70 S. W., 947, and 71 S. W., 1136.

This is a case wherein a suit to recover penalties under the antitrust laws the district clerk of Travis County claimed commissions under what is now Article 1193, Code of Criminal Procedure.

Chief Justice Gaines rendered the opinion for the Court, holding that this Statute related only to matters of a criminal nature; that the fees of a district clerk in civil actions were prescribed in the Civil Statutes; and that he could recover in a civil action only such fees as the Civil Statute fixed.

He used the following language in his opinion:

"There are several provisions in our statutes which describe the fees which

shall be allowed clerks of the district court. One is Article 2423 of the Revised Civil Statutes. Others are Articles 1086, 1093, 1123 and 1143 of the Code of Criminal Procedure. The Revised Civil Statutes (Sayles') prescribe civil rights and regulate the remedies and procedure in civil suits. The Code of Criminal Procedure provides the practice in criminal actions; that is to say, such as are triable on the criminal side of the docket, and appealable, if appealable at all, to the court of criminal appeals. For an illustration, let us take the case of those jurisdictions where separate criminal courts are established. There, as to suits which are prosecuted in the criminal district courts, the provisions of the Code of Criminal Procedure apply. As to those prosecuted in district courts having civil jurisdiction only, the Revised Civil Statutes apply and the fees of the district clerks are regulated by Article 2423. This is certainly the general rule. But the argument on behalf of the appellee resolves itself into the proposition that Article 2423 is modified and added to by Article 1143 of the Code of Criminal Procedure. We cannot concur in the proposition. The title of the statute which enacted our Penal Code and Code of Criminal Procedure is as follows: 'An Act to adopt and establish a "Penal Code" and a "Code of Criminal Procedure" for the State of Texas.' The second section of the Act: 'Be it further enacted, that the following articles shall hereafter constitute the Code of Criminal Procedure of the State of Texas, to wit:' Then follows the Code, containing Articles from 1 to 1146, inclusive. We are not prepared to say that, under our Constitution, it was permissible to incorporate under the title above set forth a provision allowing fees in a civil action. But conceding, for the sake of argument, that this might have been done, we are clearly of the opinion that it was not the purpose of the Legislature to do so in this instance. We think that in enacting the Code of Criminal Procedure, and regulating the fees of office thereunder, the lawmakers had in mind only such actions as were regulated by that Code, namely, those over which the criminal courts had jurisdiction, and which should be prosecuted in such courts. The question is practically decided in State vs. Norrell, above cited. It is true that the suit in which the money was recovered in that case was not one for a forfeiture, and in no sense was it a penal action or a criminal case. But the collections from which the clerk claimed the right to retain five per cent. were 'moneys collected for the State,' and therefore fell within the broad terms of Article 1143, provided that article was intended to embrace civil suits. The court held that it was not so intended, and gave judgment for the State."

These two cases are directly in line with the question we are now considering and escheat proceedings is a civil action. District Attorneys, when the facts prescribed by statute are present, are required to bring escheat proceedings in behalf of the State.

Article 363, R. C. S., provides for fees for district and county attorneys in civil actions and specifically names escheat proceedings in behalf of the State.

Article 363 is still a valid and subsisting law in Texas. It has not been repealed and the adoption of Article 1120 of the Code of Criminal Procedure did not amend or repeal same, inasmuch as said Article 1120, under the cases above quoted and the rules therein established, provided compensation only in matters of a criminal nature and Article 363 provides compensation for district attorneys whether in one or more counties in matters purely of a civil nature. They relate to separate and distinct duties of a district attorney; are in no way in conflict with each other and therefore both statutes are in present operation.

The compensation provided in Article 363 Revised Civil Statutes for district attorneys in escheat proceedings in behalf of the State is

ten per cent on the first one thousand dollars collected in any one case, for the State, and five per cent on all sums over one thousand dollars.

See also, Wharton County vs. Ahlday, 84 Texas, 15; 19 S. W., 292; Austin vs. Johns, 62 Texas, 183; State vs. Norrell, 53 Texas, 430.

Therefore, it is the opinion of this department and I so advise you that a district attorney, whether in a district composed of one county or in a district composed of two or more counties, is entitled to the compensation fixed in Article 363 Vernon's Sayles' Revised Civil Statutes, on all moneys collected by him in an escheat proceeding in behalf of the State of Texas.

However, a district attorney, in a district composed of two or more counties. would not be entitled, at the same time, to receive a per diem from the State as is provided in Article 1122, Code of Criminal Procedure, for the days he was in attendance upon the Court during such escheat proceedings.

Yours very truly,

JOHN MAXWELL,
Assistant Attorney General.

Op. No. 2173, Bk. 53, P. 550.

DISTRICT ATTORNEYS—FEES OF OFFICE.

Chapter 70, Acts of the Regular Session of the Thirty-sixth Legislature, 1919, fixing the compensation of district attorneys in all judicial districts in this State composed of two or more counties, does not repeal by implication Chapter 76, Acts of the Fourth Called Session of the Thirty-fifth Legislature. 1918, as there was no express provision in the subsequent Act repealing the provisions of the former Act and the law was not repealed by necessary implication in the passage of the last Act.

Repeals by implication are not favored and the repugnancy between the latter and former Act must be wholly irreconcilable in order to work a repeal of the former.

Repeals by implication are things disfavored by law and never allowed except when the inconsistency and repugnancy are plain and unavoidable.

The district attorney of the El Paso district, the Thirty-fourth Judicial District of the State of Texas, composed of the counties of Culberson, Hudspeth and El Paso, which contains a city of 35,000 inhabitants and an army post, would be entitled to collect as compensation for his office $15 per day for one hundred seventy days, under the provisions of Chapter 70, Acts of the Regular Session of the Thirty-sixth Legislature, 1919; and in addition thereto, compensation at $15 per day not to exceed forty days, provided that he renders the service in the manner provided for by the statutes and provided that such compensation does not exceed $5,000 in any one year.

Section 1, Chapter 76, Acts Thirty-fifth Legislature; Section 1, Chapter 70, Acts of the Thirty-sixth Legislature; Decennial Digest, Volume 18, Section 159. Ex Parte Kimbrell, 83 S. W., 382; Ex Parte Keith, 83 S. W., 683; Lewis' Statutory Construction, Volume 1, 523-527; Black on Interpretation of Laws, second edition, 351-352.

January 20, 1920.

Hon. Leigh Clark, County Attorney, El Paso, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of recent date, desiring to have his opinion as to whether or not Chapter

76, Acts of the Fourth Called Session of the Thirty-fifth Legislature, 1918, fixing the compensation of District Attorneys in counties which contain cities of 35,000 inhabitants and over and according to the last Federal census, and also, where army posts are now located, was repealed by a subsequent Act of the Legislature, denominated Chapter 70, Acts of the Regular Session of the Thirty-sixth Legislature, 1919, fixing the salaries of District Attorneys in all judicial districts of this State composed of two or more counties.

You advise that you are District Attorney in and for the Thirty-fourth judicial district of the State of Texas, which district is composed of the counties of Hudspeth, Culberson, and El Paso. You desire to have the opinion of the Attorney General as to the amount of compensation now allowed by law to your office.

Replying thereto, we beg to advise that in our opinion, the subsequent Act of the Legislature referred to, Chapter 40 Acts of the Regular Session of the Thirty-sixth Legislature, 1919, did not repeal the Acts of the Fourth Called Session of the Thirty-fifth Legislature; but that both Acts are harmonious and in effect at this time and that you are lawfully entitled to compensation as fixed by the Acts of the Legislature referred to. Omitting the captions of the bills and the emergency clauses, Section 1 of each Act reads as follows:

SECTION 1, CHAPTER 76, ACTS OF THE THIRTY-FIFTH LEGISLATURE.

Hereafter in counties which contain cities of thirty-five thousand inhabitants and over, according to the last Federal census, and also where Army Posts are now located, the District Attorney or the County Attorney, as the case may be, shall in addition to the compensation as now provided by law, be paid the sum of fifteen dollars per day for not exceeding forty days during any one year, when engaged in prosecuting violators of the law. All time spent by such District Attorney, or county attorney, in assisting the grand jury in investigating violations of said Act shall be included within the compensation herein allowed and be considered as that much time spent in such prosecutions. The compensations herein provided for shall be in addition to that heretofore provided as per diem or fees of office, and shall not be included within the limitations of the fee bill. Such compensation shall be paid in the same manner as the per diem and fees of District Attorneys and county attorneys performing the duties of District Attorneys are now paid, provided that such additional compensation shall not be granted to any officer where the same will increase his entire compensation to more than five thousand dollars per annum. By the word Army Post shall constitute a permanent Fort which has been established ten years or more."

SECTION 1, CHAPTER 70, ACTS OF THE THIRTY-SIXTH LEGISLATURE.

That Article 1120 of Title 15 of Chapter 2 of the Code of Criminal Procedure of the State of Texas be and the same is hereby amended so as to hereafter read as follows:

ARTICLE 1120.—In addition to the five hundred dollars now allowed them by law, district attorneys in all judicial districts of this State composed of two counties or more shall receive from the State as compensation for their services the sum of fifteen dollars for each day they attend the session of the district court in their respective districts in the necessary discharge of their official duty, and fifteen dollars per day for each day they represent the State at examining trials, inquest proceedings and habeas corpus proceedings in vacation; said fifteen dollars per day to be paid to the district attorneys, upon the sworn account of the district attorney, approved by the district judge, who shall certify that the attendance of said district attorney for the

number of days mentioned in his account was necessary after which said account shall be recorded in the minutes of the district court; provided, that the maximum number of days for such attendance and service for which the compensation is allowed shall not exceed one hundred and seventy days in any one year; and, provided further that all fees in misdemeanor cases, and commissions and fees heretofore allowed district attorneys under the provisions of Article 118 of the Code of Criminal Procedure, and in Chapter 5 of the General Laws passed at the Special Session of the Twenty-fifth Legislature, in districts composed of two or more counties shall, when collected, be paid to the clerk of the district court, who shall pay the same over to the State Treasurer; provided, the provisions of this bill shall not apply to district attorneys whose last preceding annual report of himself or his predecessor shows that he or his predecessor making such report received in fees, under the criminal laws, over two thousand four hundred and ninety-five dollars. Provided, further, that in districts composed of two or more counties, and in which said district there is a county containing a city of thirty-five thousand population or over, according to the last federal census, the district attorney in such district shall, with the approval of the county commissioners' court of such county, be authorized to appoint one assistant district attorney, who shall receive a salary of not to exceed one hundred and fifty dollars per month, such salary to be paid by such county, payable monthly; and provided, further that such assistant district attorney shall be subject to removal at the will of the district attorney. Such assistant district attorney shall be authorized to perform any duty devolving upon the district attorney and to perform and exercise any power conferred by law upon the district attorney when by him so authorized.

The additional compensation allowed by Chapter 76 Acts of the Fourth Called Session of the Thirty-fifth Legislature, to the office of District Attorney in counties which contain cities of 35,000 inhabitants and over, according to the last Federal census, and, also, where army posts are located, was an additional sum allowed, as then provided by law, to be paid to such officer in the sum of $15.00 per day, for not exceeding forty days in any one year, when engaged in the prosecuting of violators of the law. It is specially provided by said Act that such compensation shall be in addition to that theretofore provided for as per diem or fees of office and shall not be included within the limitations of the fee bill, provided that such additional compensation shall not be granted to any officer where the same will increase their entire compensation to more than $5,000 per annum.

From the language of the said Act, it is manifest that it was the intent of the Legislature to increase the salaries of district attorneys in cities of 35,000 inhabitants or more; and, also, where army posts were located, to the extent of allowing said parties for additional time not to exceed forty days during any one year, when engaged in prosecuting violators of the law. This was in substance a special act, the legislature having in view the granting of additional compensation to the District Attorneys of the districts in counties where there was a city of 35,000 inhabitants or more, or an army post. Doubtless, it was contemplated by the Legislature that such officer would have many additional duties to perform more onerous than those of similar officers in counties sparsely settled and where there are not located army posts.

It is specifically provided in said Act of the Legislature that: "The compensation herein provided for shall be in addition to that

heretofore provided as per diem or fees of office and shall not be included within the limitation of the fee bill." Which Act of the Legislature recognized the per diem and fees of office then allowed to the office of district attorneys in districts composed of two or more counties and did not in any way conflict therewith, but was cumulative thereof, in the particulars hereinbefore mentioned, to-wit, in allowing additional compensation to such officers so situated in cities of 35,000 inhabitants or more where an army post was located.

At the time of the passage of this Act (Chapter 76, Acts of the Fourth Called Session of the Thirty-fifth Legislature), Article 1120 of Title 15, p. 2, Code of Criminal Procedure of this State, allowed to District Attorneys in all judicial districts of this State composed of two or more counties, in addition to $500 now allowed them by law from the State as compensation for services was $15 per day, provided that the maximum number of days for such service for which compensation was allowed shall not exceed one hundred thirty-three days in any one year. This article of the Code of Criminal Procedure was amended by Chapter 70, General Laws of the Thirty-sixth Legislature, 1919, extending the maximum number of days for which such officer could collect his fees for a time not to exceed one hundred seventy days in any one year. In this last amendatory act of Article 1120, Code of Criminal Procedure, there is no expressed provision therein repealing any and all laws in conflict therewith, and if there should be a repealing of the former Act by the adoption of the provisions of this Act, it would be by necessary implication and not by any expressed provisions thereof.

"Repeals by implication are not favored. * * * The presumption being, as just stated, against any intention to make any unnecessary changes in the laws, it follows that there is also a presumption against repeals by implication. Every new statute should be construed in connection with those already existing in relation to the same subject matter, and all should be made to harmonize and stand together if that can be done by any fair and reasonable interpretation, and if the new act does not expressly declare the repeal of an earlier statute, it will not be construed as effecting such repeal unless there is such a repugnancy or conflict between the provisions of the two acts as to show that they could not have been designed to remain equally in force. Repeals by implication * * * are things disfavored by law, and never allowed but when the inconsistency and repugnancy are plain and unavoidable; and if laws and statutes seem contrary to one another, yet if, by interpretation, they may stand together, they shall stand; and when two laws only so far disagree or differ as that by any other construction they may both stand together. * * * Where a new act is couched in general affirmative language, and the previous law can well stand with it, and if the latter act is all in the affirmative, there is nothing to say that the previous law shall b erepealed, and therefore the old and lew laws may stand together." Black on Interpretation of Laws, 2nd ed. 351-352.

Repeals by implication are not favored and the repugnancy between the latter and the former act must be wholly irreconcilable in order to work a repeal of the former. Decennial Digest, Vol. 18, Section 159. Ex Parte Kimbrell, 83 S. W., 382; Ex Parte Keith, 83 S. W., 683.

"It is a principle that a general statute without negative words will not repeal by implication from their repugnancy the provisions of a former one

which is special, local, or particular, or which is limited in its application unless there is something in the general law or in the course of legislation upon its subject matter that makes it manifest that the Legislature contemplated and intended a repeal. * * * A special statute providing for a particular place, or applicable to a particular locality, is not repealed by a statute general in its terms and application, unless the intention of the legislature to repeal or alter the special law is manifest, although the terms of the general act would, taken strictly and but for the special law, include the case or cases provided for by it. Lewis' Statutory Construction, Vol. 1, pp. 523-527.

Construing the two acts of the Legislature above referred to, fixing the fees of the office of district attorney, in which last act there appears no express repealing clause, we are of the opinion that both acts can be sustained and that the subsequent act does not repeal the provisions of the former. As before stated, repeals by implication are not favored by the courts and the repugnancy between the latter and the former must be wholly irreconcilable in order to work a repeal of the former. There is no such repugnancy between the two acts of the Legislature and since both acts of the Legislature can be sustained without doing violence to the language of either act, and since there is no repugnancy or conflict between the two which is irreconcilable, in our opinion, it is the duty of this office in construing the same to hold that the first act was not repealed by necessary implication by the provisions of the second act. If the Legislature had intended a repeal of the former act by the use of the necessary language for such purpose, it could have accomplished a repeal thereof, and in the absence of such language, either expressed or implied, we are, therefore, of the opinion that both Acts referred to are valid subsisting laws, and that you are entitled to the compensation as provided for by both. Under the provisions of Chapter 70, Acts of the Thirty-sixth Legislature, you would be entitled to compensation at the rate of $15.00 per day for a maximum number of days, for such service, not to exceed one hundred seventy days in any one year. In addition to this compensation, under the provisions of Chapter 76 Acts of the Fourth Called Session of the Thirty-fifth Legislature, you would be entitled to collect the additional compensation, to the one hundred seventy days, of $15.00 per day for not exceeding an additional forty days during any one year, when engaged in the discharge of the duties of your office. The additional days, however, as provided for under this Act, could not be included in any of the time of the one hundred seventy days allowed by Chapter 70, Acts of the Thirty-sixth Legislature, but would necessarily have to be for additional time thereto, not to exceed forty days in any one year and conditioned upon the fact that you actually rendered additional service in the manner provided for by law.

Yours very truly,

W. J. TOWNSEND,

Assistant Attorney General.

Op. No. 2159, Bk. 53, P. 445.

DISTRICT AND COUNTY ATTORNEYS—DISTRICT JUDGES—FEES—HABEAS CORPUS CASES.

Granting of the writ of habeas corpus is within the discretion of the district judge. Where more than one application is made by the same applicant in similar cases the district judge may issue one writ only and fix bond in all other cases.

When a writ of habeas corpus is granted by a district judge in any felony, and the same is set down for hearing and there is an actual trial or hearing of the cause in which the district attorney appears and represents the State, he would be entitled to the fee prescribed by the statute. Whether a district attorney represents the State in a habeas corpus proceeding is a question of fact to be determined by the trial judge.

Article 1, Section 12, Bill of Rights. Article 5, Section 8, Constitution.

Articles 160-161-165-175-176-1118-174 and 190 Code of Criminal Procedure.

December 8, 1919.

Hon. D. A. McAskill, District Attorney,
Hon W. S. Anderson, Judge 37th Judicial District, San Antonio, Texas.

GENTLEMEN: Your respective letters of October 27th and 24th addressed to the Attorney General have been received. The delay in answering these communications has been occasioned by an unusual rush of business in this office, and then shortly after receiving Mr. McAskill's letter, he requested this Department to defer our opinion uptil such a time as he could have an opportunity to visit this office and talk the matter over with us. As Mr. McAskill has not called upon the office, and in view of Judge Anderson's renewed request of the 5th instant, we take pleasure in replying to the respective communications at this time. Your respective letters read as follows:

"A question has arisen in our County, arising out of the following statement of facts:

"Fifty-one indictments were returned against one E. L. Miller, wherein he was charged with the embezzlement of moneys belonging to the Brown Cracker and Candy Company. The aggregate amount taken is something near thirty thousand dollars. Each indictment is predicated upon a separate and distinct embezzlement, on separate and distinct days. The defendant had heretofore been arrested on charges preferred before a Justice of Peace, and writs of Habeas Corpus were allowed by the court before indictment. The indictments above referred to against the defendant were indictments found on the charges as originally preferred before a Justice of the Peace. The defendant's attorney made application for writs of Habeas Corpus in each of the said fifty-one cases, after indictment, and the sheriff waived process on said writs and they were presented to the court for filing. The court after a hearing fixed the amount of bond in each of the fifty-one cases. Defendant made bond in each of the fifty-one cases, and was released.

"The question presented is this: The Judge is in doubt as to whether he should allow the District Attorney a fee in every case. The matter is in abeyance before the court, and what we desire to know is, shall the District Attorney be entitled to his fee in every case, he being present and representing the State on the several petitions presented to the court. Each offense is a separate and distinct offense, and we do not think that the fact that they were all committed by the one defendant is sufficient to prevent the district attorney's office getting fees in each case. The petitions were presented and

we have performed all of the functions required of us under the statutes, and we think that we are as much entitled to the fee as the clerk, or the sheriff, and we believe that each and all of the officers, including the Clerk and the sheriff, are entitled to the statutory fee.

"Second: George Mandry was indicted by the Grand Jury in fifty-one separate indictments for the crime of accessory after the fact, in concealing the said E. L. Miller above referred to as having been indicted for the crime of embezzlement in the fifty-one cases, as above set out. The same facts apply to the Mandry case as the Miller case, as above set out, with the exception that Mandry had not been charged before a Justice of the Peace before indictment, and no writs of habeas corpus had been theretofore asked for by him. Fifty-one separate and distinct writs of habeas corpus were presented to the Judge, together with a waiver on each one by the sheriff, and on a hearing of the matter bond was fixed in each case by the court. The court is willing to abide by a decision of your office as to whether or not he should allow the district attorney a fee in each case.

"Please give this your immediate attention as it is a matter of considerable importance to the office of district attorney, and as to the duties of the district judge in the premises.

"We believe that we are entitled to our fees for separate writs of habeas corpus, and we appear in the cases and the amount of bond is fixed in each case. The statute had provided that we are entitled to our fees in habeas corpus cases, both before and after indictment, and we see no reason why the same should not be allowed in these cases.

"I do not agree with that portion of Judge Anderson's letter wherein he states that these cases grew out of the '*same transactions*' for this, that the offenses were committed in a period of time of almost a year, and were for different sums, on different dates.

"The court simply desires to know the ruling of your office relative to this matter, and we trust that you will give us your opinion at the earliest possible moment."

"I am writing you with reference to certain writs of habeas corpus that have been granted in the cases of E. L. Miller, charged with embezzlement of certain funds from the Brown Cracker Co., aggregating possibly $25,000.00. These cases are all identical except as to amounts embezzled, and the dates thereof, and as heretofore stated, all from the Brown Cracker Co. Sixty-four writs of habeas corpus were granted Miller prior to his indictment and his aggregate bond fixed at $9,000.00. Subsequently he was indicted by the Grand Jury in 68 cases, and has made application for writs of habeas corpus in 68 cases, the bond after indictment being fixed the same as that fixed prior to indictment.

"What I desire to know is if, under the law, I am compelled to permit this defendant to sue out 64 writs of habeas corpus and allow fees therein, and subsequent to indictment to permit him to sue out 68 writs of habeas corpus and permit fees therefor to the district attorney Am I not permitted by law, where cases of this nature growing out of the same transaction, being all, as heretofore stated, similar in their nature, to hear one writ and fix bond in all other cases of a like character?

"In the case of George Mandry, who is charged as an accessory after the fact with E. L. Miller, mentioned heretofore, he has sued out 51 writs of habeas corpus after indictment. Am I permitted by law to, and is it legally and morally right that I should, permit fees to be allowed the district attorney's office in that number of writs, his cases all being identical in kind and nature.

"As a matter of fact the proof in these cases was never heard. After the cases were called for hearing a bond was agreed upon by the district attorney's office and the defendant's counsel. These matters arise frequently, in fact they are of weekly occurrence.

"In order that I may be righted in the matter, as requested of you by the district attorney in a letter of this week, I also desire that you shall give me an opinion with reference to my rights in the premises as District Judge of this district."

The first question submitted by Judge Anderson is in substance as follows: Where a defendant is held by a large number of indictments or complaints, should the district judge permit the defendant to sue out writs of habeas corpus in each case and allow fees therefor, or is he permitted under the law where the cases are all similar in their nature to hear one writ and fix bond in all other cases of a like character?

The second question submitted by Judge Anderson is the same as submitted by Mr. McAskill, and is in substance: "If under the facts stated in the instant case is the district attorney entitled to a fee in each case, and if not, to what fee is he entitled?"

We will endeavor to answer these questions in their regular order. In order to correctly determine the first question, it would be well to review the statutes relating to writs of habeas corpus, the duties of county attorneys with reference thereto and the fees of such officers. Article 1, Section 12, of the Bill of Rights is as follows:

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

Article 5, Section 8, of the Constitution provides:

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

These are the only constitutional provisions that we find pertaining to the inquiry.

Article 160, Code of Criminal Procedure, provides:

"The writ of habeas corpus is the remedy to be used when any person is restrained of his liberty."

Article 161 is as follows:

"A writ of habeas corpus is an order issued by a court or 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 165, in part, reads as follows:

"The district courts, or any judge thereof * * * have power to issue the writ of habeas corpus, and it is their duty, upon proper application, to grant the writ under the rules herein prescribed."

Article 175 provides:

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

Article 176 provides:

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

There are many other articles dealing with the writs of habeas corpus, but we think it unnecessary for the purposes of this opinion to quote them.

When application is made to the district judge for a writ of habeas corpus, it is his duty to either grant or refuse the same. If he refuses the same, there can be no appeal from his decision, Ex Parte Copley, 153 S. W., 325; but if he grants the writ, then it becomes the duty of the sheriff or other person who has the applicant in custody to reply to the writ in accordance with the provisions of Article 190 of the Code of Criminal Procedure. By Section 2 of said Article, he is required to state "by virtue of what authority, or for what cause, he took and detains such person," and by Section 4 "he shall annex to his return the writ or warrant by virtue of which he holds the person in custody, if any writ or warrant there be."

When an application is made to a district judge for many writs of habeas corpus, as was done in this case, the district judge is apprised by the allegations in the petition of the nature of the charges against the defendant, that the defendant is restrained of his liberty by only one person, and is further advised that the object of the writs is to determine the amount of bail. Article 174 of Code of Criminal Procedure prescribes what the petition for the writ must substantially contain. In the instant case, the applicant had to state and annex to his petition a copy of the writ, order or process by which the sheriff of Bexar County was restraining the applicant of his liberty. Was it necessary to absolutely safeguard the rights of the supplicant for the district judge to issue a writ in each case, or could everything be accomplished by the issuance of one writ that could be accomplished by the issuance of 68 writs? We think so. For when the sheriff was served with one writ, he had to answer to the court and show by what authority he restrained the applicant of his liberty, and in doing so he would state to the court under oath that he restrained the defendant of his liberty by virtue of 68 warrants of arrest issued by the District Clerk of Bexar County based upon 68 indictments had in said court for embezzlement, and that his bond had been fixed at a certain amount in each case, and that the defendant had failed to give bond. The applicant could then introduce evidence of his ability or inability to give the bond required in each case. Everything could be done under one writ that could be done under 68 writs had that many been issued. The court would in one trial be able to determine the supplicant's ability to give bond and could determine what bond the applicant was able to give, and could thereby fix his bond in all of the 68 cases accordingly.

We are of the opinion that when a large number of applications for writs of habeas corpus are presented to a district judge by the same applicant, as was done in this case, that the district judge should examine the applications and grant one writ and refuse all

the other writs. In refusing these writs, he is justifiable in assigning as his reasons therefor that he had already granted a similar writ. The object of a writ of habeas corpus is to ascertain why the applicant is being held in custody or under restraint. Where the applicant is restrained of his liberty by virtue of many writs in the hands of the restraining officer, there can be in reality but one inquiry. Therefore, there is necessity for the issuance of but one writ.

We think this rule should be followed by district judges in all cases where the facts are similar to the facts in the instant case; that it would make no difference whether the applicant was charged with a felony before a justice of the peace, sitting as a magistrate, or after indictment had.

This Department is of the opinion, and you are so advised, that Judge Anderson's first question should be answered in the affirmative. As to whether the district attorney is entitled to a fee in each of the cases filed by Miller and Mandry is a question of fact. We are not fully advised as to just what action was taken in each of these cases. It appears that Judge Anderson granted a writ on each of the 68 applications filed by Miller, and on each of the 51 applications filed by Mandry. It further appears that when these cases were called for trial, the district attorney and the applicant announced to the court that an agreement had been reached as to the amount of bail in each case. Whether the court called each of these cases, or whether only one of the cases was called and an order made in that case with an understanding that a similar order would be made in all other cases, is not disclosed in your communication. We think the trial judge is in a better position to determine the facts in these particular cases than we are. His judgment should prevail.

It is provided in Article 1118 of the Code of Criminal Procedure that district and county attorneys may receive "for representing the State in each case of habeas corpus, where the defendant is charged with a felony, the sum of sixteen dollars." If, as a matter of fact, Judge Anderson issued 68 writs of habeas corpus in one case and 51 in the other, and thereafter these cases were called for hearing and the district attorney appeared and represented this State in each case, this office is unprepared to say that he is not entitled to a fee in each case. The statute allowing fees to district attorneys in cases of this kind provides, as quoted above, "for representing the State in each case" the sum of sixteen dollars. The trial judge is in a much better position to know and to determine from the facts whether the district attorney represented the State in each case than we or anyone else can possibly be. However, we are of the opinion, and you are so advised, that when a writ of habeas corpus is granted by a district judge in any felony case, and the same is set down for hearing, and there is an actual trial or hearing of the case in which the district attorney appears and represents the State, he would be entitled to the fee prescribed by the statute, although no evidence was introduced, and an agreement as to the amount of bond was agreed upon by the district attorney and

the applicant and no further action taken than such announcement to the court, who accepted the agreement. Each case must be governed by the particular facts of that case.

You are, therefore, advised that this Department is of the opinion that Judge Anderson is the proper person to determine whether the district attorney is entitled to a fee in each of the cases against Miller and Mandry. He has the facts before him and can best determine this question.

Yours very truly,
BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 2102, Bk. 53, P. 181.

CORPORATION COURTS—TRAFFIC OFFICERS—JURISDICTION—COUNTY ATTORNEY—PRACTICE.

1. Offenses arising under Chapter 127, Acts of the Regular Session, Thirty-sixth Legislature, and occurring within the territorial limits of incorporated cities and towns, may be tried either in the Justice, County or Corporation Court.

Constitution, Article 5, Sections 1, 18 and 19.

2. Under Section 5, Article 21, of the State Constitution, county attorneys have the right and authority to appear and represent the State in the corporation courts of their respective counties in all cases to which the State may be a party.

3. Although it is the right and authority of the county attorneys to appear and represent the State in corporation courts, yet there is no provision made by law for compensating such officers for services thus rendered.

AUSTIN, TEXAS, June 24, 1919.

Hon. J. R. Keith, Assistant County Attorney, Cleburne, Texas.

DEAR SIR: We have yours of June 19th, in which you make the following inquiries:

"Section 6, Chapter 127, page 229, Acts of Regular Session of the Thirty-sixth Legislature, uses the following language concerning cases filed by the 'Traffic Officer' authorized by said act: 'When arrests by said officers for offenses committed within the corporate limits of any city or town, complaints shall be filed before the City Court, or other proper tribunal in said city or town, having jurisdiction over such offenses, and the fines arising therefrom shall be *retained* by such city or town, etc.'

"1. Under the terms of this act would said officer be authorized to file such cases in which he makes arrests in Justice and County Courts, in the event violation was in County Seat, or would he be compelled, under the terms of this act, to file in a City Tribunal?

"2. The officer whose appointment is authorized by this act is a County Officer. Would the County Attorney be authorized or required to appear in City Court, in the event you hold that it is necessary to file in such court, and represent the State in prosecutions?

"3. In the event that you hold that County Attorney is authorized or required to appear for State, then, in cities where the city officials are on salary basis and in which all fees go to city treasury, would the County Attorney collect his fees as in prosecutions in State Courts?"

In reply thereto I will first call your attention to the provisions of the Constitution, fixing the jurisdiction of justice courts. Article 5, Section 19, of the Constitution, reads as follows:

"Justices of the Peace shall have jurisdiction in criminal matters of all cases where the penalty or fine to be imposed by law may not be more than two hundred dollars."

Section 16, Article 5, reads in part as follows:

"The County Court shall have original jurisdiction of all misdemeanors of which exclusive original jurisdiction is not given to the justice court as the same is now or may hereafter be prescribed by law."

It would appear from the provisions of Section 6, Chapter 127, Acts of the Regular Session, Thirty-sixth Legislature, that it was intended to give to corporation courts exclusive jurisdiction of offenses created by Chapter 127 to the city court, but, in view of the provisions of the Constitution above quoted, it is my opinion that the Legislature could not vest exclusive jurisdiction of such offenses in city courts, for the reason that the Constitution itself gives both to county and justice courts this jurisdiction. The Legislature can not take from a court jurisdiction definitely fixed therein by the Constitution.

There is no question about the constitutionality of corporate courts. This has been affirmed both by the Supreme Court and the Court of Criminal Appeals.

See Harris County vs. Stewart, 41 S. W., 650;

Ex Parte Wilbarger, 55 S. W., 968.

I therefore advise you, in reply to your first inquiry, that offenses arising under Chapter 127, Acts of the Regular Session of the Thirty-sixth Legislature, may be tried in either the justice or county courts, or within the corporation courts in cases where the offense occurred within the territorial limits of any incorporated city or town.

In reply to your second and third inquiries I will quote for you an opinion given out by this department, answering the same questions, in March 1914, as same is found on page 853 of the published opinions of the Attorney General of Texas, 1912 to 1914:

"*Hon. Mark McGee, County Attorney, Brownwood, Texas.*

"DEAR SIR: At your request we have given the question of your right to collect fees in corporation courts for services rendered by you in said courts in representing the State further consideration, and we are convinced that our former opinion to you was correct.

"There appears to be two incorporated towns in your county, Bangs and Blanket. Each of these towns has a corporation court, but no city attorney to represent the State in prosecutions brought in said courts. Under such circumstances you contend that you, as county attorney, have the right to appear and represent the State in said courts and to collect fees for such service.

"We do not think there can be any question about your right and authority to appear and represent the State in said courts. You would have that right, even though there was a city attorney at each place.

"Article 5, Section 21, of the Constitution, provides that the county attorney 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. Passing upon this provision of the Constitution, the Supreme Court of this State in the case of the State of Texas vs. Moore, county attorney, 57 Texas, 307, had this to say:

"'The powers granted to county attorneys in reference to representing the State in all cases in the district and inferior courts in their respective counties are broad and comprehend alike cases civil and criminal, except so far as the Constitution itself confers power upon the Attorney General to represent the State in those cases. It must be presumed that the Constitution, in selecting the depositaries of a given power, unless it be otherwise expressed, intended that the depositary shall exercise an exclusive power with which the Legislature could not interfere by appointing some other officer to the exercise of the power.'

"The corporation courts in Brown County being inferior courts of the State, there is no question but that the county attorney has the exclusive right to appear in said courts and represent the State in all cases pending therein to which the State is a party. This question was clearly discussed and passed upon by the Court of Civil Appeals, Galveston district, in the case of Howth vs. Greer, et al., 90 S. W., 211. A writ of error was denied by the Supreme Court in said case.

"The same question was also passed upon by the Court of Civil Appeals of the Austin District in the case of Upton vs. City of San Angelo, et al., 94 S. W., 436, and the same doctrine was announced as was announced in the Howth vs. Greer case. Therefore, it is the well settled law of this State that the county attorney under the provisions of the Constitution has the authority to appear and represent the State in corporation courts of his county in all cases to which the State is a party.

"The other part of your question as to whether the county attorney would have the right to collect the fees for the services rendered by him in said city courts has also been decided by the courts of this State. This question was directly presented in the case of Howth vs. Greer, above cited, and the court held that although it was the privilege and right of the county attorney to appear in the corporation courts of his county and represent the State in such courts in all cases to which the State was a party, yet such officer would not be authorized to collect fees for such service because the Legislature had failed to make provision for the payment of county attorneys for rendering such service. In the disposition of this question in said case the following language was used by the court:

"'It is also claimed by the plaintiff in error that he is entitled to certain fees for all prosecutions and convictions by him in the corporation court, and the court below was asked for a mandamus compelling the recorder to tax such fees for his benefit, and that the city marshal and the clerk of the corporation court be required to collect and turn over to him such fees. The Constitution provides "that county attorneys shall receive as compensation only such fees, commissions and perquisites as may be prescribed by law." In the case of State of Texas vs. Moore, it was said: "It is not believed that any well considered case can be found in which a public officer has been permitted to collect fees unless the same are provided for and the amount thereof declared by law." In that case it was held that, although the county attorney had the right and was charged with the duty to represent the State in the prosecutions of the cases against defaulting tax collectors, the Legislature not having provided any compensation therefor and fixed the amount thereof, he was not entitled to any compensation. The Legislature, in dealing with the subject immediately in hand, while conferring upon the county attorney the right to represent the State in prosecutions in the corporation court, expressly provides that "in all such cases the county attorneys shall not be entitled to receive any fees or other compensation whatever for such services." Having absolute power under the Constitution over the whole question of compensation for services of the county attorney, to provide such fees as it might think proper. or to provide none, if it thought proper, the Legislature had clearly the right to make the provision above recited in the corporation act, with regard to the compensation of the county attorney.'

"Article 914, R. S., 1911, provides that there shall be taxed against and collected of each defendant in case of his conviction before such court (meaning corporation court) such costs as may be provided for by ordinance of

said city, town or village; but in no case shall the council or board of aldermen of any such city, town or village prescribe the collection of greater costs than are prescribed by law to be collected of defendants convicted before Justices of the Peace.

"Article 913, R. S., 1911, provides that all costs and fines imposed by said court (meaning corporation court) in any city, town or village in any prosecution therein shall be paid into the city treasury of said city, town or village for the use and benefit of the city, town or village.

"Article 911, R. S., 1911, provides that in all prosecutions in said court (meaning corporation court), whether under an ordinance or under the provisions of the Penal Code, the 'complaint shall commence in the name of the State of Texas and shall conclude against the peace and dignity of the State,' and where the offense is covered by an ordinance the complaint may also conclude as contrary to the said ordinance; and all prosecutions in such court shall be conducted by the city attorney of such city, town or village or by his deputy; but the county attorney of the county in which said city, town or village is situated may, if he so desires, also represent the State of Texas in such prosecutions, but in all such cases the said county attorney shall not be entitled to receive any fees or other compensation whatever for said services and in no case shall the said county attorney have the power to dismiss any prosecution pending in said court unless for reasons filed and approved by the recorder of said court.

"The above articles of the statute were passed by the Legislature in 1899. In 1907 the Thirtieth Legislature at its Regular Session provided that county attorneys who in cities of over 30,000 and under 40,000 population according to the United States census of 1900 represent the State in misdemeanor cases in the corporation courts thereof shall receive for such services the same fees as are now provided for by law for similar services in justice courts, and in no case shall there be charged more than one fee, as provided by law.

"From these provisions it is clear that the Legislature did not intend that county attorneys who represent the State in corporation courts should be compensated for such service except the county attorneys who represent the State in corporation courts in cities of over 30,000 and under 40,000 population according to the United States census of 1900. Your contention that the county attorney should be entitled to the fees when he performs the services in said courts is met by the statement that the law has made no provision therefor, except as above shown, and under the general rule that an officer is not entitled to compensation for the performance of services unless specific provision therefor has been made by law, the conclusion is inevitable that county attorneys who represent the State in corporation courts are not entitled to any fees as compensation for such services unless the services are rendered in corporation courts in cities of over 30,000 and under 40,000 population according to the United States census of 1900.

"The fact that the corporation courts in your county have no city attorneys could not change this rule, because no provision is made in the statute for compensating county attorneys for services rendered in the city courts under any circumstances except as above shown and without such provision no authority exists for such officer to collect fees in such courts.

"We think it is unquestionably clear that you have the right and the authority to appear in the city courts of your county and represent the State in said courts in all cases to which the State is a party, but that you would not be entitled to the fees for such services because you would not come within the provision of the statute enacted by the Thirtieth Legislature, the corporation courts of your county being in cities of less than 30,000 population.

"For a thorough discussion of the questions involved in this opinion, see Section 5, Article 21, State Constitution; Articles 911 to 914, R. S., 1911; Howth vs. Greer et al., 90 S. W., 211; The State of Texas vs. Moore, 57 Texas, 307; Moore vs. Bell, 66 S. W., 45; Jackson vs. Swayne, 47 S. W., 711; Upton vs. City of San Angelo et al., 94 S. W., 436."

Yours very truly,

C. A. SWEETON,

Assistant Attorney General.

Op. No. 2000, Bk. 52, P. 46.

FEES OF OFFICE—COUNTY ATTORNEY—GAMING CASES.

The county attorney is entitled to receive a fee of $15.00 for every conviction secured in gaming cases whether in justice court or in county court.

The word "conviction" is usually defined as the legal proceeding of record which ascertains the guilt of a party and on which the sentence of judgment is founded. The status of a person who pleads guilty, so far as "conviction" is concerned, is precisely the same as though he had been found guilty by the verdict of a jury, or by the verdict of the court where he is tried before the court without a jury.

Section 7, Chapter 164, Acts Fifteenth Legislature;
Article 1168 of the 1911 Code of Criminal Procedure.

AUSTIN, TEXAS, February 24, 1919.

Hon. W E. Adams, County Attorney, Woodville, Texas.

DEAR SIR: I have your recent letter addressed to the Attorney General, wherein you ask this Department for a construction of Article 1168 of the 1911 Code of Criminal Procedure, relative to the fees to be paid the County Attorney in gaming cases. Said article provides that:

"District and County Attorneys shall be allowed the following fees, to be taxed against the defendant:

"For every conviction under the law against gaming when no appeal is taken, or when, on appeal, the judgment is affirmed, fifteen dollars. * * *."

This article of the Code of Criminal Procedure is taken from Section 7, of Chapter 164, of the Acts of the Fifteenth Legislature, said Chapter being "An Act to fix and regulate the fees of all officers of the State of Texas, and the several counties thereof," and said Section 7, of said Act, provides that:

"The county attorneys shall be entitled to the following fees and no others to-wit: For every conviction under the laws against gaming where no appeal is taken or when, on appeal, the judgment is affirmed, fifteen dollars to be paid by the defendant as other costs * * *."

Under this law, as enacted by the Fifteenth Legislature, the county attorneys were entitled to a fee of $15.00 for every conviction under the laws against gaming, and the word "conviction" is usually defined as the legal proceedings of record which ascertain the guilt of a party and on which the sentence of judgment is founded. (Bouvier's Law Dictionary.) The status of a person who pleads guilty so far as "conviction" is concerned is precisely the same as though he had been found guilty by the verdict of a jury, or by the verdict of thhe court where he is tried before the court without a jury.

Therefore, under the Act of the Fifteenth Legislature quoted above, the county attorney was entitled to a fee of $15.00 for every conviction under the laws against gaming, whether such conviction was secured by a plea of guilty or by the verdict of the jury or court, finding such person guilty of the offense of gaming, whether in justice court or county court.

The codifiers, in arranging the Code of Criminal Procedure of 1911, placed that part of Section 7, of said Chapter 164, of the Acts of the Fifteenth Legislature in Chapter 4, Title 15, of said Code of Criminal Procedure, said Title 15 being entitled "Costs in Criminal Actions" and said Chapter 4, of said Title 15, is headed with "of costs to be paid by defendant," and Chapter 4 is subdivided into five subdivisions, and in subdivision 2, under the caption of "in the District and County Courts," we find Article 1168, which we have hereinabove quoted. It now remains to be determined whether the arrangement in the Code of Criminal Procedure shall govern as against the Acts of the Fifteenth Legislature in enacting this law fixing the fees of county attorneys in gaming cases. If the arrangement of the code governs then the county attorney is only entitled to a fee of $15.00 in gaming cases where the conviction is secured in County Court. If the arrangement of the Code does not govern, a count attorney is entitled to a fee of fifteen dollars for every conviction in gaming cases regardless of the court in which the conviction is secured.

The courts in the following cases have held that the Code governs:

Rathbone vs. Hamilton, 175 U. S., 414;
Crabtree vs. Whiteselle, 65 Texas, 111;
Central of Georgia Ry. Co. vs. State of Georgia, 42 L. R. A., 518;
State vs. Bergess, 101 Texas, 524;
Hale County vs. Lubbock County, 195 S. W., 678.

The Court of Criminal Appeals of Texas, in the following cases, held that the Code did not govern and that the intention of the Legislature might be ascertained by an examination of the original enactment:

Ex parte Cox, 109 S. W., 369;
Brown vs. State, 49 S. W., 620;
Phipps vs. State, 36 S. W., 753;
Ex parte Muckenfuss, 52 Texas, C. A., 467;
Runnels vs. State, 45 Texas, C. R., 446.

In questions involving the fees of office in criminal cases the decisions of the Court of Criminal Appeals will govern.

You are, therefore, respectfully advised that the county attorney may receive $15.00 for every conviction secured in gaming cases in any court in which such conviction is secured.

Yours very truly,

E. F. SMITH,

Assistant Attorney General.

Op. No. 2075, Bk. 53, P. 41.

CONSTITUTIONAL LAW—COMPENSATION OF COUNTY ATTORNEY.

The Legislature is without authority to change the compensation of county attorneys from "fees of office" to a salary or per diem remuneration.

It is the duty of the county attorney to discharge all the duties of his office, even though the Legislature has failed to provide any compensation for certain official services required of him.

It being the duty of the county attorney to discharge all the duties of district attorney in Eastland County, he is entitled to receive the fees that a district attorney would receive, if there was a district attorney, provided that the total amount of fees received as county attorney and for discharging duties of district attorney shall not exceed the maximum amount allowed to be retained by the county attorney under the law.

Section 21, Article 5, Texas Constitution.

Section 4, Chapter 139, Acts Thirty-sixth Legislature, passed at its Regular Session.

Articles 32-1127a-1131 Code of Criminal Procedure.

AUSTIN, TEXAS, May 29, 1919.

Hon. G. G. Hazel, County Attorney, Eastland, Texas.

DEAR SIR: I have your letter of recent date addressed to the Attorney General, wherein you call attention to the law passed by the Thirty-sixth Legislature at its Regular Session, creating the 88th Judicial District to be composed of Eastland County alone. In your letters you directed our attention to that part of said law which makes it the duty of the county attorney of Eastland County, to perform the duties of district attorney for said 88th Judicial District, which provides that the compensation of said county attorney shall be the same as is now or may be fixed by law for district attorneys acting in judicial districts composed of two or more counties. You ask for a ruling from this Department as to whether or not the Legislature has the authority to change the compensation of the county attorney of Eastland County from "fees of office" to a salary or per diem basis; also as to whether or not you can continue to hold the office of county attorney of Eastland County and refuse to perform the duties of district attorney of the 88th Judicial District.

In answering your question with reference to whether or not the Legislature has the authority to change the compensation of the county attorney of Eastland County from "fees of office" to a salary or per diem basis, your attention is respectfully directed to Section 4, of Chapter 139, Acts of the Thirty-sixth Legislature, passed at its Regular Session, which reads as follows:

> "The county attorney of Eastland County shall do and perform all the duties of county attorney and district attorney in the Eighty-eighth Judicial District, composed of Eastland County, and shall receive the same compensation for his services as is now, or which may hereafter be fixed by law for district attorneys acting in judicial districts composed of two or more counties."

We find then that the Legislature has provided that the county attorney of Eastland County, in addition to the duties devolving upon him as county attorney, shall also perform the duties of district attorney in the 88th Judicial District, and for performing all the duties of county and district attorney he shall receive the same compensation for his services as is now or which may hereafter be fixed by law for district attorneys acting in judicial districts composed of two or more counties. The law creating the 88th Judicial

District does not become effective until June 18, 1919. On that same date, the law passed by the Regular Session of the Thirty-sixth Legislature (Chapter 70), increasing the salaries of district attorneys in all judicial districts in this State composed of two or more counties, goes into effect. This law provides in part that:

"In addition to the five hundred dollars now allowed them by law, district attorneys in all judicial districts of this State composed of two counties or more shall receive from the State as compensation for their services the sum of fifteen dollars for each day they attend the session of the district court in their respective districts in the necessary discharge of their official duty, and fifteen dollars per day for each day they represent the State at examining trials, inquest proceedings and habeas corpus proceedings in vacation; said fifteen dollars per day to be paid to the district attorneys, upon the sworn account of the district attorney, approved by the district judge, who shall certify that the attendance of said district attorney for the number of days mentioned in his account was necessary, after which said account shall be recorded in the minutes of the district court; provided, that the maximum number of days for such attendance and service for which the compensation is allowed shall not exceed one hundred and seventy days in any one year."

At this time, district attorneys with certain exceptions are on a salary or per diem basis and do not depend upon "fees of office" for their remuneration.

The Legislature, as we have seen, in passing the law creating the 88th Judicial District, have made it the duty of the County Attorney of Eastland County to perform the duties of district attorney for said judicial district, and has attempted to change the remuneration of said county attorney from "fees of office" to salary or per diem basis. Section 21 of Article 5 of our State Constitution provides in part that:

"County attorneys shall receive as compensation only such fees, commissions and perquisites as may be prescribed by law."

Black's Law Dictionary defines the word "fee," as above used, to mean:

"A reward or wages given to one for the execution of his office, or for professional services, as those of a counselor or a physician."

A county attorney receives a "fee" as his reward or wages for securing convictions in misdemeanor cases in the county and justice courts of his county. He also receives a "fee" as a reward or wages for performing certain other official duties. In the trial of misdemeanor cases, the fee that the county attorney receives is purely a reward offered for the conviction of the defendant by the State.

The word "commissions," as used in the above quotation taken from our State Constitution, means a reward or wages paid to the attorney for collecting certain moneys that may be due to the State or county.

Black's Law Dictionary defines the word "perquisites" as:

"Emoluments or incidental profits attaching to an office or official position, beyond the salary or regular fees."

Article 3893, Vernon's Sayles' Civil Statutes, 1914, provides that the commissioners' court may, if it chooses to do so, pay to certain county officials an ex-officio salary. Among these officials is included the county attorney, provided that such ex-officio salary, together with the fees of office and excess fees, shall not exceed the total amount allowed to be retained by such county officers under the law. We find then that, in certain counties, county attorneys receive fees of office and commissions as a reward or wages for the execution of his official duties; also an ex-officio salary, which as we have seen is a perquisite of his office, or as Mr. Black says the ex-officio salary is an emolument or incidental profit attaching to the office beyond the regular fees of office.

The language used in that provision of our State Constitution which has hereinabove been quoted is unambiguous and can only be construed to mean that county attorneys shall receive as their compensation such fees, commissions and perquisites as may be prescribed by law, and by the plain language therein used it is clearly evident that the Legislature is inhibited from changing the compensation of county attorneys from "fees of office" to salary or per diem remuneration.

In asking the question as to whether or not you can continue to hold the office of county attorney of Eastland County and refuse to perform the duties of District Attorney of the 88th Judicial District, you were evidently laboring under the impression that you would not be entitled to any additional compensation for performing the duties of district attorney, and in this connection I desire to call your attention to Article 1120 of the Code of Criminal Procedure, which provides in addition to the Five Hundred ($500.00) Dollars allowed under the Constitution that all district attorneys in judicial districts of this State composed of two or more counties shall receive from the State as compensation for their services the sum of Fifteen ($15.00) Dollars for each day they attend the session of the district court in their respective districts in the necessary discharge of their official duty, and Fifteen ($15.00) Dollars per day for each day they represent the State at examining trials, inquest proceedings and habeas corpus proceedings in vacation, provided that the maximum number of days for such attendance and service for which the said commission is allowed shall not exceed one hundred and thirty-three (133) days in any one year. This article was amended by the Thirty-sixth Legislature at its Regular Session, so that district attorneys in all judicial districts composed of two or more counties shall receive Fifteen ($15.00) Dollars a day for the services above enumerated and increases the maximum number of days for which the compensation is allowed to one hundred and seventy (170) days in any one year.

It will be noted that the law above referred to applies only to judicial districts composed of two or more counties. The 88th Judicial District is composed of only one county, therefore, the provisions of the above law are not applicable to the 88th Judicial District. Article 1131, Code of Criminal Procedure, fixes the fees allowed the district or county attorney in felony cases in those

counties casting less than three thousand (3,000) votes at the last presidential election. See Article 1127a Code of Criminal Procedure.

While it is true that it is clearly the duty of a person who assumes a public office to discharge all the official duties connected with the office regardless of whether there is any compensation provided for such services or not, however, the Legislature has in its wisdom made it the duty of the county attorney of Eastland County to perform the duties of the District Attorney of the 88th Judicial District composed of Eastland County alone and has attempted to fix the compensation of the county attorney on a salary or per diem basis. This, as we have seen, the Legislature did not have the authority to do.

Article 32, Code of Criminal Procedure, provides that the county attorney shall attend the terms of the district court in his county, and when there is no district attorney the county attorney shall represent the State in such court and perform the duties required by law of district attorneys. There is no district attorney in the 88th Judicial District and the Legislature has made it the duty of the county attorney to perform all the duties pertaining to the office of district attorney for said 88th Judicial District, and for discharging the duties of the district attorney, the county attorney is entitled to the fees that would accrue to a district attorney, if there was a district attorney, provided that the county attorney of Eastland County shall in no event receive and retain as fees of office an amount exceeding the maximum amount fixed by law. See Article 3881, Vernon's Sayles' Civil Statutes, 1914, et seq.

Therefore, it is the opinion of this Department, and you are so advised, that the Legislature is without authority to change the compensation of County Attorney for Eastland County from "fees of office" to a salary or per diem basis, and you are further advised that it is the duty of the County Attorney of Eastland County to perform all the duties of District Attorney for the 88th Judicial District, and for performing these duties the County Attorney is entitled to receive the fees that the district attorney would receive, if there was a district attorney; provided, the county attorney shall not receive and retain as fees of office an amount exceeding the maximum amount allowed county attorneys by law in counties of the population of Eastland County.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

Op. No. 2211, Bk. 53, P. ——.

COUNTY ATTORNEYS' FEES ALLOWED IN HABEAS CORPUS HEARINGS.

The County Attorney who represents the State in the District Court in a District composed of two or more counties in a habeas corpus case, where the defendant is charged with a felony, is entitled to the fee prescribed by

statute for such services, provided, however, that the District Attorney of such judicial district is not in attendance on said court.

AUSTIN, TEXAS, April 23, 1920.

Hon. Langston King, County Attorney, Nacogdoches, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of the 21st instant, and it is not deemed necessary here to set out in full the contents of same as the only question propounded in such letter is the following:

"Is a County Attorney, residing in a judicial district composed of two or more counties, entitled to a fee for representing his State in habeas corpus hearings in the absence of the District Attorney of such judicial district?"

In answering this inquiry, you are respectfully advised that Article 32, Code of Criminal Procedure, 1911, in defining the duties of county attorneys, makes this provision:

"It shall be the duty of the county attorney to attend the terms of the county and inferior courts of his county, and to represent the State in all criminal cases, under examination or prosecution in said court. * * * He shall also attend the terms of the district court in his county; and if there be a district attorney of the district including such county, and such district attorney be in attendance upon such court, the county attorney shall aid him when so requested; and when there is no such district attorney, or when he is absent, the county attorney shall represent the State in such court and perform the duties required by all district attorneys."

Article 38, Code of Criminal Procedure, 1911, reads as follows:

"Whenever any district or county attorney shall fail to attend any term of a district, county, or justice court, the judge of said court, or such justice, may appoint some competent attorney to perform the duties of such district or county attorney who shall be allowed the same compensation for his services as is allowed the district or county attorney."

Article 350, Vernon's Sayles' Texas Civil Statutes, in defining the duties of county and district attorneys, makes this provision:

"In counties where there is a county attorney, it shall be his duty to attend the terms of the county and other inferior courts of his county and to represent the State in all criminal cases under examination or prosecution in said county and also to attend the terms of the district court, and to represent the State in all cases in said court during the absence of the district attorney, and to aid the district attorney when so requested; and when representing the State alone, he shall be entitled to, and receive, the fees allowed by law to the district attorney; and when, at the request of the district attorney, he shall aid him in the prosecution of any case in behalf of the State, he shall receive one-half of the fee allowed by law and the district attorney the remainder."

Article 199, Code of Criminal Procedure, 1911, in defining who shall represent the State in habeas corpus cases, makes this provision:

"In felony cases, it shall be the duty of the district attorney of the district where the case is pending, if there be one, and he be present, to represent the State in the proceedings by habeas corpus. If no district attorney be

present, the county attorney, if present, shall represent the State; if neither of said officers be present, the court or judge may appoint some well qualified practising attorney to represent the State, who shall be paid the same fee as is allowed district attorneys for like services."

The articles above quoted define the duties enjoined upon county and district attorneys, as well as the duties of the county attorney in the absence of a district attorney, and further provides for the appointment of some other well qualified attorney to perform such duties in the absence of both the county and district attorneys and provides compensation for such services rendered in each instance.

Article 199, supra, in defining who shall represent the State in habeas corpus cases, makes it the duty of the district attorney, if there be one, and he be present, and if no district attorney be present, the county attorney, if present, is required to represent the State in such proceedinggs, but in the event both the district and county attorneys be absent, it is made the duty of the court to appoint some well qualified attorney to represent the State.

It is to be observed that the compensation of such services, rendered by the district or county attorney, is not fixed by this Article, but the compensation for the attorney appointed to represent the State in the absence of such officers is fixed.

Article 1118, Code of Criminal Procedure, 1911, in counties in which 3,000 or more votes are cast at the next preceding presidential election, provides that the county or district attorney, for representing the State in each case of habeas corpus, where the defendant is charged with a felony, the sum of $16.00 shall be paid as compensation for such services rendered by such county or district attorney.

Article 1131, Code of Criminal Procedure, 1911, where less than 3,000 votes are cast at the next preceding presidential election, such district or county attorney shall be allowed, for representing the State in each case of habeas corpus, where the defendant is charged with a felony, the sum of $20.00.

Article 1118, Code of Criminal Procedure, 1911, fixes the compensation of district and county attorneys, for representing the State in habeas corpus proceedings, as follows:

"The district or county attorney shall receive the following fees: For representing the State, in each case of habeas corpus where the defendant is charged with a felony, the sum of $16.00."

Article 1131, Code of Criminal Procedure, 1911, fixing the compensation of district and county attorneys for representing the State in habeas corpus proceedings in counties casting less than three thousand votes at the last preceding presidential election, provides that the county and district attorney, "for representing the State in each case of habeas corpus where the defendant is charged with a felony, the sum of $20.00."

In our opinion, the Act of the Thirtieth Legislature, amended by the Thirty-first and Thirty-fourth and Thirty-sixth Legislatures, provided that the district attorneys, in districts containing two or

more counties, shall receive compensation for their services at the rate of $15.00 per day not to exceed one hundred seventy days, during each year, repealed that portion of the above quoted statutes applying to district attorneys who are embraced within the provisions of the per diem Act, leaving the remainder of the statute, applying to county attorneys, in operation.

We, therefore, advise you that in our opinion, the county attorney who represents the State in habeas corpus proceedings in felony cases in the absence of a district attorney is entitled to the fees prescribed by Article 1118 and Article 1131 of the Code of Criminal Procedure of 1911, as might be determined by the vote cast in such county at the last preceding presidential election.

Yours very truly,
C. L. STONE,
Assistant Attorney General.

Op. No. 2166, Bk. 53, P. 489.

COMMISSIONERS' COURTS—COUNTY OFFICERS—JUSTICES OF THE PEACE —CONSTABLES—FEES OF OFFICE—EX-OFFICIO COMPENSATION.

Commissioners' Courts are authorized to pay ex officio compensation, for ex officio services rendered, to County Judges, District Clerks, County Clerks, County Attorneys and Sheriffs, and to any other county officer when that officer renders ex officio services to the county.

Whether any officer, except County Judge, District Clerk, County Clerk, County Attorney and Sheriff, renders ex officio services to the county is a mixed question of law and fact.

It would be an abuse of power for Commissioners' Courts to allow ex officio compensation to a county officer when that officer renders no ex officio services to the county.

If Justices of the Peace and Constables render ex officio services to the county they may receive from the county ex officio compensation, provided they hold their offices in a city of more than twenty thousand inhabitants.

Articles 3893, 3852, 3858, 3861, 3862 and 3866 of the Revised Civil Statutes.

Veltman et al. vs. Slator et al. (Not yet reported.)

AUSTIN, TEXAS, December 18, 1919.

Hon. John M. Murch, County Auditor, Galveston, Texas.

DEAR SIR: Your letter of the 10th instant, addressed to the Attorney General, has been received. It reads as follows:

On January 20, 1919, our County Commissioners Court passed the following order:

"Upon motion of Commissioner Hartel and seconded by Commissioner Boddeker, there was passed and ordered entered upon the minutes of the Commissioners' Court of Galveston County, Texas, the following order:

" 'No. 1. There is hereby allowed and ordered paid to E. B. Holman, Justice of the Peace, Precinct No. 1, Court A, Galveston County, Texas, as ex officio salary and compensation for the current fiscal year the sum of $500.00 or so much thereof as may be necessary and no more, to make up the difference, if any there be, between the amount of fees reportable and retainable by him and the sum of $2000.00, the compensation allowed said officer under Article 3883 (3881) Vernon's Sayles' Civil Statutes of 1914.' "

Which also included in the same language Alex. Gomez, Justice of the

Peace, Precinct No. 1, Court "B" for the same amount, $500.00, also Chas. Theobald, County Attorney, for the sum of $1200.00, with maximum of $3500.00 compensation, Article 3883.

Also on January 31st, 1919, another order in same language in favor of J. F. Moran, Constable, Precinct No. 1, for $400.00, with maximum of $2000.00 compensation, Article 3881, and also in favor of Henry Thomas, Sheriff, for the sum of $1200.00, with maximum of $3500.00 compensation, Article 3883.

At a regular meeting held December 8th, 1919, a request was made for issuance of warrants as authorized to the parties named after their annual reports for year ending November 30th, 1919, has been received and audited by me, the only exception for issuing warrant being the County Attorney, whose collections reached his maximum, and in the case of Justice Holman only $478.35 was required to reach his maximum of $2,000. In the other cases there was still a deficit even after the amounts authorized. Now when the question came up of issuing the warrants mentioned the County Judge (who was not a member of the Court at the time the aforementioned orders were passed) questioned the authority of the Commissioners' Court to issue the warrants for the reason that Article 3893 as understood by him only conveyed authority to the County Commissioners' Court for allowances for ex officio services actually performed for which no fees are allowed and the officer's collections did not reach the maximum; in other words, he makes the distinction between an official not reaching his maximum and had actually performed ex officio services and another who does not reach his maximum by reason only of insufficient business of the office and in the latter case he contends that the County Commissioners' Court has no authority to make an allowance. The request is, therefore, made for your views and opinion for his guidance as well as others and this letter is written at the instance of the County Judge.

Another question. In Article 3893 the expression is used of "County Officials." Do Precinct Officers, such as Justices of the Peace and Constable, come under that head?

We would like very much to hear from you on or before next Monday, if conveniently possible."

It appears from your communication that the Commissioners' Court of Galveston County, early in January, 1919, entered certain orders upon the minutes of the Commissioners' Court of Galveston County allowing ex-officio salary and compensation for the current fiscal year to be paid to both justices of the peace and both constables of Precinct No. 1, which includes the city of Galveston, a city of more than 20,000 inhabitants. It further appears that in said orders an ex-officio salary was allowed to the County Attorney of Galveston County in the sum of $1,200, and that a like sum was allowed to the sheriff. It appears in two of these orders that ex-officio compensation was attempted to be allowed under Article 3883, of the Revised Civil Statutes, while in another order reference is made to Article 3881, of the Revised Civil Statutes. While reference is made to these particular articles of the Statute, it is evident that the Commissioners' Court was attempting to allow ex-officio compensation to these several officers by virtue of the provisions of Article 3893, of the Revised Civil Statutes.

Your first question, in substance, is:

"Has the Commissioners' Court the authority to allow compensation to county officers when the compensation and excess fees which they are allowed to retain do not reach the maximum provided for such officers and when such officers do not render any ex officio services to the county?"

Your second question, in substance, is:

"Are Justices of the Peace and Constables 'County officials' within the purview of the provisions of Art. 3893, and as such, have commissioners' courts the authority under the provisions of said article to grant such officers ex officio compensation when the compensation and excess fees which are allowed to be retained by such officers do not reach the maximum?"

I will attempt to answer these questions in the order in which they come.

Prior to the enactment of Article 3893, only certain officials were permitted to receive ex-officio compensation. These officials were the county judge, the district clerk, the county clerk, and the sheriff, and the articles which permitted them to receive ex-officio compensation are Articles 3852, 3858,3861, 3862 and 3866, but with the enactment of Article 3893, which reads as follows:

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

Commissioners' courts were authorized to allow compensation to county officers for ex-officio service, when, in their judgment, such compensation is necessary. This provision of the article is plain and unequivocal, and authorizes commissioners' courts to allow ex-officio compensation to county officials for ex-officio services under the conditions stated in said article.

In the recent case of Joseph Veltman, et al., vs. J. M. Slator, et al. (not yet reported), Chief Justice Phillips, in answering certified questions from the honorable Court of Civil Appeals for the Fourth Dsitrict, with reference to this article, said:

"Article 3893, as amended by the Act of 1913, is a clear grant of power to the Commissioners' Courts to allow, when in their judgment necessary, ex officio compensation to county officials where the compensation and excess fees they are permitted to retain do not reach the maximum provided by law, limited only by the requirements that the allowance shall not increase the compensation of the particular official beyond that maximum, and the operation of subsisting laws. There is no implication from the language, as has been suggested, that the power can be exercised only where the allowance of ex officio compensation to the official is authorized by some other statute. The evident purpose of the legislature was to authorize its allowance by this statute, within the limitations above stated; and it therefore suffices for the purpose. The power was one within the authority of the legislature to confer. The statute grants it in unequivocal terms *that end the matter so far as the courts are concerned except in cases of a manifest abuse of the power.*"

As heretofore stated, before the enactment of Article 3893, as amended by the Acts of 1913, the only county officials permitted to

receive ex-officio compensation were the county judge, district clerk, county clerk and sheriff. In the recent case of Veltman, et al., vs. Slator, et al., supra, the Supreme Court, in answering certified questions, held that under the provisions of Article 3893, as amended by the Acts of 1913, commissioners' courts were authorized to allow county attorneys ex-officio compensation. By Article 356, it is made the duty of county attorneys to give to the assessor of taxes, the collector of taxes or the treasurer of the county, within his county, written opinions touching their duties concerning the revenue of the State or county, and it is also made his duty to advise in writing the clerk, sheriff, or other officer of his county, to insure the prompt collection of all moneys for which judgments may have been rendered in favor of the State or of a county. By the provisions of Article 356a, it is made the duty of the county attorney to give all county and precinct officers within his county, upon request, an opinion and advise in writing touching their official duties.

As to whether a county officer renders ex-officio services to the county, and for which services the commissioners' court is permitted to allow him ex-officio compensation, is a question of fact as well as of law. It is certain that the Legislature authorized, by previous statutes, cited above, the payment of ex-officio compensation to county judges, district clerks, county clerks, and sheriffs. By the case of Veltman, et al., vs. Slator, et al., it is settled that commissioners' courts are authorized to allow ex-officio compensations to county attorneys for ex-officio services rendered.

The writer cannot recall any ex-officio services rendered a county by any county official except those enumerated above. As to whether other county officials than the five mentioned above render any ex-officio services to the county is a question of fact. If any of such officers do actually render to the county ex-officio services, they may be allowed ex-officio compensation for same by the commissioners' court subject only to the judgment of the court and the limitations and the restrictions contained in Article 3893.

It is made plain by the provisions of Article 3893 that the commissioners' court may allow its ex-officio compensation to county officials for ex-officio services rendered. Whether a county official may be paid an ex-officio compensation depends, first, upon whether the law requires that official to render services to the county for which it prescribes no compensation, and, secondly, whether said officer actually renders said services to the county. The best definition of the term "ex-officio services," that we have been able to find, is defined in the case of Calhoun County vs. Watson, 152 Ala., 554. It is there defined as follows:

> "Every service a circuit court clerk is required by law to perform, for which no fee or charge is specified, or that cannot be legally charged to either party in any case, is an ex officio service, for which the clerk is entitled to reasonable compensation from the county."

It is the opinion of this department, and you are so advised, that unless a county officer renders some ex-officio service to the county, the commissioners' court is not authorized to allow ex-

officio compensation to said officer in any amount. If the commissioners' court should allow ex-officio compensation to an officer who renders no ex-officio service to the county, it, as suggested by Judge Phillips in the Veltman case, might be a manifest abuse of power.

Inasmuch as your letter contains the statement that the commissioners' court of Galveston County rendered an order allowing the sheriff of Galveston County an ex-officio compensation of $1,200.00 for the fiscal year ending November 31, 1919, I take the liberty to call your attention to another question decided by the Supreme Court in the case of Veltman vs. Slator, supra. That court held that, under the provisions of Article 3866, Revised Civil Statutes, in counties like Galveston, the maximum that could be allowed sheriffs as ex-officio compensation is $800.00 per annum.

In reply to your second inquiry, beg to call your attention to the provisions of Section 24, Article 5 of the Constitution, which reads as follows:

"'County judges, county attorneys, clerks of the district and county courts, justices of the peace, constables, and other county officers, may be removed for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury.'

"It will be noted from a reading of the above section that the framers of the Constitution clearly classed justices of the peace as county officers.

"We call attention also to Article 6030 of the Revised Civil Statutes of 1911, providing for the removal of certain county officers. This article is as follows:

"'All district attorneys, county judges, commissioners, and county attorneys, clerks of the district and county courts, and single clerks in counties where one clerk discharges the duties of district and county clerks, county treasurer, sheriffs, county surveyor, assessor, collector, constable, cattle and hide inspector, justice of the peace, and all other county officers now or hereafter existing by authority either of the constitution or laws, may be removed from office by the judges of the district court for incompetency, official misconduct, habitual drunkenness, or drunkenness not amounting to habitual drunkenness, as hereafter defined in this chapter.'

"The Legislature has substantially embodied in the foregoing article Section 24, Article 5, of the Constitution, and in so doing has likewise classified justices of the peace as county officials.

"In holding that the trustees of a common school district are county officers the Court of Civil Appeals of this State in the case of Hendericks vs. State, 49 S. W., 705, after citing the section and article of the Constitution above cited, said:

"'School districts are subdivisions of the county, as are commissioners' and justices' precincts. Commissioners, justices of the peace, and constables are named along with other officers whose offices extend to the entire county; and the mention of 'other county officers' is a reference to them as county officers. Each of them is an officer in and for the precinct of the county of which his precinct is a part, and consequently of the county itself; and we think there should be no difficulty in construing the Constitution and the statute as including the officers of the precincts and districts of a county in the general designation of county officers.'

"In the case of Kimbrough vs. Barnett, 55 S. W., 120, the Court of Civil Appeals held that trustees of an independent school district were also county officers. The court said:

"'We think there can be no doubt that a school trustee of an independent school district in this State is a county officer, as was held in the case of Hendericks vs. State, 49 S. W., 705.'

"A justice of the peace as a magistrate may sit in any portion of the

county. His jurisdiction to this extent is co-extensive with the boundaries of the county.

"'Hart vs. State, 15 Court of Appeals, 202; Ex parte Brown, 43 Texas Criminal, 45; Brown vs. State, 55 Texas Criminal, 572."

We are therefore of the opinion, and you are so advised, that justices of the peace and constables are "county officials" within the meaning of Article 3893, and, as such, commissioners' courts may allow them ex-officio compensation when such officers render to the county ex-officio services, and further provided said officers hold their office in a city of more than twenty thousand inhabitants.

Yours very truly,
BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 1957, Bk. 51, P. 406.

PUBLIC OFFICERS—EX-OFFICIO COMPENSATION—EXTRA COMPENSATION.

1. Where the commissioners' court has granted ex-officio compensation to the county judge it may at any subsequent time change, modify or revoke the order and may reduce the ex-officio compensation.

2. Where a county judge receives ex-officio compensation the commissioners' court is without authority to grant any extra sum as ex-officio compensation for any passed period of time.

3. Where no ex-officio compensation has been fixed by the commissioners' court, then the court may at a subsequent time allow ex-officio compensation for passed services. Section 53, Article 3, Constitution.

AUSTIN, TEXAS, December 7th, 1918.

Hon. Robt. H. Hopkins, County Attorney, Denton, Texas.

DEAR SIR: From your letter of December 4th, addressed to the Attorney General, it appears that at the February term, 1917, the commissioners' court of your county fixed the ex-officio compensation of your county judge at $1,000.00 per year; that thereafter at the April term the commissioners' court entered an order reducing such ex-officio to the sum of $1.00 per month, which amount has been paid to the county judge continuously since such date. It now appears that a new commissioners' court desires to pay to the county judge an additional amount as ex-officio compensation for the period subsequent to April, 1918, if the same can be legally done.

Replying thereto we beg to say that the ex-officio compensation of a county judge is such an amount as may be determined by the commissioners' court. Article 3852, R. S., 1911. It is also held by the courts of this State that an order fixing ex-officio compensation is not a contract and may be rescinded, changed, modified or revoked at any time. Collingsworth County vs. Myers, 35 S. W., 414. Therefore, the order of the commissioners' court entered at the April term, reducing the ex-officio to $1.00 per month, was a valid order.

Having received compensation under the statute by virtue of the

order of the commissioners' court, the question then presented is, may the commissioners' court grant ex-officio compensation after the service has been performed. Section 53, Article 3, of the Constitution, provides in substance that the Legislature shall have no power to grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant, or contractor, after service has been rendered.

If the order of the commissioners' court entered at the April term had simply abolished the ex-officio compensation of the county judge it would be lawful for the court to, at this time, grant compensation for the time that has elapsed since that order. In other words, where no ex-officio compensation is paid the commissioners' court may afterwards grant such compensation. Dallas County vs. Lively, 167 S. W., 219.

In the above case the county sued Judge Lively to recover $675.00 paid him as ex-officio compensation after the services were rendered. The court denied the recovery on the ground that the Constitution does not prohibit the granting of compensation after service is performed, but does prohibit the granting of extra compensation, same being an addition to the compensation fixed by law or agreed upon by the officials. The Court says:

> "If the law had specified the salary to be allowed, or the commissioners' court had fixed the amount, then any additional compensation procured after services were rendered would be extra, and forbidden."

Again, in the same opinion, the Court uses this language:

> "The Constitution does not forbid the fixing of compensation after service rendered, but forbids increasing the agreed or prescribed sum after service rendered or work performed. Had the salary been specified before the ex officio duties were performed, any additional sum would be extra compensation, which the Constitution forbids."

It therefore appears that the case presented by you comes squarely within the holding of the Court in the Lively case, that is, the commissioners' court having fixed the ex-officio compensation at $1.00 per month for the time subsequent to April, 1918, that court would now be without power to grant an additional amount for that time for the reason that it would be in violation of Section 53, Article 3, of the Constitution, prohibiting the granting of extra compensation to an official after the service has been performed.

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

Op. No. 2001, Bk. 52, P. 176.

FEES OF OFFICE—COMMISSION OF COUNTY TREASURER.

I.

A County Treasurer is not entitled to any commission on that part of the gross registration chauffeur or transfer fees that is required to be transmitted by the tax collector to the State Highway Department at Austin.

II.

A county treasurer is entitled to his commission on that part of the gross registration chauffeur or transfer fees that is required to be deposited by the tax collector in the county depository to the credit of the special highway fund.

III.

The total commissions to be received by the county treasurer shall in no event exceed $2,000.00 annually.

IV.

Section 3, Chapter 75, Acts of the Thirty-fifth Legislature, passed at its Fourth Called Session.

Articles 3873-3875, R. S.

AUSTIN, TEXAS, March 21, 1919.

Hon. I. J. Curtsinger, County Attorney, San Angelo, Texas.

DEAR SIR: I have your letter of March 18, addressed to the Attorney General, reading as follows:

"The County Treasurer has requested me to write you for your opinion as to whether or not she is entitled to a commission on the moneys paid into her hands by the Tax Collector which he receives for auto licenses and chauffeurs' licenses under the late Highway Act. The statute does not seem to make any provision for her to keep out of said moneys any commissions."

In reply to your inquiry, I direct your attention to Section 3, Chapter 73, Acts of the Thirty-fifth Legislature, passed at its Fourth Called Session, wherein it is provided that:

"It shall be the duty of the tax collector to transmit on Monday of each week to the State Highway Department at Austin one-half of the gross registration chauffeur or transfer fees collected during the preceding week. The remaining one-half shall be deposited by the tax collector in the county depository of the county to the credit of a special highway fund to be expended under the provisions of law relating thereto."

I also direct your attention to Article 3873, Revised Statutes, wherein it is provided that:

"A county treasurer shall receive commissions on the moneys received and paid out by him, said commissions to be fixed by order of the commissioners' court as follows: for receiving all moneys other than school funds for the county not exceeding two and one-half per cent and not exceeding two and one-half per cent for paying out the same; provided, however, he shall receive no commission for receiving money from his predecessor nor for paying over money to his successor in office."

And it is also provided by Article 3875, Revised Statutes, that:

"The commission allowed to any county treasurer shall not exceed $2,000.00 annually."

It is the duty of the tax collector on Monday of each week to transmit to the State Highway Department at Austin one-half of the gross registration chauffeur or transfer fees collected during the preceding week. The county treasurer has nothing at all to do with this fund that is transmitted by the tax collector to the State Highway Department at Austin, and clearly is not entitled to any commission from such fund.

The tax collector shall deposit in the county depository of the county, to the credit of a special highway fund, one-half of the gross registration chauffeur or transfer fees collected. The money in this special highway fund is to be expended by or under the direction of the commissioners' courts of the respective counties in the maintenance of the public roads of such counties in accordance with plans approved by the State Highway Department.

It is true that the State Highway law itself makes no provision for the payment of any commission to the county treasurer for the moneys received from the gross registration chauffeur or transfer fees collected by the tax collector, nor for paying out any money from the special highway fund into which this gross registration chauffeur or transfer fees are placed.

However, Article 3873, quoted above, provides that the county treasurer shall receive commissions "on moneys received and paid out by him." This is a general law and is applicable to all funds received by the county treasurer except such funds as are specifically excepted from the provisions of this Article. It is, therefore, clearly evident that the county treasurer is entitled to his commission on that part of the gross registration chauffeur or transfer fees that are deposited in the county depository.

In the case of Bastrop County vs. Hearn, 70 Texas, 563, the court in construing Article 2403, now article 3873, said:

"The Constitution, Article 16, Section 44, provides that the Legislature shall prescribe the duties of a county treasurer and that he shall have such compensation as may be provided by law. The legislature has prescribed that the county treasurer shall receive all moneys belonging to the county and shall be entitled to commissions to be fixed by the commissioners' court as follows: for receiving all moneys belonging to the county (except the school funds) not exceeding two and one-half per cent and not exceeding two and one-half per cent for paying out same. (Revised Statutes Article 2403.) (Article 3873.) From these several provisions of the law it is evident that a county treasurer is the lawful custodian of all moneys that may belong to his county and that he has a property right in such moneys to the extent of his commissions."

The Court in this same opinion held that no distinction can be made between general and special funds belonging to the county. The money collected by the tax collector and deposited in the county depository to the credit of a special highway fund is money belonging to the county. The money collected by the tax collector and transmitted to the State Highway Department at Austin does not at any time belong to the county.

To answer your inquiry in a clear and concise way, it is the opinion of this Department, and you are so advised:

First: That the county treasurer is not entitled to any commission on that part of the gross registration chauffeur or transfer fees that is required to be transmitted by the tax collector to the State Highway Department at Austin.

Second: That the county treasurer is entitled to his commission on that part of the gross registration chauffeur or transfer fees that is required to be deposited by the tax collector in the county depository to the credit of the special highway fund.

Third: The total commissions to be received by the county treasurer shall in no event exceed $2,000.00 annually.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

Op. No. 2130, Bk. 53, P. 328.

FEES OF OFFICE—TAX ASSESSOR—TAX COLLECTOR.

The County Tax Assessor is entitled to receive for assessing the taxes in all drainage districts, road districts or other political subdivisions of the county the sum of one-half of one cent for each $100 of the assessed values of such districts or subdivisions.

The county tax collector is entitled to receive for collecting the taxes in all drainage districts, road districts or other political subdivisions of the county the sum of one-half of one cent for each $100 of taxes collected by him for such district or subdivision.

AUSTIN, TEXAS, September 8, 1919.

Hon. W. N. Stokes, County Attorney, Vernon, Texas.

DEAR SIR: I have your letter of September 4th, addressed to the Attorney General, wherein you state you are unable to understand our opinion of date August 23rd, relating to the above subject. In reply I respectfully direct your attention to Article 3871 as amended by Chapter 158, Acts of the Thirty-sixth Legislature, at its Regular Session, and again amended by the Second Called Session of the Thirty-sixth Legislature. This article now provides, among other things, that:

"for assessing the taxes in all drainage districts, road districts or other political subdivisions of the county, the assessor shall be paid one-half of one cent for each one hundred dollars of the assessed values of such districts or subdivisions."

Unfortunately the stenographer in our former opinion to you on this subject erroneously said in quoting the above "one-half of one per cent" instead of "one-half of one cent," hence, the confusion resulting from our other opinion. Said Article 3871, as amended by the Regular Session of the Thirty-sixth Legislature, did provide for the assessor to recieve one-half of one per cent. This would have given the assessor fifty cents for assessing each $100 worth of property in drainage districts, road districts or other political subdivisions of the county, which, of course, would have been absurd; therefore, the Legislature, when it met for its second called session, amended Article 3871 to read as hereinabove set out. By reason of this mistake in the quoting of the above article, our opinion of August 23rd is set aside and this one is substituted in lieu thereof.

You are, therefore, respectfully advised that the tax assessor is entitled to receive for assessing the taxes in all drainage districts, road districts or other political subdivisions of the county the sum of *one half of one cent* for each one hundred dollars of the assessed

values of such districts or subdivisions. This law does not apply to assessing the taxes in independent school districts for the reason that Article 2862 is a special statute fixing the compensation of the tax assessor and tax collector for assessing and collecting the taxes in an independent school district.

I also respectfully direct your attention to Article 3872 as amended by said Chapter 158, Acts of the Thirty-sixth Legislature at its Regular Session, wherein it is provided, among other things, that:

"for collecting the taxes in all drainage districts, road districts or other political subdivisions of the county"

The tax collector shall receive:

"one half of one (1%) per cent on all such taxes collected; provided that the amount to be paid the tax collector shall be paid by the various drainage districts, road districts or other political subdivisions of the county on a pro rata basis in accordance with the amount collected for such districts."

You are, therefore, respectfully advised that the tax collector is entitled to receive *one-half of one per cent* on all taxes collected by him for road districts, drainage districts or other political subdivisions of the county.

You will notice the difference in the compensation to be paid the assessor and the collector to be this: The assessor receives one-half of one per cent for each one hunderd ($100) dollars worth of property assessed, the collector receives one-half of one per cent of the taxes actually collected.

To illustrate,—we will assume that the property valuation in a certain road district is $100,000. The tax assessor is entitled to one-half of one cent on each $100 of this amount, regardless of what the tax levy may be. The tax assessor's compensation for assessing this $100,000 worth of property would be $5.00. This it seems is inadequate compensation, but with this we have nothing to do, it being our duty to construe the law as we find it.

Continuing our illustration, we will assume the above facts to be true in a certain road district and that the tax levy is fifty cents on the one hundred dollar valuation, the total amount of taxes collected would be, assuming that all taxes were paid, $500.00. The tax collector would be entitled to receive, for collecting this $500.00, one-half of one per cent on each dollar actually collected, which would not be fifty cents on each one hundred dollars of property assessed, but fifty cents on each one hundred dollars actually collected by him, so that his total compensation for collecting that five hundred dollars would be two dollars and fifty cents.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

OPINIONS ON STATE HIGHWAY COMMISSION AND AUTOMOBILE LICENSE LAW.

Op. No. 2101, Bk. 53, P. 154.

STATE HIGHWAY COMMISSION LAW—REGISTRATION OF MOTOR VEHICLES AND MOTORCYCLES.

All persons who register a motorcycle or any kind of a motor vehicle after the 1st day of July, 1919, must—

1. Comply with the provisions of Chapter 113, Acts of the Thirty-sixth Legislature, passed at its regular session.
2. Motorcycles and motor vehicles registered prior to July 1, 1919, will not be affected, so far as the registration feature is concerned, by the provisions of said Chapter 113 until the 1st day of January, 1920, when all motorcycles and motor vehicles will have to be registered according to the provisions of said Chapter 113.
3. An automobile truck, regardless of its make, is not a commercial vehicle if its net carrying capacity is less than one ton.
4. A truck of less than one ton net carrying capacity shall be registered in accordance with the provisions of the law governing the registration of motor vehicles which are not "commercial motor vehicles" nor "interurban motor vehicles."
5. Trucks used in private business and not for hire are not required to comply with Section 16a of said Chapter 113.

AUSTIN, TEXAS, June 23, 1919.

State Highway Department, State Office Building, Austin, Texas.

GENTLEMEN: I have your letter of June 12th, addressed to the Attorney General, reading as follows:

"We enclose herewith copy of a letter which we have just received from the Honorable C. A. Tosch, Tax Collector, Dallas County.

"In order that we may be sure of the correctness of the answers we shall make to the questions contained in his letter, it is respectfully requested that you give us an opinion setting forth what the answers to these questions should be. We have already received from several other tax collectors similar inquiries to these, and it is our intention to send each county tax collector a mimeograph copy of the opinion which you shall give us in response to this request."

Also, a copy of the letter from Hon. C. A. Tosch, tax collector of Dallas County, which you refer to in your letter.

In reply, we shall take up and answer, one at a time, the questions propounded by Mr. Tosch in his letter to your department. Mr. Tosch desires to know:

1. "When is the date of beginning for the registration of commercial vehicles under the new law?"

In reply to this question you are advised that all persons who register a motorcycle or a motor vehicle of any kind after the 1st of July, 1919, must comply with the provisions of Section 16 of the State Highway law as amended by Chapter 113, Acts of the Thirty-sixth Legislature, passed at its Regular Session.

2. "Will commercial vehicles that are now registered be compelled to re-register; if so, what will be the value of the unexpired part of the license they now have?"

Replying to this question, you are advised that a motorcycle or a motor vehicle of any kind registered prior to July 1, 1919, will not be affected by the provisions of Section 16 of the State Highway law as amended by Chapter 113, Acts of the Thirty-sixth Legislature, until the 1st day of January, 1920, when all motorcycles and motor vehicles will have to be registered according to the provisions of said Chapter 113 of the Acts of the Thirty-sixth Legislature passed at its Regular Session.

3. "What will be the fee on commercial vehicles under one-ton trucks. such as Ford trucks?"

In reply to this question, you are advised that an automobile truck, regardless of its make, is not a commercial vehicle if its net carrying capacity is less than one ton. Subdivision C of Section 16 of the State Highway law as amended by said Chapter 113, Acts of the Thirty-sixth Legislature passed at its regular session, defines a commercial vehicle as follows:

"A commercial motor vehicle, under the provisions of this Act, is a motor vehicle with a net carrying capacity of more than one ton that is used in carrying freight, for its owner or for others, whether for hire or not, or a motor vehicle of net carrying capacity of more than one ton that is used in carrying passengers for hire."

A truck of less than one ton net carrying capacity shall be registered under the provisions of Subdivision B of said Section 16, which provides that motor vehicles not "commercial vehicles" and "interurban motor vehicles" shall be thirty-five cents per horsepower as determined by the standard gauging power employed by the Association of Licensed Automobile Manufacturers, but no motor vehicle shall be registered for a full year for a less sum than seven dollars and fifty cents.

4. "Will trucks used in private business be required to keep mileage on special trips out of the city or county?"

In reply to this question, your attention is directed to Section 16a of said Chapter 113, Acts of the Thirty-sixth Legislature as passed at its Regular Session, which, by the language used therein, clearly indicates that all owners of motor vehicles, whether engaged in private business or in hauling for the public, must comply with the provisions of said Section 16a with reference to the miles traveled by their motor vehicles or motorcycles. However, Section 16b of said Chapter 113 reads as follows:

"Any person or agent of any person, or any agent or officer of any firm or corporation who operates any commercial motor vehicle or interurban commercial motor vehicle in carrying passengers or freight for hire between any cities, towns or villages of this State when such vehicle has not been duly registered and licensed as required by the next preceding section of this

Act, shall be deemed guilty of a misdemeanor, and shall, on conviction, be fined in any sum not less than $25.00 and not exceeding $200.00; and each day such vehicle is so operated shall constitute a separate offense."

By the provisions of Section 16b hereinabove quoted, there is no penalty provided for failure to further register any commercial motor vehicle or interurban commercial vehicle under Section 16a, unless such vehicle is used in carrying passengers or freight for hire between two or more cities, towns or villages of this State.

Therefore, it was evidently the intention of the Legislature not to require trucks used in private business and not for hire to comply with the provisions of said Section 16a.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

Op. No. 2193, Bk. 53, P. ——.

TAXATION—AUTOMOBILE OWNED BY A CHURCH—REGISTRATION FEE.

A church is not exempt from the payment of a registration fee upon an automobile owned by it and kept for the use of the pastor.

Such registration fee is not a tax within the meaning of the provisions of the State Constitution and statutes exempting from taxation "actual places of religious worship," and even if it were held to be a tax the constitutional and statutory provisions referred to are not broad enough to exempt a church from the payment of same.

Constitution of Texas, Article 8, Section 2.

Revised Civil Statutes, Article 7507, Section 1.

AUSTIN, TEXAS, March 15, 1920.

Hon. J. P. Word, County Attorney, Meridian, Texas.

DEAR SIR: I have your letter of the 11th inst., addressed to the Attorney General, in which you request an opinion as to whether a church is subject to a registration fee upon an automobile owned by it and kept for the use of the pastor.

In reply you are respectfully advised that there is no exemption in such case, because such registration fee is not a tax and the automobile is not a place of religious worship.

The Constitution of Texas provides that the Legislature may by general law exempt from *taxation* "actual places of religious worship."

The Legislature, in Article 7507, Section 1, Revised Civil Statutes, has declared that:

"The following property shall be exempt from *taxation* to-wit: public schoolhouses and houses used exclusively for public worship, the books and furniture therein and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same, and not leased or otherwise used with a view to profit."

It will be noted that the Constitution, as well as the statute, uses the word "taxation," and hence, in order to hold that a church is

exempt from the registration fee upon an automobile owned by it, we would have to hold that such registration fee is a tax.

But such registration fee is clearly not a tax. It is in the nature of a charge for the privilege of operating an automobile over the public highways of this State and is therefore to be distinguished from a tax as that term is used in the constitutional and statutory provisions above mentioned. The correctness of this assertion is manifest upon a careful examination of the statute providing for registration of motor vehicles. The Highway Department is given authority to refuse registration in the case of a motor vehicle improperly equipped or unfit to be operated upon the public highways, and for a like reason may revoke a registration already made. No person is permitted to operate a motor vehicle on the public highway without number plates and a seal for the current year. The registration fee becomes delinquent under the Act forthwith upon the operation of a motor vehicle upon the public highways without the registration fee first having been paid.

No action to collect the registration fee could, of course, be brought until the fee becomes delinquent, and since such fee does not become delinquent until the car is operated upon the public highways, no registration fee could be collected at all if the owner should keep his car in the garage. This in itself is conclusive upon the proposition that the registration fee is not an ad valorem tax, but on the other hand is by way of compensation for the privilege of operating a car upon the public highways of the State.

This very question was raised, and it would seem settled, in the recent case of Adkins vs. State Highway Department, 201 S. W., 226, in which case writ of error was refused by the Supreme Court of Texas on December 2, 1919. In that case appellant contended that the registration fee upon motor vehicles was a tax and that the Act providing therefor was violative of the State Constitution. The court held, however, that the provisions of the Constitutions relied upon by appellant relate to ordinary ad valorem taxes and not to the motor vehicle registration fee provided for in our statute and that such registration fee is not a tax. The court in reaching its conclusion upon this point used the following language:

> "We therefore conclude that the sum of money which appellant is required to pay under the laws here involved is not a tax on ownership, but a license fee for the privilege of operating his automobile on the public highways of the State."

It is well settled that a general grant of exemption from "taxation" does not relieve a person or corporation from local assessments for public improvements unless the language of the grant very clearly includes burdens of this sort; 37 Cyc., 894-5, and authorities cited, including cases from many of the states of the Union.

In Illinois Central Railway Company vs. Decatur, 147 U. S., 190, the Supreme Court of the United States in holding that the railway company was not exempt from the payment of municipal assessments upon its land within a municipality in the state laid for the purpose of grading and paving a street therein, stated it as a rule that:

"An exemption from taxation is to be taken as an exemption simply from the burden of ordinary taxes, taxes proper, and does not relieve from the obligation to pay special assessments."

In the same case the Supreme Court quotes, with approval from In the Matter of the Mayor, etc., of New York, 11 Johns, 77, 80, in which the New York court held that a church was not exempt from local assessments to pay for the opening of a street under a statute providing that no church or place of public worship should be *taxed* by any law of the state.

These cases proceed upon the correct theory that a statute exempting a person or property from taxation is to be strictly construed and no exemption will be presumed to have been intended unless it is clear and beyond doubt that it was intended.

Cooley on Taxation, 54-146;
Campbell vs. Wiggins, 85 Texas, 424-429, 21 S. W., 599, affirming 20 S. W., 730;
Morris vs. Lone Star Chapter, 68 Texas, 698, 702, 5 S. W., 519.

Thus, it is clear that such registration fee is not a tax and that on this ground the church is not exempt from the payment of same.

But even if it were held to be a tax, there is another reason for holding that there is no exemption from the payment of such registration fee. The Constitution merely permits the Legislature to exempt from taxation "*actual places of religious worship.*" The statutes declare the following to be exempt from taxation:

"* * * houses used exclusively for public worship, the books and furniture therein and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same, and not leased or otherwise used with a view to profit."

There is no general exemption of all the property of churches. How could it be contended that an automobile owned by the church and used by the pastor comes within the terms of either the constitutional or statutory provisions here referred to

This same question was raised with reference to a parsonage, the residence of the pastor of the church, in the case of Trinity Methodist Episcopal Church vs. City of San Antonio, 201 S. W., 669. It was contended there that the parsonage was exempt from taxation under the provisions of the Constitution and the statutes herein discussed. In other words, it was contended that the parsonage was a place of religious worship. The court held against this contention and stated that the language of the constitution must fix the exemption no matter what the language of the statute may be and that under Section 21, Article 8, of the Constitution appellant had not shown himself entitled to exemption for its parsonage as being an "actual place of religious worship," it having been shown that the parsonage was simply furnished by the church as a residence for the pastor. The court further said:

"It may be that it was a necessary appurtenance to the church, but the

constitution does not exempt anything attached or appurtenant to a church on the ground of necessity."

If a parsonage is not exempt as a place of religious worship, how can an automobile used by a pastor be held to be exempt as such?

You are therefore advised that, in the opinion of this department, a church is not exempt from the payment of a registration fee upon its automobile kept for the use of its pastor, first, because such registration fee is not a tax, and, second, because it is not an actual place of religious worship within the meaning of our Constitution and statutes.

Yours very truly,
L. C. SUTTON,
Assistant Attorney General.

Op. No. 2136, Bk. 53, P. 338.

CITIES AND TOWNS—STREETS AND ALLEYS—LICENSE—SERVICE CARS—AUTOMOBILES.

Cities and towns of less than five thousand inhabitants are authorized to license and regulate service cars operating for hire over the streets and alleys of such cities and towns.

AUSTIN, TEXAS, September 12, 1919.

Hon. Charles Bruns, Mayor, Seguin, Texas.

DEAR SIR: We have your communication of September 9, addressed to this department, in which you ask an opinion as to whether or not cities and towns under five thousand inhabitants are authorized to license and regulate service cars operating for profit. This question has been passed upon by the courts of Texas and other states a great many times, but all instances that I have so far discovered relate to cities and towns operating under special charters.

Two questions arise from your inquiry: First, has a city or town in Texas, organized under the general laws, a right to license and regulate service cars operating for profit over its streets? Second, if such city had such right primarily, is same taken from it by the provisions of Chapters 190 and 207 of the General Laws of the Regular Session of the Thirty-fifth Legislature and amendments thereto?

In answering your question I will first refer you to Article 854, Vernon's Sayles' Revised Statutes, which reads in part as follows:

"Any incorporated city or town in this State shall have the exclusive control and power over the streets, alleys and public grounds and highways of the city."

I next refer you to Article 870 of Vernon's Sayles' Revised Statutes. This article is a part of Chapter 24, Title 22, of the Revised Civil Statutes and relates to the powers of cities and towns

organized under the general laws of Texas, and provides that cities and towns have the power:

"To license, tax and regulate hackmen, draymen, omnibus drivers and drivers of baggage wagons, porters and all others pursuing light occupation with or without vehicles and to prescribe their compensation."

I further refer you to Article 928, Vernon's Sayles' Revised Statutes, which reads as follows:

"The city council shall have power to levy and collect taxes, commonly known as license, upon trades, professions, callings and other business carried on; and each and every person and firm engaging in the following trades, professions, callings and business, among others, shall be liable to pay such license tax; but this enumeration shall not be construed to deprive the city council of the right and power to levy and collect other license taxes, and from other persons and firms, under the general authority herein granted."

I quote you these several articles to show that the same powers over streets and alleys and to license occupations are granted to cities incorporated under the general laws as are discussed by the courts in their opinions sustaining the rights of citizens operating under special charters to license and regulate service cars operating over their streets and alleys for hire, commonly known as "jitneys," and that the rule laid down in these opinions will also apply to cities and towns incorporated under general laws.

This question was first decided in Texas ex parte Sullivan, 178 S. W., 537. This was a case in which the city of Ft. Worth attempted to regulate motor busses operating for hire over the streets of Ft. Worth. Sullivan applied to the Court of Criminal Appeals for a Writ of Habeas Corpus and discharge thereunder. The charter of the city of Ft. Worth had provisions with reference to the control and management of the streets very similar to the statutes quoted above. The court denied the application for a Writ of Error and said:

"There can be no doubt that the city under the charter provisions above given not only had the power and authority to enact and enforce particular ordinances prescribing reasonable regulations on the subjects embraced in said ordinance, but that it was its imperative duty to do so."

This rule has been followed by the Court of Criminal Appeals of Texas each time that this or any similar question has been presented to it.

This question first came before the Court of Civil Appeals of Texas in the case of Greene vs. City of San Antonio, 178 S. W., 6. This was a case involving the constitutionality of an ordinance passed by the city of San Antonio licensing and regulating the operation of automobiles for hire within said city of San Antonio. Chief Justice Fly, for the court, discussed in detail the powers of cities over their streets and alleys. This opinion is too long to quote in full, but I refer you to same for study. The court in that opinion held that the highways of the State, including the streets of cities

and towns, are under the paramount and primary control of the Legislature, and that cities and towns have such powers, and those only, as are delegated to them by the Legislature. The court further said that the only absolute right that a private individual has in the streets of a city, not including the abutting owner, is his right to convey himself or property from one place to another, and even that right may be regulated. Then the court said:

"No individual has the inherent right to use a street or highway for business purposes. No man has the right to use a street for the prosecution of his private business, and his use for that purpose may be prohibited or regulated as the State or municipality may deem best for the public good. Not having the absolute right to use streets for the prosecution of private business, within the bounds of reason, where no discrimination is shown, persons or classes of persons may be controlled or regulated in the use of streets."

This rule has been followed consecutively by the courts of Texas and all other states without deviation as far as I have been able to find.

See:

Ex Parte Sullivan, 178 S. W., 537;
Green vs. City of San Antonio, 178 S. W., 6;
Ex Parte Bogle, 179 S. W., 1193;
Auto Transit Co. vs. Ft. Worth, 182 S. W., 685;
Willis vs. Ft. Smith, 182 S. W., 276;
Craddock vs. San Antonio, 198 S. W., 635;
City of Dallas vs. Gill, 199 S. W., 1146;
Ex Parte Parr, 200 S. W., 404.

There are a great number of other cases both from Texas courts and those of other states, but it is unnecessary to quote same here as the above are conclusive.

In the case above cited, Ex Parte Parr, 200 S. W. 404, the question arose before the Court of Criminal Appeals as to whether or not the powers granted to cities by the statutes above cited, or by their special charters, were taken from them by the passage of Chapters 190 and 207 of the general laws of the Regular Session of the Thirty-fifth Legislature. These two chapters are what are known as the highway laws of Texas. This case was an application for a Writ of Habeas Corpus to the Court of Criminal Appeals from San Antonio. The applicant was being held for violation of an ordinance of the city of San Antonio regulating the operations of motor vehicles for hire in San Antonio. The applicant contended that such ordinance was void for several reasons, among which was that the State laws above referred to as Chapters 190 and 207 deprived cities of the right to regulate such motor vehicles. Justice Morrow, speaking for the Court, quoted parts of the Chapters above referred to, and, citing numerous authorities in Texas and elsewhere, denied the application for Writ of Habeas Corpus and sustained the validity and constitutionality of the ordinance of San Antonio and held that the passage of the two above named chapters did not take from the cities the control over their streets and alleys with reference to the operation of automobiles for hire, but that

such control still remained in them as had previously been vested in them by general law and by special charters.

I, therefore, advise you that cities and towns in Texas having less than five thousand inhabitants and incorporated under the general laws of Texas are authorized and have the power to license and regulate the operation of service cars for hire in, over and upon the streets, alleys and public ways of such cities and towns.

Yours very truly,
JOHN MAXWELL,
Assistant Attorney General.

Op. No. 2083, Bk. 53, P. 110.

STATE HIGHWAY DEPARTMENT—MOTOR VEHICLES—LICENSE FEES.

All persons, whether dealers or not, who offer for sale second hand motor vehicles on and after June 18th, 1919, must have a tax collector's receipt for the license fee for such motor vehicle and must deliver same to the purchaser thereof at the time of delivery of said car.

AUSTIN, TEXAS, June 6, 1919.

State Highway Department, Attention: J. R. Windrow, Austin, Texas.

DEAR SIRS: We have yours of May 28th, addressed to this department, with a letter from S. W. Ray of Jacksonville, Texas, in which Mr. Wray makes these inquiries:

"1st. We have had on hand for two years one 1916 model used car, yet unsold. Will it be necessary for us to have this car registered, pay license on it until it is sold. It has never been sold.

"2nd. We bought one 1918 model car the first of this year before this year's licenses were due. It has been registered but license fees for this year have not been paid. At times we have used it we have had our dealer's number and seal on it. Will it be necessary for us to pay the license fee on this car before selling or until such time as we do sell it?"

In your communication you request that we answer these two inquiries, to the end that you may be able to advise Mr. Ray and such other persons as may desire such advice.

In reply to these inquiries I direct your attention to Sections 3a, 3b and 3c, Chapter 139, General Laws of the Regular Session, Thirty-sixth Legislature, same being House Bill No. 417, which reads as follows:

"Section 3a. It shall be unlawful for any person acting for himself or any one else *to offer for sale or trade* any second-hand motor vehicle in this State, without then and there having in his actual physical possession the Tax Collector's receipt for the license fee issued for the year that said motor vehicle is offered for sale or trade.

"Section 3b. It shall be unlawful to sell or trade any second-hand motor vehicle in this State without transferring by indorsement of the name of the person to whom said license fee receipt was issued by the Tax Collector and by physical delivery of the Tax Collector's receipt for license fee for the year that the said sale or trade is made.

"Section 3c. It shall be unlawful for any person acting for himself or an-

other to buy or trade for any second-hand motor vehicle in this State without demanding and receiving the Tax Collector's receipt for the license fee issued for said motor vehicle for the year that said motor vehicle is bought or traded for.

"Any person violating the provisions of Sections 3a, 3b and 3c shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than Ten Dollars ($10) nor more than Two Thousand Dollars ($2000.00), or by confinement in the County Jail for any term less than one year, or both such fine and imprisonment, and all moneys collected for such fines shall be placed in the Road and Bridge Fund of the County in which the violation occurs and the penalty is recovered."

Before the passage of this bill by the Legislature, Section 21 of Chapter 190, of the General Laws of the Regular Sesion of the Thirty-fifth Legislature, provided that a manufacturer or dealer in motor cars might have issued a special dealer's number in lieu of a specific number for each car. This was intended for the economy and convenience of dealers who have cars in stock and exhibit them to prospective purchasers.

However, H. B. 417 makes no exceptions in favor of dealers with reference to the license numbers on second-hand automobiles, and inasmuch as House Bill 417 was passed by the Legislature subsequent to Chapter 190 of the General Laws of the Thirty-fifth Legislature, said House Bill 417 supersedes said Chapter 190, in so far as there is conflict between them.

The aforesaid Section 3a, 3b and 3c are unequivocal, in that same provide that no person *shall offer for trade or sale any* second-hand motor vehicle; that it shall be unlawful to sell or trade any second-hand motor vehicle; and that it shall be unlawful for any person, for himself or another, to buy or trade for any second-hand motor vehicle unless such second-hand sale or purchase is registered as required by the laws of this State, and unless such person selling same has the receipt for the license fee for said car and delivers same to the purchaser at the time of such sale or trade and unless said purchaser, at such time, demands of the seller thereof such receipt for license fee for the number and seal as required by the statutes. This statute applies to the one who offers for sale as well as the one who sells or trades. This provision would apply to the dealer in second-hand motor vehicles in stock and for sale as well as to the individual.

I would therefore advise you, in reply to the inquiries of Mr. Ray, that in each instance it is the duty of the owner of a second-hand motor vehicle, before he shall sell same or offer same for sale, whether he be a dealer or not, to obtain from the tax collector of his county the required receipt for license fee and to deliver same upon the delivery of such second-hand motor vehicle to the purchaser thereof.

This rule applies only to second-hand cars and not to dealers in new cars, who may operate such new cars on the highways of the State for purposes of demonstration only, under general dealers' numbers as issued by your department.

Yours very truly,

JOHN MAXWELL,

Assistant Attorney General.

Op. No. 2108, Bk. 53, P. 215.

AUTOMOBILES—LICENSES—DEALERS—JITNEY.

1. A dealer in automobiles is one who is engaged in the business of buying and selling automobiles.

2. A dealer in second-hand or used cars is not entitled, upon payment of license fee, to receive a distinguishing dealer's number which he may transfer at will from one car to another, but such person must have the tax collector's receipt for the license fee for each individual car at the time he sells same or offers same for sale or trade.

3. A jitney driver, licensed as such and operating his car as a jitney, can not drive said car under a dealer's distinguishing number.

4. A dealer in automobiles would not be authorized, under the law, to use his dealer's number on his private car and drive same continuously or repeatedly on the roads of the State.

AUSTIN, TEXAS, June 26, 1919.

Mr. J. R. Keith, Assistant County Attorney, Cleburne, Texas.

DEAR SIRS: We have your communication of June 11th, in which you make the following inquiries:

"Section 21, Chapter 190 of the General Laws of the Thirty-fifth Legislature, Regular Session, undertakes to regulate the issuance of license to Dealers in Automobiles, and the use of such license after issuance. The following language, in part, is used: 'Any dealer—etc.—which may be attached to any motor vehicle—he sends temporarily upon the road.'

"1. Who is a dealer within the purview of this statute? Is any person who may desire to do so, and who may trade, or expect to trade, in second-hand cars, entitled, upon payment of the license fee, to receive a dealer's number which he is at liberty to transfer at will from one car to another?

"2. Is a dealer a person who regularly, as a business and not a side issue, deals in automobiles, and must he have a regular place of business?

"3. Could a jitney driver, licensed as such and operating his own car as a jitney, drive said car continuously under a dealer's number?

"Would a dealer be authorized, under this law, in attaching his dealer's number to his private car and using same continuously on the road?"

In reply, I will first quote Section 21 of the Act, which reads as follows:

"Section 21, Any manufacturer of, or dealer in, motor vehicles in this State may, in lieu of registering each machine he may wish to show or demonstrate on the public highways, apply for registration and secure a general distinguishing number, which may be attached to any motor vehicle or motorcycle he sends temporarily upon the road. The annual fee for such dealers' registration or a general distinguishing number shall be fifteen ($15.00) dollars, and additional number desired by any dealer, not exceeding five, will be assigned and registered for a fee of five ($5.00) dollars each. All the other provisions of this Act shall apply in case of dealers' registration."

By the use of the word "dealer" in Section 21 is meant any person who engages in the business or occupation of buying or selling automobiles, and usually has a fixed place of business.

"Dealers are the middle men between the manufacturers or producers and consumers." Commonwealth vs. Vetterlein, 63 Atlantic 192.

"Dealer, in a popular, and therefore a statutory sense of the word, is not one who buys to keep or makes to sell, but one who buys to sell again. He

stands immediately between the producer and the customer and depends for his profit, not upon the labor he bestows upon his commodity, but upon the skill and foresight with which he watches the markets." i. d.

"A dealer is one whose business it is to buy and sell merchandise, goods, and chattels as a merchant, storekeeper, or a broker." State vs. Rosenbaum, 68 Atlantic, 250.

This is the definition of dealer as contemplated in Section 21, Chapter 190. This definition would include a person who is a dealer in second-hand cars, as well as one who is a dealer in new cars. It is not absolutely necessary for such person to have a place of business. However, it is usual in the automobile business for him to have a regular establishment. To constitute a person a dealer, he must buy and sell automobiles as his business. To occasionally buy a car and subsequently sell same would not constitute a person a dealer in automobiles and entitle such person to the privileges of Section 21. Just a casual trader who takes in automobiles on trade or sale and trades off or sells automobiles would not be a dealer in automobiles. While this definition of a dealer includes a person buying and selling second-hand automobiles, yet the Regular Session of the Thirty-sixth Legislature passed an Act relating to the dealing in second-hand automobiles and took same out of the provisions of Section 21 of Chapter 190 of the Thirty-fifth Legislature. You will find this in Chapter 138 of the Acts of the Regular Session of the Thirty-sixth Legislature. The portion thereof that relates to dealers in second-hand automobiles is found in Sections 3a, 3b, and 3c of said Chapter 138. These sections require any person selling or offering for sale or trade, at the time such sale or offer for sale or trade is made, to have in his actual physical possession the tax collector's receipt for the license fee issued for the year that said motor vehicle is offered for sale or trade, and to deliver same in case of sale or trade to the purchaser.

This Act fixes a rather strenuous penalty for the failure to obey this provision. There are no exemptions in favor of dealers, but the Act applies to all persons alike who sell or trade second-hand or used motor vehicles.

The provisions of Section 21 of Chapter 190, since the passage of Chapter 138 by the Thirty-sixth Legislature, applies only to persons who are manufacturers or dealers in motor vehicles that have not been used or that can not be classed as second-hand used cars, and even then only applies when used temporarily for purposes of demonstrating such cars for sale.

I would, therefore, answer your inquiries as follows:

1. A dealer in automobiles is one who is engaged in the business of buying and selling automobiles.

2. A dealer in second-hand or used cars is not entitled, upon payment of license fee, to receive a distinguishing dealer's number which he may transfer at will from one car to another, but such person must have the tax collector's receipt for the license fee for each individual car at the time he sells same or offers same for sale or trade.

3. A jitney driver, licensed as such and operating his car as a

jitney, can not drive said car under a dealer's distinguishing number.

4. A dealer in automobiles would not be authorized, under the law, to use his dealer's number on his private car and drive same continuously or repeatedly on the roads of the State.

Yours very truly,
JOHN MAXWELL,
Assistant Attorney General.

OPINIONS ON TAXATION.

TAXATION.

Is it the duty of the Automatic Tax Board to deduct unappropriated cash in the State Treasury from the total amount of moneys to be raised by an ad valorem tax in arriving at the State ad valorem tax rate to be levied.

State Constitution, Article 3, Section 43, Article 4, Section 9, Revised Statutes, Articles 7349 and 7351.

AUSTIN, TEXAS, July 17, 1920.

Hon. Jno. W. Baker, State Treasurer, Capitol.

DEAR SIR: I am in receipt of an oral request from the Automatic Tax Board for an opinion as to whether or not various sums of money in the State Treasury which remain as unexpended balances of appropriations, which have expired, may be considered when the Tax Board undertakes to determine the amount of money which must be raised by ad valorem taxes, and fixes the tax rate for such purposes.

In reply to this inquiry, we direct your attention first to Section 9 of Article 4, of our State Constitution, which makes it the duty of the Governor to give the Legislature at its sessions an estimate of the amount of money required to be raised by taxation of the amount of money required to be raised by taxation for all purposes. Speaking with reference to the duty of the Governor, this section of the Constitution, in part, provides:

"and at the commencement of each regular session he shall present estimates of the amount of money required to be raised by taxation for all purposes."

Section 48, of Article 3, of the Constitution, declares that the Legislature shall not have the right to levy taxes "except to raise revenues sufficient for the economic administration of the government." From this constitutional provision, it is apparent, we think, that taxes cannot be levied except for the purpose of raising revenues "sufficient for the economic administration of the government." This is the express limitation of the Constitution, and as such each must dominate and control and interpret all statutes relating to the subject.

Chapter 1, of Title 26, of the Revised Statutes, among other things, provides for the creation of what has become familiarly known as the Automatic Tax Board. And Article 7301 lays down the rules which must govern this Board in fixing the tax rate. In ascertaining the duties of the Automatic Tax Board, under this article of the statute, we must keep steadily in mind the constitutional provision that this board through the agency of the Legislature cannot levy taxes and raise revenues in an amount in excess of that "sufficient for the economic administration of the government."

In Article 7551, the Tax Board is authorized to find the total amount which will or which may become due by the State during

the following fiscal year by adding together the amounts appropriated by the Legislature which will or may become due by the State during the following fiscal year. The exact language of the statute is as follows:

"They shall find, by adding together the amounts appropriated by the Legislature, which will or which may become due by the State during the following fiscal year, the total sum which will or which may become due by the State during the following fiscal year."

This language must be interpreted and construed in the light of the constitutional provision, which inhibits the levying of taxes except for a "sufficient amount for the economic administration of the government." We must therefore read in the language of the statute the constitutional limitation. That is to say, by the method laid down in the statute, the board is to find "the total sum which will or which may become due by the State during the following fiscal year," "sufficient for the economic administration of the government." In the present instance, as we understand from a letter from you, there are several millions of dollars expired appropriations, and, therefore, unappropriated funds in the State Treasury. If these funds are to be disregarded, then the amount of money which would be raised by a tax levy would exceed the "revenues sufficient for the economic administration of the government" by several millions of dollars.

The conclusion therefore is inevitable that in determining the amount of money which will be raised the statute means that the Board shall add together the sums appropriated by the Legislature which will or may become due by the State the following fiscal year for the payment of which there is not already in the Treasury a sufficient amount of money.

The whole purpose of the tax law is to find out how much money must be raised by taxation, and if the State already has on hand unappropriated funds to the amount of several millions of dollars, then manifestly this amount of money need not be raised by taxation, because it has been raised and is on hand.

You are advised, therefore, that it is the duty of the Board to deduct from the gross amounts appropriated by the Legislature which will or may become due the following fiscal year the amount of unappropriated general funds in the Treasury available for the payment of such appropriations so made by the Legislature, and the remainder will give you the sum which must be raised by taxation and which you are to consider in calculating or fixing the tax rate. Any other construction of this law would be in direct conflict with the plain limitations of the Constitution. We therefore prefer to give the law a construction consistent and harmonious with the Constitution and harmonious with the general purpose and intent of the law, which was to provide a practical method by which a minimum tax should be levied "to raise revenues sufficient for the economic administration of the government." The statute was written to carry into effect the Constitution and not to thwart its primary and fundamental purpose.

Since dictating the foregoing, your request for an opinion has been reduced in writing and has been received by this department. The request contained in your written communication is as follows:

"The Automatic Tax Board will be glad to have you advise them, if under the Constitution and Statutes they will be permitted to deduct unappropriated cash in the State Treasury from the total amount of moneys to be raised by an Ad Valorem Tax, in arriving at the State Ad Valorem Tax rate to be levied."

Therefore, directly answering your question, I beg to advise you that the Automatic Tax Board not only will be permitted, but it is required by the Constitution and laws of this State "to deduct unappropriated cash in the State Treasury from the total amount of moneys to be raised by an ad valorem tax in arriving at the State ad valorem tax rate to be levied."

Yours very truly,
C. M. CURETON,
Attorney General.

Op. No. 2183, Bk. 53, P. 599.

LANDS—INTERESTS IN LAND—OIL LEASE CONTRACTS.

Oil in place is a mineral and susceptible of separate ownership from the ownership of the surface.
Oil in place owned separately from the surface is taxable against its owners.

February 21, 1920.

Hon. M. L. Wiginton, Comptroller Public Accounts, Capitol.

DEAR SIR: I have your letter of recent date, addressed to the Attorney General, reading as follows

"I am having numerous inquiries from tax assessors on one hand and the oil companies on the other in reference to the assessment of oil and gas leases. My department has held to the opinion that where oil and gas leases have a commercial value, separate and apart from the fee in the land covered by the lease, and are sold on the market as a commodity having a value of its own, such leases are subject to taxation and should be assessed to the owner of the lease.

"This opinion has been questioned by the oil companies on the ground that the form of lease used by them was not a conveyance but simply an option, granting a privilege to prospect for oil, gas and other minerals.

"I am herewith enclosing to you, copies of what is purported to be a conveyance and an optional lease.

"I failed to see any difference in the effect of the two forms of lease, in so far as the owner of the land is concerned.

"The question that I desire an opinion from your department on is whether or not the "Optional Lease" is subject to taxation and to whom should they be assessed, the owner of the land or the owner of the lease.

"Trusting that I may have an opinion from your department on the point mentioned at an early date, I am * * *."

In answering your inquiry, the first question that presents itself

is whether or not oil in place is a mineral and susceptible of separate ownership from the ownership of the surface. This question must be answered in the affirmative.

Thornton on Oil and Gas, 2d ed., Secs. 18, 19, 20.
27 Cyc., p. 629.
So. Oil Co. vs. Colquitt et al, 69 S. W., 169.
Cox vs. Robison (Sup.) 150 S. W., 1149.
Murray vs. Allred, 100 Tenn., 100, 43 S. W., 355, 39 L. R. A., 249, 66 L. R. A., 740.
Kelley vs. Ohio Co., 570 S. W., 317, 39 L. R. A., 765, 63 L. R. A., 721.
Wagner vs. Mallory, 169 N. Y., 501, 62 N. E., 584.
Ohio Oil Co. vs. Indiana, 177 U. S., 190.
That oil leases are a conveyance of the oil in place:
Benevides vs. Hunt, 79 Texas. 383.
Staley & Barnsdall vs. Durden, 121 S. W., 1136.
Southern Oil Company vs. Colquitt et al, 69 S. W., 169.
Gracioso Oil Co. vs. Santa Barbara Oil (Cal.), 99 Pac. 483, 20 L. R. A. N. S.), 211.
Wolf Co. vs. Beckett (Ky.), 105 S. W., 447, 17 L. R. A. (N. S.), 688.
Harvey Coke and Coal Co. vs. Dillon (W. Va.), 6 L. R. A. (N. S.), 628.
Pierce-Fordyce Oil Association vs. Woodrum, 188 S. W., 245.
McEntire vs. Thomason, 210 S. W., 553.

The next question which presents itself is whether or not mineral in place, and as we have seen oil is included within the term "minerals" owned separately from the surface, are taxable against their owners. This question is also answered in the affirmative. State vs. Downman, 134 S. W., 787. Texas Company vs. Daroughty, 176 S. W., 717.

We come now to the question of whether or not the two oil lease contracts, copies of which you were kind enough to furnish us, conveyed an interest in land. If they do, they are taxable as real property. If they do not, they are not taxable as real property.

For the purpose of identification, and in order that our opinion may be clearly understood, we have marked these oil lease contracts as "Contract No. One" and "Contract No. Two."

You are advised that a contract, similar if not identical with Contract No. One, was construed by the Supreme Court of this State in the Daroughty case, supra, and held to convey an interest in land and, as such, was taxable as real property. Therefore, you are advised that Contract No. One does convey an interest in land and, as such, is taxable as real property.

In the Daroughty case, supra, Chief Justice Phillips took occasion to say:

"The question is to be resolved, in our opinion, by the determination of whether the instruments involved conferred upon the plaintiff in error an interest in the lands therein respectively described. If their effect, at most, was but the creation in its favor of a mere franchise or privilege to devote the land to a certain use, with the usufructuary right, as a part of its use and enjoyment, to appropriate a portion of such oil and gas as might be discovered, such franchise or privilege was taxable against the owner of the fee as a part of the land, just as any other such valuable right or privilege belonging to land is, unless otherwise distinctly provided by statute, so taxable under Article 7504."

Article 7504, referred to by Judge Phillips, reads as follows:

"Real property, for the purpose of taxation, shall be construed to include the land itself, whether laid out in town lots or otherwise, and all the buildings, structures and improvements, or other fixtures of whatsoever kind thereon, and all the rights and privileges belonging or in any wise appertaining thereto, and all mines, minerals, quarries and fossils in and under the same."

It will be seen that the Supreme Court has declined to say that all oil lease contracts necessarily convey an interest in land. In other words, the Supreme Court declined to construe contracts not before it for construction.

The contract that was construed by the Supreme Court in the Daroughty case contained the following habendum clause:

"To have and to hold, all and singular, the above-described premises, rights, properties, and privileges, and all such as are hereinafter specified, under the said grantee, and the heirs, successors and assigns of such, forever, upon the following terms."

The copy of the oil lease contract which you furnished us, and which we have marked "Contract No. Two," and which will be hereinafter referred to as "Contract No. Two," does not contain this habendum clause, but it does contain the following:

"Lessor hereby warrants and agrees to defend the title to the lands herein described, and agrees that the lessee shall have the right at any time to redeem for lessor, by payment, any mortgages, taxes or other liens on the above described lands, in the event of default of payment by lessor, and be subrogated to the rights of the holder thereof."

The contract which the Supreme Court construed also contained the following provision:

"This lease is not intended as a mere franchise, but is intended as a conveyance of the property and privileges above described for the purposes herein mentioned, and it is so understood by all parties hereto."

Contract No. Two does not contain this provision.

The contract construed by the Supreme Court provided that the grantor, by the terms of the instrument, "granted, bargained, sold and conveyed" to the grantee "all of the oil, gas, coal and other minerals in and under" the particular tract of land.

The grantor, by the terms of Contract No. Two, "granted, conveyed, demised, leased and let" to the grantee "for the sole and only purpose of mining and operating for oil and gas and laying pipe lines and building tanks, towers, stations and structures thereon" on that certain particular tract of land.

There is a material difference in the language used in the contract construed by the Supreme Court and that used in Contract No. Two, but regardless of the language used, does Contract No. Two by its terms and provisions actually convey an interest in the land? It is of the utmost importance that this question be answered correctly.

The tax assessors of the State are going to confront this proposition. Land that a few years ago, before the discovery of oil nearby, that had an assessable value of ten dollars per acre, in many instances now has an assessable value of one thousand dollars per acre. The owner of the fee has leased his land under the terms of lease contract No. Two. If the assessor attempts to assess, as against the owner of the fee of this land, at one thousand dollars per acre, the owner will naturally object and if the land is eventually assessed against the owner of the fee,) it will mean litigation. On the other hand, if the tax assessor attempts to assess the grantee or lessee under lease contract No Two with seven-eighths of this increased value of $990.00 per acre, it is possible that the lessee will object on the ground that the lease contract does not in fact convey an interest in the land. And for the further reason that lease contract No. Two merely grants a franchise or privilege and, therefore, is not taxable as real property.

By the terms of Contract No. Two, the lessee is given the exclusive right to go onto the land for the purpose of prospecting for and developing, oil and gas. The owner of the land is estopped from exercising any right or control over the oil and gas in his land. If oil is produced, the lessee receives seven-eighths thereof under the terms of Contract No. Two, and the owner of the land receives the remaining one-eighth. The lessee may assign his rights under this contract to any other person without notice to the owner of the soil. In other words, the lessee has the exclusive right to handle, manage and dispose of seven-eighths of the oil that may be contained in the land; and the owner of the soil is estopped from exercising any right to seven-eighths of the oil that may be in the land.

It is the oil in the land, or that is thought to be in the land, that enhances the value of the land. And it is the lessee, and not the owner, that has absolute control over this oil which has enhanced the value of the land.

The language used in Contract No. Two makes it difficult of construction, and we are constrained to believe that it was prepared by able lawyers with the end in view that such a lease might not be taxable as an interest in the land.

We call your attention to the case of Pierce-Fordyce Oil Association vs. Woodrum, supra, and, particularly, to that part of the opinion with reference to appellant's motion for rehearing. In that case. the Court of Civil Appeals at Fort Worth was construing an oil lease contract which contains the following habendum clause:

"To have and to hold the same for a term of one year from this date and as much longer thereafter as oil or gas is found thereon and produced therefrom in paying quantities."

It will be observed that the language used in the habendum clause in the contract construed by the Fort Worth Court is materially different from the habendum clause in the lease contract construed by the Supreme Court in the Daroughty case. And the only thing

contained in Contract No. Two which might be referred to as a habendum clause is the following:

"It is agreed that this lease shall remain in force for a term of.......... years from this date and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee."

It will be observed that the language used in Contract No. Two, with the exception of the words "to have and to hold," is very similar to that used in the contract construed by the Fort Worth Court.

The words of the granting clause in the contract construed by the Fort Worth Court are as follows:

"Do hereby grant, sell, convey and lease unto the said lessees all the oil and gas in and under the following described tracts of land and the possession thereof for the purpose of entering upon and operating thereon and removing therefrom said oil and gas."

We have already called attention to the words used in the granting clause in Contract No. Two. And it will be observed that the language is very similar to that used in the contract construed by the Fort Worth Court, with the exception that the contract construed by the Fort Worth Court contained the word "sell" which is omitted from Contract No. Two, and that the contract construed by the Fort Worth Court only used the word "lease," whereas, Contract No. Two uses the words "demise, leased and let." The Fort Worth Court in construing the habendum and granting clause in the contract they had before them said:

"The habendum clause limits the contract to a period of 12 months from its date unless oil or gas or both shall have been found in paying quantities at that time. Now it will be observed that, in addition to the words 'grant, sell, and convey,' contained in the granting clause, the word 'lease' is also used in connection with said other words, and undoubtedly was intended to qualify and limit them, which intention the contract as an entirety plainly shows."

While the Fort Worth Court said that the word "lease" was intended to qualify and limit the contract, yet, further on in the opinion, the Court said:

"The appellee subjected his land to a servitude for the promotion of appellant's purposes in a search for oil and gas, and it was entirely reasonable and just that in consideration of his parting with that much interest in his land there should have been a compensation paid him in case the grantees or lessees failed to make use of the property as contemplated in the contract."

And we are not left in any doubt as to the final construction placed on this contract by the Court of Civil Appeals, for in the case of McEntire vs. Thomason, supra, the same court said:

"It seems to be no longer an open question with us that a lease of the character of the one under consideration is a conveyance of an interest in lands. See Texas Company vs. Daroughty, 107 Texas, 226; 176 S. W., 717; L. R. A., 1917-F, 989; Pierce-Fordyce Oil Association vs. Woodrum, 188 S. W., 245."

So then we find that the Court of Civil Appeals has held an oil lease contract to be an interest in land which used a habendum clause very similar to that used in Contract No. Two, and that used the word "lease" in its granting clause, and that granted the land for the purpose of entering upon and operating thereon and removing therefrom the oil and gas.

In the case of McEntire vs. Thompson, we are not given the benefit of the language used in the lease contract, but we consider it worthy of note that in the Daroughty case, decided by the Supreme Court, the Pierce-Fordyce Oil Association case, decided by the Fort Worth Court of Civil Appeals, and the McEntire case, decided by the Fort Worth Court of Civil Appeals, all construed the contract before them as conveying an interest in the land.

Then we are constrained to believe that Contract No. Two has the effect and does in fact convey an interest in land. Therefore, you are respectfully advised that in the opinion of this department such an oil lease contract is taxable as real property.

You are further advised that, while we cannot say that every oil contract lease, regardless of the language used, will convey an interest in land, we do advise you that the burden of proof should be on the lessee to show that his lease contract does not convey an interest in land and the safe policy for the tax assessor to pursue would be to tax all oil lease contracts as a part of the real property, unless it clearly and unmistakably shows that it does not in fact constitute an interest in the land.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

Op. No. 2185, Bk. 53, P. ——

TAXATION—LANDS—OIL LEASE CONTRACTS.

Oil lease contracts that convey to the lessee an interest in land are taxable.

AUSTIN, TEXAS, March 8, 1920.

Hon. Mark L. Wiginton, Comptroller Public Accounts, Capitol.

DEAR SIR: On February 21, 1920, this Department rendered to you an opinion relative to taxation of oil lease contracts. A short time after this opinion was delivered to you, we requested that you withhold any action pending further consideration of the question by this Department.

This is, therefore, to advise you that after further consideration, we desire to re-affirm everything that we said in our opinion of February 21st.

And, in order to assist the tax assessors and boards of equalization, in order that they may have a clear understanding of the law, we desire to add the following to what was said in our former opinion:

An oil lease contract which conveys to the lessee an interest in the fee in the land is always taxable as real property. The language used in the lease contract may be looked to to ascertain the intent of the parties, but, regardless of the language used, if the effect of the instrument is to convey to the lessee an interest in the fee in the land, such interest is taxable as real property.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

Op. No. 2042, Bk. 52, P. 405.

A PROVISION IN A SPECIAL ROAD LAW AUTHORIUING A TAX FOR BOND PURPOSES ON THE INTANGIBLE ASSETS OF A RAILROAD VIOLATES THE PROVISIONS OF SECTION 3, ARTICLE 8, OF THE CON STITUTION, AND IS UNCONSTITUTIONAL.

AUSTIN, TEXAS, April 17, 1919.

Mr. Geo. Hauesler, County Auditor, La Grange, Texas.

DEAR SIR: We have a letter from you calling attention to the fact that the special road law of your county contains a provision to the effect ''that the county or any district thereof may levy a tax on all tangible and intangible property situated in the county or district to pay off bonds.''

You then ask the following question:

"Can a road district under this law levy and collect taxes on intangible assets of railroads?"

Replying thereto, it is the opinion of this Department that the portion of your road law authorizing a tax to be levied in road districts for bond purposes on the intangible assets of railroads is clearly unconstitutional for the following reason, to-wit:

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

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

There is no general law of this State authorizing taxes to be levied in road districts on the intangible assets of railroads for the purpose of providing interest and sinking fund for bond issues. On this subject we hand you herewith opinion of this Department No. 1092 rendered to Hon. A. L. Bevil, County Attorney, Kountze, Texas.

You are therefore advised that neither by virtue of the terms of your special road law, nor by virtue of any existing general law, can a tax be levied for bond purposes in a road district on the intangible assets of a railroad.

Yours very truly,
JNO. C. WALL,
Assistamt Attorney General

Op. No. 2073, Bk. 53, P. 12.

TAXATION: MARL—SAND—SHELL—MUDSHELL—EXEMPTIONS.

All marl, sand, shell, and mudshell used by counties and cities in building roads and streets is exempt from the State tax whether the county or city does the work under its own supervision or by contract, even though the contract between the county or city and the contractor is silent as to the tax.

The marl, sand, shell, and mudshell that is used in constructing and repairing the Galveston Causeway is not exempt from the State tax.

Article 4021, i, Vernon's Sayles' Civil Statutes, 1914.

AUSTIN, TEXAS, May, 20, 1919.

Hon. W. G. Sterrett, Game, Fish, and Oyster Commissioner, Capitol.

Attention Mr. Jefferson.

DEAR SIR: I have your letters of May 14th addressed to the Attorney General, together with the enclosures: one letter with reference to marl, sand, shell, and mudshell being used by certain contractors in road and street improvement work for certain counties and cities; the other letter is with reference to marl, sand, shell and mudshell that is being used in the construction and repair of the Galveston causeway.

In reply, your attention is directed to Article 4021i, Vernon's Sayles' Civil Statutes, 1914, which reads as follows:

"Article 4021i. Permits to counties, cities, towns, etc.—If any county, or any subdivision of a county, city or town should desire any marl, sand or shell or mudshell included in this Act for use in the building of any road or street, which work is done by such county, or any subdivision of a county, city or town, such county or any subdivision of a county, city or town may be granted a permit without charge and shall have the right to take, carry away or operate in any waters, or upon any islands, reefs, or bars included in this Act, and this whether such county, subdivision of a county, city or town does the work under its own supervision or by contract but such county, or any subdivision of a county, city or town shall first obtain from the said commissioner a permit to do so, and the granting of same for the operation in the territory designated by such county, or any subdivision of a county, city or town, shall be subject to the same rules, regulations and limitations and discretion of the said commissioner as are other applicants and permits. (Id. Section 8.)"

In view of the language used in the above statute, you are advised that this Department is of the opinion that the State is not entitled to collect a tax on the marl, sand, shell, and mudshell used by counties and cities in building roads and streets, even though the contract between the counties and cities and the contractor is silent as to the tax.

In making contracts for marl, sand, shell, or mudshell, counties and cities should receive the benefit of the exemption from taxation. However, if the county or city fails to receive this benefit, that fact does not warrant the State in collecting the tax from the contractor for the reason that the law is very explicit and unambiguous in providing that marl, sand, shell, and mudshell used by a county or city in building roads and streets shall be exempt from the tax whether the work is done under the supervision of the county or city, or whether it is done by contract.

In reply to the second letter relative to the marl, sand, shell, and mudshell that is being used in the construction and repair of the Galveston causeway, you are respectfully advised that the County of Galveston, Gulf, Colorado and Santa Fe Railway Company, Galvestion, Houston and Henderson Railway Company, The Galveston, Harrisburg and San Antonio Railway Company, and the Galveston-Houston Electric Railway Company have entered into a contract with Larkin and Sangster, Inc., for the construction and repair of said Galveston causeway.

The steam railway companies and the interurban railway company above named and the County of Galveston have agreed as between themselves as to what proportion of the cost of the construction and repairing said Galveston causeway shall be paid by each of them as follows, to-wit:

Forty-five per cent of the cost of reconstruction and repair of the causeway to be paid by the three steam railway companies; the interurban company to pay twenty-two per cent of such cost of construction, and the County of Galveston will pay the remaining thirty-three per cent of such cost of construction, with the proviso that when the sum of one million, seven hundred and twenty-five thousand ($1,725,000.00) dollars shall have been expended, the County of Galveston shall contribute and pay all the remaining cost and expense of said work.

The width of said causeway is to be 63 feet and 3 inches, which is to provide for two railroad tracks, one interurban track and a county roadway of 20 feet and 6 inches between curbs. The steam railway companies have an equal undivided interest of a strip of said causeway 28 feet in width; the interurban railway company to have all of a strip 13 feet in width of said causeway, cost of maintenance and repair to be borne by the respective parties in the same proportion as the cost of construction.

The County of Galveston purports to lease to said steam railway companies and to the said interurban company their respective strips of said causeway above described for a period of 999 years from and after December 15, 1908.

The statute quoted above clearly intends to exempt from the State tax all marl, sand, shell, and mudshell used by counties and cities in building roads and streets. It is a familiar law that statutes exempting property from taxation are to be strictly construed.

Bank vs. Dennis, 116 U. S., 665;
Railroad Company vs. Thomas, 132 U. S., 174;
Schurz vs. Cook, 148 U. S., 397.

In view of the above authorities, it is clearly evident that the above quoted statute could not be construed to mean that the marl, sand, shell, and mudshell used in the construction and repair of the Galveston causeway is to be free from the State tax, for it is quite evident that said causeway is not a county road such as is contemplated by the above statute.

The County of Galveston, prior to the construction and repair of

said Galveston causeway, had no causeway to lease to said steam railway companies and to said interurban company; and the contract between the County of Galveston, Gulf, Colorado and Santa Fe Railway Company, Galveston, Houston and Henderson Railroad Company, The Galveston, Harrisburg and San Antonio Railway Company, and the Galveston-Houston Electric Railway Company with Larkin and Sangster, Inc., for the construction and repair of the Galveston causeway is nothing more or less than a joint building contract with a stipulation or proviso in the contract between the County of Galveston and said steam railway companies and said interurban railway company that the County of Galveston shall have a revisionary interest in said causeway; that is, that, at the expiration of 999 years, all right, title and property to said causeway shall be vested in Galveston County. Prior to the termination of said 999 years, all right, title, and interest in a strip 28 feet in width of said causeway is vested in said steam railway companies; and all right, title and interest in a width of 14 feet of said causeway is vested in the interurban company; and all right, title, and interest to 20 feet and 6 inches is vested in the County of Galveston, which is approximately thirty-three per cent of said causeway.

Reputable authorities have held that the estate of a landlord during the existence of an outstanding leasehold estate is called a reversion, and during the existence of the lease, the tenant is absolute owner of the demised premises, for all practical purposes, for the term granted, the landlord's right being confined to his reversionary interest.

16 Ruling Case Law, 619;
Stern vs. Sawyer, 78 Vermont, 5.

It is clearly evident that, for all practicable purposes, sixty-seven per cent of the Galveston causeway will be owned, controlled, and operated—not as a county road and for the benefit of Galveston County and the public generally—but, instead, will be operated for the benefit and profit of the steam railway companies and the interurban railway company above named. It would, therefore, be a perversion of the very intent of the Legislature to permit marl, sand, shell and mudshell to be used in the construction of said causeway free from the State tax; for the Legislature intended that the various counties, subdivisions of counties, cities and towns could use, for road and street building purposes, marl, sand, shell and mudshell free of the State tax—but it was not intended that steam railway companies and interurban companies or general contractors should receive the benefit of this tax exemption in constructing railroads or railroad bridges or causeways.

The full amount of the State tax on all marl, sand, shell, and mudshell used in constructing and repairing the Galveston causeway should be collected. And, as Galveston County owns and controls a strip of said causeway 20 feet and 6 inches in width which is approximately thirty-three per cent of said causeway and

as this 20 feet and 6 inches strip is to be used by Galveston County as a public road, Galveston County is entitled to receive the benefit of the tax exemption. Therefore, after the collection of the tax, thirty-three per cent thereof should be remitted to the County of Galveston.

The Legislature, in enacting the above statute, had in mind the accomplishing of a particular result, viz.: to aid counties and cities in building roads and streets to the extent of exempting from the State tax all marl, sand, shell, and mudshell used in building said roads and streets; and it has been held by the U. S. Supreme Court in a case dealing directly with tax exemptions that

"when a statute creates an exemption with the evident design of aiding in accomplishing a particular result, the exemption should be expected to cease when that result has been accomplished, and the statute should be read in the light of such expectation."

Winona & St. Peter Land Co. vs. Minnesota, 159 U. S., 526.

Assuming for the moment that the reversionary interest of Galveston County in the Galveston causeway is such as to vest immediate ownership in the county, even then, the State would be entitled to its tax upon sixty-seven per cent of the marl, sand, shell and mudshell used in the construction and repair of said causeway for the reason that the statute only exempts from taxation the marl, sand, shell or mudshell that is used in the building of roads or streets belonging to a county or a city. And it is clearly evident that sixty-seven per cent, or a strip 42 feet and 6 inches wide of said Galveston causeway, is not a county road or street of a city, but, instead, said 42 feet and 6 inches has two railroad tracks and one interurban track thereon.

In the supplemental contract of lease between the County of Galveston and said steam railway companies and said interurban railway company whenever the county roadway is mentioned, it has reference to that strip of said causeway which is 20 feet and 6 inches wide belonging to Galveston County to be used as a road; and the remaining 42 feet and 6 inches is never referred to as a county road or roadway.

Again assuming for the moment that the reversionary interest of Galveston County in the Galveston causeway is such to vest immediate ownership, your attention is respectfully directed to an opinion handed down by our own Supreme Court in the case of Daugherty vs. Thompson, 71 Texas, 192, wherein that court held that

"Property exempted from taxation in the hands of its owner, while used for the purpose on account of which the exemption is given, will doubtless become subject to taxation if leased for any period to be used for a purpose which does not itself give the exemption, unless in cases in which the exemption is given by the Constitution, or under a contract that would be impaired by taxation."

It is, therefore, self evident that if the entire Galveston causeway was to be used as a public road, the marl, sand, shell, and mudshell used in its construction and repair would be free from the State tax. However, we find that more than two-thirds of this causeway

has been leased for a period of 999 years and is "to be used for a purpose which does not itself give the exemption," viz.: for railroad and interurban tracks. If Galveston County was leasing this entire causeway to corporations for railway purposes or for any other purpose, certainly no one, in view of the language used in the statute above quoted, would contend for a moment that the marl, sand, shell, and mudshell used in its construction and repair should be free from the State tax. Then why, in the present case, where sixty-seven per cent of this causeway, or a strip 42 feet and 6 inches wide, out of a total width of 63 feet, is to be used by corporations for railway purposes, and not as a county road, should the State tax not be collected

Long before this 999-year contract terminates and the ownership of said causeway reverts to Galveston County, this same causeway will long since have ceased t obe in existence. It, therefore, can not be contemplated that the County of Galveston will ever receive any benefit from this causeway other than its thirty-three per cent interest therein; that is, its strip 20 feet and 6 inches wide, which is to be used as a county road.

You are, therefore, respectfully advised that the State should collect the full amount of tax from the contractor who is furnishing the marl, sand, shell, or mudshell and should remit thirty-three per cent of said tax back to the County of Galveston.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

Op. No. 1980, Bk. 52, P. 30.

TAXES—PAYMENT BY CHECK—COLLECTION OF TAXES.

The acceptance of a check by a Tax Collector for the amount of the drawer's taxes is only a conditional payment; the taxes are not paid until the check is paid.

The Tax Collector will not lose the amount of worthless checks given in attempted payment of taxes.

If taxes are not actually paid prior to February first it is the duty of the Tax Collector to report them as delinquent.

AUSTIN, TEXAS, February 15, 1919.

Hon. J. P. Word, County Attorney, Meridian, Texas.

DEAR SIR: I have your letter of the 13th inst., addressed to the Attorney General in which you request an opinion from this Department on the question asked in the following letter addressed to yourself from Hon. J. S. Lamar, your county tax collector:

"Several persons gave their checks to me for their 1918 taxes—some poll taxes—and I gave them credit for same by issuing to them my official receipts and marking opposite their names on the tax rolls date of proposed payments.

"The checks of the persons above referred to were deposited in the County Depository to the credit of J. S. Lamar, Tax Collector. Afterwards the said

checks were returned to me by the Depository, unpaid, and the amounts of the checks charged to me as Tax Collector by said Depository.

"In view of the facts set forth in the above paragraphs, that in the event the Unpaid Checks or "Turned Down" Checks are Unpaid by the time I make my January report, would I be justified, under the law, to cancel the credits given for taxes purporting to be paid with checks that the banks upon which said checks were drawn refused to pay; and, further, would I be justified in reporting the taxes purporting to be paid with valueless checks delinquent?

"Or do I have to lose the amounts of the worthless checks already referred to? If so, what recourse have I to recover money so lost by me?"

By the provisions of Article 7358, Revised Statutes, taxes are made payable in the currency or coin of the United States; provided, that persons holding scrip issued to themselves for service rendered the county may pay their county ad valorem taxes in such scrip. Cooley on Taxation, Vol. 2, page 804, lays down this general rule.

"A tax collector has no authority to receive in payment of taxes anything but such money as at the time is legal tender, or at least passes current. He has no right to receive the promissory notes of individuals, and such notes, if so received, do not operate as payment or discharge the taxes, and are void as without consideration and contrary to public policy. A bank check is conditional payment only, and the tax will remain in force if the check is dishonored."

The acceptance of a check on a bank for the amount of the drawer's taxes is at most only a conditional payment; that is, the taxes are not paid until the check is paid and if it is never presented or is dishonored the taxes remain a charge. The same rule applies to drafts. 37 Cyc. 1164.

In a case in Massachusetts, a tax payer gave the tax collector a check for $2,457.00 drawn on the Maverick National Bank of Boston, in payment of taxes. Before the tax collector presented the check for payment the bank was closed under the instruction of the Comptroller of the Currency. Chief Justice Field, of the Supreme Judicial Court of Massachusetts, in this case, held:

"We are of the opinion that the statutes contemplate taxes should be paid to the collector of taxes in money; that if the collector, for the convenience of the tax payers or of himself, receives checks, in the absence of any agreement to the contrary, they are to be taken as conditional payment, and that if they (the checks) are not paid the claim for taxes is not satisfied, and that the taxes can still be collected according to law." Houghton vs. Boston, 159 Mass. 138.

In Kansas the taxes are paid to the county treasurer. A tax payer there attempted to pay his taxes by draft which was accepted by the county treasurer, and receipt issued and the taxes marked "paid" on the tax roll. Before the draft reached the bank on which it was drawn the bank had failed. The Supreme Court of Kansas in passing on this case held:

"A county treasurer has no authority to receive a draft in payment of taxes and where a draft is given for that purpose, if payment is refused by the drawee, the county treasurer, even after having issued a tax receipt and marking the taxes 'paid' on the tax roll, may proceed to collect the taxes from the lands against which they are charged." Barnard vs. Mercer, 54 Kan. 630.

Also see:

Koones vs. District of Columbia, 4 Mackey 339;
Johns vs. McKibben, 156 Ill., 71;
Richards vs. Hatfield, 40 Neb., 879;
McLanahan vs. Syracuse, 18 Hun., 259;
Kahl vs. Love, 37 N. J. L., 5.

The doctrine of these cases is that where an attempt has been made to pay taxes by check, and for any reason the check is not paid, the taxes continue to be a lien upon the lands in question, and the lands may be sold as in ordinary tax proceedings for the payment of the taxes so remaining a lien.

It is customary in most, if not all, counties in this State for the tax collector to accept a check as a conditional payment of taxes and to then issue his receipt showing the taxes paid and to mark them paid on the tax roll. In the event any such check is not paid when presented to the bank upon which it is drawn, the taxes are not paid and the tax collector would have authority to cancel the credits given for taxes which were attempted to be paid with worthless checks. The tax collector would not lose the amount of the worthless checks accepted by him as a conditional payment of the taxes and it would be his duty after February first to report the taxes which were attempted to be paid with worthless checks as delinquent, unless, of course, payment of the taxes was actually made prior to February first.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

Op. No. 1967, Bk. 51, P. 470.

COMMISSIONERS' COURT AS BOARD OF EQUALIZATION

1. The commissioners' court, acting as a Board of Equalization, having examined, corrected and approved the tax assessor's lists and having adjourned, has no further power or authority in reference to the tax rolls, except that given in Articles 7706 and 7652. It has no power or authority to increase or diminish the value of property shown thereon or to make any changes in the approved rolls, except those mentioned.
2. The tax rolls of a county, made out from the lists of the assessor, after the Board of Equalization has examined, corrected and approved the same, are binding on the tax collector of the county, and said collector has no power or authority to question or review the action of said Board.
3. After the tax lists have been approved by the commissioners' court and the tax rolls have been prepared from said approved lists, it is the duty of the tax collector to proceed with the collection of the taxes as shown by said tax roll. He has no power or authority to make any changes upon said roll, and must collect and receipt for the taxes as shown thereon.
4. The decision of the commissioners' court, sitting as a Board of Equalization, upon a particular assessment is in the nature of a judgment; is final and has the ordinary force and effect of a judgment in the absence of fraud and illegality.
5. If the Board of Equalization, in fixing the value of property, has acted with corrupt or fraudulent motives, the collection of the tax may be enjoined

and the action of the Board set aside. Fraud may be also pleaded and relied on as a defense to a suit by the State to collect a tax.

AUSTIN, TEXAS, January 20, 1919.

Hon. T. J. Newton, County Attorney, San Antonio, Texas.

DEAR SIR: We are in receipt of letters from you and from Judge Davis about the tax situation in Bexar County. From the two letters we note there is quite a difference of opinion between the commissioners' court and a number of tax payers as to whether the assessment of taxes for the year 1918 in Bexar County was regular, especially in reference to the notice given by the commissioners' court, sitting as a board of equalization, as to its intentions to increase the value of property appearing on the assessor's list. We note also that there is considerable question as to whether many of the tax payers did not waive the notice.

No other questions being raised in these letters, we will assume that the other proceedings were regular; that the commissioners' court, sitting as a board of equalization, received the assessor's list of rendered property, said list having on the margin his notations of increased values and accompanied by affidavits of tax payers who objected to such increases as provided in Article 7569, R. S.; that the commissioners' court heard testimony and corrected and approved said list as provided in Article 7577, R. S.; that thereafterwards said assessor prepared his list of unrendered property placing his valuation thereon, and presented it to the commissioners court, as required by Article 7576, and that said court corrected and approved said list, as required by Article 7578. That the assessor then prepared his tax rolls from said lists, so corrected and approved by the commissioners' court, filing one copy thereof with the State Comptroller, one with the collector of taxes, and one in the county clerk's office, as required by Article 7577, R. S.

It might be well to now observe that the revenues of the State and county and the financial interests of the tax payers are not all that is involved in a decision of this question. It is also of much importance to the tax collector of Bexar County. He is charged on the books of the Comptroller with the taxes as they appear upon the rolls approved by the commissioners' court and must make settlement by such rolls. He must then proceed to collect the taxes as they appear upon said rolls, unless relieved of such duty, or prevented from doing so, by some tribunal having authority to determine questions of fact and to order a settlement upon a different basis.

The Attorney General's Department has no such authority. As to whether the commissioners' court, sitting as a board of equalization, gave proper notice before increasing the value of certain piece of property, or as to whether the owner of said property waived such notice, involve questions of fact which are not within our province to determine. And even if we should undertake to do so, our finding would not be binding on any of the parties concerned. We can, therefore, only call attention to some rules of law and general principles which should be considered in arriving at a decision. The first of these is thus stated in 37 Cyc, page 1108:

"The decision of the.. .. ..board of equalization upon a particular assessment submitted to it for adjudication is in the nature of a judgment and has the ordinary force and effect of a judgment; and in the absence of fraud and illegality it generally is final and conclusive as to all matters submitted by law to the decision of the... .... court, and is not open to impeachment or contradiction in a collateral proceeding. It must be accepted and obeyed by the officer whose duty it is to make the changes in the assessment roll which are ordered by the board (the collector of taxes in this instance), and he cannot question or review its decision, but mandamus lies to compel him to perform the simple ministerial duty which the decision of the board imposes on him. It is also binding on the collector of taxes, and conversely it will protect him in the discharge of his duties, if he acts within it. But it may be reviewed and reversed by the courts when shown to have been given without jurisdiction or otherwise to be wholly illegal, and also where shown to have been fraudulent, malicious or entirely arbitrary."

That the foregoing quotation fairly expresses the doctrines to be applied in this State in controversies of this kind, we call your attention to certain statutory provisions and to some decisions by our higher courts.

Article 4715, of the Revised Statutes of 1879, the same being Article 5124, of the Revised Statutes of 1895, is as follows:

"The boards of equalization shall have power, without complaint from any one, to supervise the assessments of their respective counties, and if satisfied that the valuation of any property is not just and fair, to increase or diminish the same, and to affix a proper valuation thereto; *and their motion in such cases shall be final and not subject to revision by said board or any other tribunal thereafter.*"

This article was amended in 1907, at the Regular Session of the Thirtieth Legislature, Chapter XI, of the printed General Laws of said session, and as so amended in Article 7570, of the Revised Statutes of 1911, and is as follows:

"Boards may equalize without complaint. The boards of equalization shall have power, and it is made their official duty, to supervise the assessment of their respective counties, and, if satisfied that the valuation of any property is not in accordance with the laws of the State, to increase or diminish the same and to affix a proper valuation thereto, as provided for in Article 7569 of this chapter; and, when any assessor in this State shall have furnished said court with the rendition as provided for in Article 7569 of this chapter, it shall be the duty of such court to call before it such persons as in its judgment may know the market value or true value of such property, as the case may be, by proper process, who shall testify under oath the character, quality and quantity of such property, as well as the value thereof. Said court, after hearing the evidence, shall fix the value of such property in accordance with the evidence so introduced and as provided for in Article 7569 of this chapter; *and their action in such case or cases shall be final.*"

Construing the foregoing article, prior to the amendment of 1907, the Supreme Court, in the case of Duck vs. Peeler, 74 Tex., 271, said:

"If the board of equalization in fact increased the valuation of appellee's property to the sum stated on the tax roll after appellee was cited to appear and show cause why this should not be done, then its action was final, and he could not be heard in that tribunal, nor in any other afterwards, to question it."

In 1899 the Court of Civil Appeals, in the case of Clawson Lumber Company vs. Jones, 49 S. W., 909, held:

"After the approval of the roll by the board of equalization, it had no further jurisdiction in the matter and the order of the commissioners' court made February 21, 1898, reducing the assessment, was void for want of authority in the court to make the order. Sayles' Civil Statute 1897, Article 5120, 5123, 5126, 5128; Duck vs. Feeler, supra."

So, also, it has been held that the action of the assessor and the commissioners' court on questions of valuation is res adjudicata.

State vs. Conts Estate, 149 S. W., 281;
Railway vs. Harrison, 54 Tex., 119;
Clawson Lbr. Co. vs. Jones, 49 S. W., 909.

It has frequently been held that the commissioners' court merely has the power to increase or diminish values and correct errors. It has no power to add any items of property to, or take any from, the assessment lists.

Sullivan vs. Bitter, 113 S. W., 193;
Davis vs. Burnett, 77 Tex., 4; 13 S. W., 613;
Galveston Co. vs. Galveston Gas Co., 72 Tex., 509; 10 S. W., 583;
San Antonio St. Ry. vs. San Antonio, 22 Tex. C. A. 341; 54 S. W., 907.

The doctrine set forth in the foregoing cases has, however, all the while, received a modification, which is well expressed in the opinion of the Court of Civil Appeals in the case of Johnson vs. Holland, 43 S. W., 71, in the following language:

"Where the board of equalization, in raising or fixing the value of property, acts from corrupt or fraudulent motives, and in violation of the laws of the State * * * their acts are voidable at the suit of the party aggrieved and that the courts of the State, having jurisdiction over the amount involved and the subject matter, may, in a proper case, declare such acts to be void, and enjoin the enforcement thereof or compliance therewith * * * not, indeed, to revise the action of such board in fixing such values, *but to set it aside for fraud.*"

It has likewise been held in this State that the tax payer may interpose as defenses to a suit by the State to collect taxes that the board in raising the value of the property involved acted fraudulently and arbitrarily.

Mann vs. State, 18 Tex. C. A. 701;
Linz vs. Sherman, 62 S. W., 71.

Whichever course the tax payer might take, we think there would still remain the presumption that the board of equalization discharged its functions properly and that this presumption would have to be overcome by the tax payer.

37 Cyc., Pages 1110 and cases cited;
Chisholm vs. Adams, 71 Tex., 678; 10 S. W., 336.

AS TO THE QUESTION OF NOTICE.

On this subject we call attention to Article 7564, R. S., which is in part as follows:

"The commissioners' courts of the several counties of this State shall convene and sit as boards of equalization on the second Monday in May of each year, or as soon thereafter as practical before the first day of June, to review all the assessment lists or books of the assessor of their counties for inspection, correction or equalization and approval. * * *

"5. Whenever said board shall find it their duty to raise the assessment of any person's property it shall be their duty to order the county clerk to give the person written notice who rendered the same, that they desire to raise the value of the same. It shall be their duty to cause the county clerk to give ten days written notice before their meeting by publication in some newspaper, but if none is published in the county, then by posting a written or printed notice in each justice's precinct, one of which must be at the court house door."

Strictly construed, the foregoing provisions apply only to rendered property. However, Judge Gaines, in a case involving the construction of a city ordinance—San Antonio vs. Hoefling, 90 Tex., 513; 39 S. W., 916—said:

"The Court of Civil Appeals, however, held that where property in the city was not rendered, and the owner was unknown, it was the duty of the assessor not only to list it in the name of the owner, but also to value it for taxation, and that the board had no power to increase that value without giving notice to the owner. We concur in that opinion."

As to the effect of failure to give notice before raising the value of property, where the same is required by statute, see the opinion of the Court of Civil Appeals in the case of Hoefling vs. San Antonio, 15 Tex. C. A. 257.

When notice is provided for, it is not generally vitiated by minor irregularities and is sufficient if it brings home in any way to the actual knowledge of the person affected the facts of which it is supposed to inform him.

Graham vs. Lancaster, 26 S. W., 472;
Masterson vs. State, 17 Tex. C. A.; 42 S. W., 1003.

Even though notice is required by statute, still, it may be waived in many ways. As an instance, the voluntary appearance of a tax payer or his agent before the officer or board of equalization for the purpose of obtaining relief against an assessment, or contesting a proposed increase of it, has been held to be a waiver of notice or of any objection to the form or service of the notice:

37 Cyc, 1101 and cases cited;
Clawson Lbr. Co. vs. Jones, 49 S. W., 909;
Graham vs. Lasater, 26 S. W. 472.

The conclusions we are able to reach from the undisputed facts presented, and the only conclusions we could properly reach, are:

I. That the board of equalization, having examined, corrected and approved the assessor's lists and adjourned, has no further

power in the matter. It has not the power or authority to increase or diminish the value of any property shown thereon or to make any changes in said approved rolls.

Clawson Lbr.. Co. vs. Jones, 49 S. W., 909;
Galveston Gas Co. vs. Galveston, 54 Tex., 293.

No authority to change these rolls in any manner rests with the commissioners' court, except that given in Article 7706, R. S., in reference to delinquent taxes of unrendered and unknown property, and that given in Article 7652, in reference to land sold to the State upon which the taxes had been paid.

II. That the tax rolls, made out from the lists of the assessor, after the board of equalization had examined, corrected and approved the same, as provided in Article 7577, R. S., are binding on the tax collector of Bexar County and said collector has no power or authority to question or review the action of the board of equalization. He must collect and receipt for taxes as shown upon said rolls.

You are therefore advised that it is incumbent upon the collector to proceed with the collection of the taxes as shown by his tax rolls and, if litigation arises, let each individual case be settled by the courts on its merits. If litigation should arise, it might be helpful to the trial court to note the following portion of the opinion of Judge Gaines in the case of San Antonio vs. Hoefling, 90 Tex., 513; 39 S. W., 918, which, perhaps, is dictum in that case, but at least suggests the view of the Supreme Court in a case involving issues very similar to those herein discussed.

"The Court of Civil Appeals, however, held that, where property in the city was not rendered, and the owner was unknown, it was the duty of the assessor, not only to list it in the name of the owner, but also to value it for taxation, and that the board had no power to increase that value without giving notice to the owner. We concur in that opinion. But we are also inclined to think that in reforming the judgment the court should have allowed the city a recovery not only for the taxes upon the property the valuation of which had not been increased by the board, but also for the taxes upon the other property, upon the basis of the assessor's valuation, disregarding the attempted increase. It would seem that, if the attempt of the board was to raise the value of certain parcels of the real estate was void because they failed to give proper notice to the owner, the assessment made by the assessor would remain unaffected. But the failure of the Court of Civil Appeals to give judgment for such additional amount was not made a ground of the motion for rehearing in that, and has not been formally assigned as a ground of rerror in this court."

Other authorities, that might be helpful, are:

San Antonio Street Ry. vs. City, 54 S. W., 908:
Galveston Gas Co. vs. Galveston, 54 Tex., 293;
Davis vs. Burnett, 77 Tex., 3; 13 S. W., 613.

Yours very truly,
JOHN C. WALL,
Assistant Attorney General.

Op. No. 2132, Bk. No. 53, P. 335.

TAXATION.

1. If land lies on a county boundary which has not been accurately and legally surveyed and fixed the same should not be assessed or taxed in more than one county.

2. Land which has been assessed in one county, according to the abstract of land titles, and the taxes paid thereon, is not afterwards subject to payment of taxes for the same year in any other county.

3. The owner of land situated on a county line which has been accurately and legally surveyed and fixed should render for taxation in each county the correct acreage of land lying in such county according to such survey, and the assessor of each county should assess taxes only upon that portion of the land lying in his county.

AUSTIN, TEXAS, September 12, 1919.

Hon. Andrew King, County Attorney, Andrews, Texas.

DEAR SIR: We have a letter from you which is as follows:

"A boundary section of land here lies in Midland and Andrews counties. The abstract books of Midland County show seventy-three acres in Andrews County. The abstract books of Andrews County show five hundred and sixty-seven acres in Midland County. The owner of the section has paid taxes on the entire section in Midland County. Can Andrews County enforce the collection of taxes on seventy-three acres in Andrews County?"

We call your attention to Article 7511 which is as follows:

"Lands lying on county boundaries, which have not been accurately and legally surveyed, determined or fixed, shall not be assessed or taxed in more than one county."

We also call your attention to Article 7513 which is as follows:

"Any lands which may have been assessed in any county according to the abstract of land titles, and the taxes paid thereon according to law, shall not be afterwards subject to the payment of taxes for the same period in a different county, although subsequent surveys and determination of the county boundaries may show said lands to be in a different county from that in which they were originally assessed; and any sale of such lands for alleged delinquency shall be illegal and void."

Your attention is next called to Article 7552, Revised Statutes, by the terms of which it is made the duty of the Commissioner of the General Land Office to:

"Furnish to each assessor of taxes in this State a correct abstract of all the surveys of land and the number of acres therein in their respective counties; and on the first day of January of each year said Commissioner of the General Land Office shall furnish said assessors an additional list of all new valid surveys in his county during the year, etc."

From the statement contained in your letter it cannot be determined whether Andrews County could enforce the collection of tax on the seventy-three acres situated in Andrews County. We can only say that if said lands lie on a county boundary which "has not been accurately and legally surveyed, determined or fixed,"

they should not have been assessed or taxed in more than one county, and that if they were assessed in Midland County

"according to the abstract of land titles and the taxes paid thereon according to law,"

they should not afterwards be subject to the payment of taxes for the same period of time in Andrews County.

Of course the owner of lands situated on a county line which has been

"accurately and legally surveyed, determined or fixed"

has no right to render all the land in one of the counties. It would be his duty to render the proper amount of land for taxation in each county. It would likewise be the duty of the tax assessor of each county to assess for taxation only the portion of land situated in his county, and an assessment so made and afterwards approved by the Commissioners' court, sitting as a board of equalization, would be valid and enforcible, and, of course, if this method should be pursued by the assessor and the commissioners' court of each county, there would be no double assessment and such a situation as that presented in your letter would not exist.

We therefore advise that if the line between Andrews and Midland counties has not been "accurately and legally surveyed, determined or fixed," this should be done, and, when done, the fixed line should be recognized by the assessors and commissioners' courts of the two counties. When this is done, no person owning land lying on the boundary line would have the right to resist the payment of taxes properly levied upon the correct amount of land lying in either county. (See Chisholm vs. Adams, 71 Tex., 678; 10 S. W., 336.)

Yours very truly,
JOHN C. WALL,
Assistant Attorney General.

Op. No. 2090, Bk. 53, P. 125.

MUNICIPAL CORPORATIONS—CITIES AND TOWNS—PUBLIC UTILITIES—TAXATION.

A city or town, organized under Title 22, Revised Civil Statutes, can pay the balance due on the purchase of a water system in annual payments out of the revenues raised by general taxation.

A city or town, organized under Title 22, Revised Civil Statutes, can purchase a water system and give a mortgage to secure the deferred payments therefor, out of the revenues derived from the operation of the water system.

It will be necessary for the city council to pass an ordinance to authorize the execution either of warrants or notes to provide for deferred payments on the purchase of a water works system.

Revised Civil Statutes, Articles 769 to 772-f inclusive, Constitution, Article 11, Section 5.

AUSTIN, TEXAS, June 9, 1919.

Hon. F. P. Bowman, City Attorney, Goldthwaite, Texas.

DEAR SIR: We have yours of the 3rd instant, addresed to this office, in which you make the following inquiries:

"The city of Goldthwaite desires to purchase a pumping plant from the railroad. The amount is $11,000.00; the city has, of water works funds, some $8,000.00 that can be used for the purpose of buying the plant.

"Query: Can the city finish the balance of the payment out of the general funds of the city? Can the city pay the balance of this amount out of general funds in yearly payments of from $250.00 to $500.00?

"Article 769, R. S., gives cities the right to own waterworks and light system.

"Article 770 permits cities to purchase, construct and operate waterworks, sewers and gas and electric light systems.

"Article 772f permits of encumbrance of light and water systems.

"Article 878 authorizes cities to provide, by ordinance, special funds for special purposes.

"Query: Would the last article cited require a special ordinance before the city could make payments on the said plant?

"Query: Could the city buy the plant and give vendor's lien notes for the balance of the amount due?"

Articles 769 and 770, Revised Statutes, to which you refer, give cities and towns a right to purchase or construct water works system and to own and operate same. It is a fundamental principle of construction that when the Legislature vests a city with the right and power to do a given thing that there goes therewith the right to expend the revenues of the city to accomplish such purposes.

Inasmuch, therefore, as the articles above referred to give cities the right to purchase water work plants and incidentals thereto, the right to pay for same out of the revenues of the city, it is clearly within the province of the city of Goldthwaite to pay the balance of the purchase money for a waterworks plant out of the general funds of the city.

This can be done either in cash, if there are sufficient funds available, or by deferred annual payments, as, in the judgment of the city government, is best.

However, in case the city should determine to pay the balance of the purchase money in annual deferred payments, then, it would be necessary to pass an ordinance authorizing the issuance of the city's warrants for the amount of the deferred payments, and such ordinance should include a provision levying a tax which accrues at each successive year until said warrants are taken up sufficient to create a fund of at least two per cent of the principal of said warrants and the annual interest due thereon. If such provision, providing for this tax levied, is not included in the ordinance, and the tax is not levied at the time of the passage of the ordinance, then the warrants themselves would be void and same could not be collected. I therefore answer your first inquiry in the affirmative as hereinabove set out.

Article 772a to Article 772f, inclusive, provide for the encumbrance of water systems by cities in order to secure purchase money and to create a fund for the payment of the purchase money therefor. And Article 772c provides especially that every contract, bond

or note secured under this act shall contain this clause: "The holder hereof shall never have the right to demand payment of this obligation out of any funds raised, or to be raised, by taxation," and the Article further provides:

> "* * * no such obligation shall ever be a debt of such city or town but solely a charge on the property so incumbered, and shall never be reckoned in determining the power of such city or town to issue bonds for any purpose authorized by law."

The purpose of this series of articles is to provide that cities may purchase water works and pay for same out of the earnings of the system. In this manner of purchase no deferred payments could be paid out of the general fund or any other fund of the city raised by taxation, nor could the holder of the notes for deferred payments compel the city by mandamus, or otherwise, to levy a tax for the purpose of paying said notes, but said holder would be dependent upon the revenues of the system and under the provisions of these articles would have a lien thereon for the payment of his notes and the city would be compelled, by proper action, to appropriate such revenues to the payment of said notes as same become due.

In order to take advantage of the provisions of these articles it would be necessary for the city government to pass an ordinance authorizing the execution of the notes for the deferred payments, and also authorizing the execution of the mortgage on the plant and revenues of the system to secure the payment of such notes, in which case both said notes and mortgage should contain the clause quoted above, out of Article 772c.

If the city should determine to use this last method of payment, then it would not be proper for the ordinance authorizing same to provide for the levy of any tax whatsoever, because such levy would be in violation of Article 772c above quoted.

In each case, however, eight thousand dollars on hand in the water works fund can be used as the initial payment, and the subsequent payments can be provided for in either of the two cases above set out, and in either instance an ordinance is necessary to provide authority for the city officials to execute the respective instruments required.

Yours very truly,
JOHN MAXWELL,
Assistant Attorney General.

Op. No. 2094, Bk. 53, P. 139.

CITIES AND TOWNS—TAXATION—STREETS AND HIGHWAYS.

A city of five thousand or less has the right to levy a tax of fifteen cents by ordinance without holding an election therefor in addition to the twenty-five cents already assessed for general city purposes for the additional purpose of procuring land for public streets.

Vernon's Sayles' Civil Statutes Articles 923, 924 and 925; Article 11, Section 4, Texas Constitution; Article 8, Section 9, Texas Constitution.

AUSTIN, TEXAS, June 11, 1919.

Mr. Tom. Holmes, Publisher The Trenton Tribune, Trenton, Texas.

DEAR SIR: I have your letter of the 6th, addressed to this office, in which you make the following inquiry:

"Mr. P. M. Inzer, Mayor of Trenton, requests me to write you and ask if the town of Trenton can collect more than 25c city tax under its present charter. The town was incorporated about 25 years ago and the tax rate has been 25c on the $100 property valuation since that time. We have never voted bonds of any kind for any improvement in town, but the town has recently bought some property in order to widen a street and the mayor would like to know if the tax rate could be raised to say about 40c without holding an election."

In answer thereto, I refer you to Section 4, Article 11, of the Constitution of this State, relative to the taxing powers of cities and towns of less than five thousand inhabitants, which says in part:

"Such tax shall never exceed for any one year one-fourth of one per cent."

This provision of the Constitution has arisen frequently in this State for construction and in the case of Citizens Bank vs. City of Terrell, 14 S. W., 1003, the question came up before the Supreme Court. This provision of the Constitution at that time applied to cities and towns of ten thousand or less, but otherwise had the same provisions as the article above referred to now has with reference to cities of five thousand or less. In this case the court held that the limit of the taxing powers of a city in the class mentioned in the Constitution was fixed at twenty-five cents on each one hundred dollars valuation based upon the last assessment of property for taxes in the city. In Goul vs. City of Paris, 4 S. W., 650, this same question came before the Supreme Court of this State and in this case Chief Justice Willis, speaking for the court, said:

"The Constitution says that these smaller cities may levy twenty-five cents on the one hundred dollars for current expenses, but when they have done so they have reached the limit beyond which they are prohibited to go and they shall levy no other tax except for the other purposes mentioned in the Constitution."

This same rule is followed in the case of Lufkin vs. City of Galveston, 63 Tex., 457, and Water and Gas Co. vs. City of Cleburne, 21 S. W., 393. There can be no question, therefore, that a city cannot levy a greater tax than twenty-five cents on the one hundred dollars for current expenses or for the use of the city for general purposes. However, Section 9, Article 8, of the Constitution, provides, in addition to the twenty-five cents above referred to for city purposes, that a city may levy a tax not exceeding fifteen cents for roads and bridges and for the erection of public buildings, streets, sewers, water works and other permanent improvements not to exceed twenty-five cents on the one hundred dollars valuation, thus fixing the taxing powers of cities and towns of five thousand or

less at twenty-five cents for roads and bridges and twenty-five cents for public buildings, streets, sewers, water works. Article 924, Vernon's Sayles' Civil Statutes, in part reads as follows:

"The city or town council or board of aldermen of any incorporated city or town within the limits of this State shall have the power, by ordinance, to levy and collect an annual ad valorem tax of not exceeding twenty-five cents on the one hundred dollars valuation of taxable property within such city or town for the erection, construction or purchase of public buildings, streets, sewers and other permanent improvements within the limits of such city or town * * *"

This Article is in addition to Article 923, which grants to such cities the right by ordinance to levy a tax of one-fourth of one per cent for general city purposes. Article 924, supra, was passed by the Legislature, put into force and effect and the provisions of the Constitution authorizing this extra tax. It is clearly within the purview of this statute and the Constitution authorizing its passage to levy a tax in addition to the twenty-five cents for general city purposes in order to purchase land for street purposes, whether the same be to lay out a street originally, or to widen a street already laid out, or for the improvement and maintenance of streets, and this tax can be levied by ordinance.

I, therefore, advise you that your city has the right, under the authorities above quoted, to levy a tax of fifteen cents by ordinance, without holding an election therefor, in addition to the twenty-five cents already assessed for general city purposes, for the additional purpose of procuring land for public streets.

Yours very truly,
JOHN MAXWELL,
Assistant Attorney General.

Op. No. 2194, Bk. 53, P. ——.

OCCUPATION TAXES—VAGRANCY—PHRENOLOGISTS.

A person practicing Phrenology in this State is not subject to an occupation tax.

Neither can such a person be punished for vagrancy under Article 634, Subdivision P of the Penal Code.

Revised Civil Statutes, Article 7355, Section 6;
Penal Code, Article 634, Subdivision "P."

March 17, 1920.

Hon. M. L. Wiginton, Comptroller, Austin, Texas.

DEAR SIR: I have yours of the eighth instant, addressed to the Attorney General, requesting an opinion from this Department as to whether a person following the practice of phrenology in this State is subject to an occupation tax under our State laws. Also, whether such a person could be punished as a vagrant under Subdivision "P" of Article 634 of the Penal Code of Texas.

The term "phrenology" does not appear to have been judicially defined, but it is defined in Webster's Dictionary as follows:

"1. The science of the special functions of the several parts of the brain, or of the supposed connection between the various faculties of the mind and particular organs in the brain.

"2. In popular usage, the physiological hypothesis of Gall, that the mental faculties, and traits of character, are shown on the surface of the head or skull; craniology."

I am informed by your department that the section of the Occupation Tax Statute about which there is doubt is Section 6 of Article 7355, Revised Civil Statutes, reading as follows:

"From every itinerant physician, surgeon, oculist or medical or other specialist of any kind, traveling from place to place in the practice of his profession, except dentists practicing from place to place in the county of their residence, an annual tax of fifty dollars."

It might be contended by some that the word "specialist" would include a phrenologist. We think, however, that the familiar rule of ejusdem generis is applicable. This rule is stated in Sutherland on Statutory Construction, Second Edition, Section 422, as follows:

"Where there are general words following particular and specific words, the former must be confined to things of the same kind."

All the specialists mentioned in the section of the Occupation Tax Law, above quoted, are specialists in the treatment of diseases and disorders of the human body. There are, of course, many other kinds of specialists that treat such diseases and disorders, and it is our opinion that the expression "or other specialist of any kind" has reference to any specialist of the same kind as the ones theretofore mentioned, and that a phrenologist is not a specialist within the meaning of this law. It is not our understanding that a phrenologist treats or offers to treat any disease or disorder, but that he simply examines the cranium, or skull, and ascertains what traits of character the structure of the skull indicates, and gives this information to the person examined.

We do not find any other provision in the statutes levying an occupation tax on persons practicing phrenology.

Answering your inquiry as to whether a phrenologist is a vagrant within the meaning of Subdivision "P" of Article 634 of the Penal Code, we beg to express it, as our opinion, that he is not. This subdivision of the vagrancy law is as follows:

"All persons who advertise and maintain themselves in whole or in part as clairvoyants or foretellers of future events, or as having supernatural knowledge with respect to present or future conditions, transactions, happenings or events."

Under the definition of phrenology, as above shown, a phrenologist is not a clairvoyant. A clairvoyant is one versed in clairvoyance, and the word clairvoyance is defined in Webster's Dictionary as:

"A power, attributed to some persons while in a mesmeric state, of discerning objects not perceptible by the senses in their normal condition."

If a person confines himself to the practice of phrenology, as hereinbefore defined, he, of course, is not a foreteller of future events and is not a person claiming to have supernatural knowledge with reference to conditions, transactions, happenings or events.

Hence, we are of the opinion that a person practicing phrenology is not subject to the payment of an occupation tax in this State and cannot be punished as a vagrant under Subdivision "P" of Article 634 of the Penal Code of this State.

Yours very truly,
L. C. SUTTON,
Assistant Attorney General.

Op. No. 2195, Bk. 53, P. ——

STATUTES NOT BROUGHT FORWARD IN REVISED STATUTES—OCCUPATION TAXES—DOLL RACKS—ETC.

The failure to bring forward a prior statute of a civil nature and incorporate it into the Revised Civil Statutes has the effect of repealing such prior statute, except where there is a provision to the contrary in the act adopting the Revised Civil Statutes.

The Legislature failed to include in the Revised Civil Statutes of 1911 that clause of Chapter 18, Acts of the Special Session of the Twenty-fifth Legislature, providing for an occupation tax on the keeping of a knife, cane or doll rack, or any other device upon which rings are pitched, or at which balls are thrown, and, hence, no occupation tax can be collected for the operation of such devices.

The Court of Criminal Appeals of this State holds that the Code, or Revision, does not govern, and that the original enactment may be examined to ascertain what the law is; whereas, the civil courts of the State hold that the Code,, or Revision, governs, and that prior statutes omitted therefrom are of no effect. In the collection of occupation taxes the decisions of the civil courts would govern, and, therefore, no occupation tax is collectible from persons operating said devices.

March 18, 1920.

Hon. M. L. Wiginton, Comptroller, Capitol.

DEAR SIR: The Attorney General is in receipt of yours of the thirteenth instant, calling attention to the fact that Subdivision 16 of Chapter 18 of the Acts of the Special Session of the Twenty-fifth Legislature was not brought forward and made a part of the Revised Statutes of 1911. This provision of the Act of the Twenty-fifth Legislature was as follows:

"From every person or firm keeping a knife, cane or doll rack, or any other device upon which rings are pitched, or at which balls are thrown, an annual tax of twenty-five dollars."

The Legislature has not repealed this provision unless it has done so in the Act adopting the Revised Civil Statutes of 1911.

You desire to be advised whether such Act of 1911 does repeal

this clause of the Occupation Tax Statutes of the Twenty-fifth Legislature. and whether an occupation tax should be collected from persons operating such devices.

The Act adopting the Revised Civil Statutes of 1911 contained the following provision:

"Repealing clause—That all Civil Statutes of a general nature, in force when the Revised Statutes take effect, and which are not included herein, or which are not hereby expressly continued in force, are hereby repealed."

We have two lines of decisions upon this question in this State; the Court of Criminal Appeals, holding that the Code, or Revision, does not necessarily govern and that the original act of the Legislature may be looked to in order to determine what the law is, and the Civil Courts of the State, holding that the Code, or Revision, governs and that a prior statute omitted therefrom is repealed unless there is some provision in the Act adopting the Revised Statutes to the contrary.

This department has had occasion to investigate this question heretofore, and in an opinion of date February 24, 1919, written by Hon. E. F. Smith, Assistant Attorney General, and addressed to Hon. W. E. Adams, County Attorney, Woodville, Texas, the authorities pro and con are collated, and we quote from said opinion as follows:

"The courts in the following cases have held that the Code governs:
"Rathbone vs. Hamilton, 175 U. S., 414;
"Crabtree vs. Whitselle, 65 Texas, 111;
"Central of Georgia Ry. vs. State of Georgia, 42 L. R. A., 518;
"State vs Burgess, 101 Texas, 524;
"Hale County vs. Lubbock County, 195 S. W.,678.
"The Court of Criminal Appeals of Texas, in the following cases, held that the Code did not govern and that the intention of the Legislature might be ascertained by an examination of the original enactment.
"Ex Parte Cox, 109 S. W., 369;
"Brown vs. State, 49 S. W., 620;
"Phipps vs. State, 36 S. W., 753;
"Ex parte Muckenfuss. 52 Texas C. A. 467;
"Runnels vs. State, 45 Tex., C. R., 446;
"In questions involving the fees of office in criminal cases the decisions of the Court of Criminal Appeals will govern."

An additional authority might be added to those above shown holding that the Code, or Revision, governs; that is, American National Insurance Company vs. Collins, 149 S. W., 554.

In the collection of occupation taxes the decisions of our Civil Courts, of course, govern, and, therefore, we follow the decisions of the Civil Courts, above cited, in answering your inquiry.

You are therefore respectfully advised that, in the opinion of this department, the failure to bring forward Subdivision 16, of Chapter 18, of the Acts of the Special Session of the Twenty-fifth Legislature, relative to occupation taxes on doll racks, etc., had the effect of repealing such subdivision and no occupation taxes should be col-

lected from persons operating the devices enumerated in said subdivision.

Yours very truly,
L. C. SUTTON,
Assistant Attorney General.

STATUTES CONSTRUED.

Chapter 135, General Laws of Regular Session of thirty-fourth Legislature.

CARNIVAL COMPANIES.

Op. No. 2070, Bk. 53, P. 19.

1. By the terms of said act, the Legislature intended that all carnival companies should pay a tax of ten ($10.00) dollars for every performance to which admission fees were charged, unless same was given under auspices, direction or control of "a Chamber of Commerce of a city or other similar organization."
2. Chamber of Commerce and charitable institution defined.
3. Charitable institutions and military organizations are not organizations similar to a Chamber of Commerce.
4. Carnival companies that have given exhibitions under the auspices and control of charitable institutions and military organizations are liable to the State for a tax of ten ($10.00) dollars for each and every exhibition so given.

AUSTIN, TEXAS, May 23, 1919.

Hon. H. B. Terrell, Comptroller of Public Accounts, Capitol.

DEAR SIR: We have a letter from you which is as follows:

"I have been advised by the State Revenue Agents of this Department that there are certain carnival companies operating throughout the State and showing under the auspices of various charitable institutions and military organizations.

"I will ask that you advise me if the act, passed by the Regular Session of the Thirty-fourth Legislature, Chapter 135, levying an occupation tax upon a Chamber of Commerce or like organization, would cover charitable or military organizations. If such is not the case, then it seems that it would be clearly the duty of any carnival company to pay the occupation tax of one hundred dollars to the State and fifty dollars to the county; and, if not that tax, such tax as covered by the law upon such attraction of the carnival of a city or town to which they may go."

In answer to your inquiry calls for a construction of the last proviso contained in Section 1, of Chapter 135, of the General Laws of the Regular Session of the Thirty-fourth Legislature. Section 1 of said act is as follows:

"That Subdivision 24, of Article 5049, Chapter 1, Title 104, of the Revised Civil Statutes of 1895 of the State of Texas, known as Section 15, of Article 7355, Chapter 1, Title 126, of the Revised Civil Statutes of 1911, of the State of Texas, be amended so as to hereafter read as follows:

"Section 15. From every menagerie, wax works, side shows or exhibition, whether connected with a circus or not, where a separate fee for admission is demanded or received, ten dollars for every performance

or exhibition, in which fees for admission are received; provided, that from any museum, menagerie or zoological exhibition, or a combination thereof, operated and maintained in any city or town and open for admission all day continuously, in which a charge for admission is demanded or received, an annual tax of fifty dollars. Provided, that where any carnival, or carnivals, shows, amusements or entertainments are held under the auspices, direction or control of any chamber of commerce of any city or other similar organization, for not longer during any one year of a period or periods aggregating thirty days, it shall not be necessary for such carnivals, shows or entertainments to pay any tax to the State, city or county during the operation of said show by said chamber of commerce or other similar organization, but there shall be assessed against said chamber of commerce a State tax of one hundred dollars."

Section 2 of said act is as follows:

"All laws and parts of laws in conflict herewith to be and the same are hereby repealed."

An examination of Section 15 of Article 7355 of the Revised Statutes of 1911 will show that the amendment of said section, made by Chapter 135 of the General Laws of the Regular Session of the Thirty-fourth Legislature, consists merely of adding to said section the two provisos which appear in Section 1 of the Act of the Thirty-fourth Legislature, as quoted above.

The emergency clause, which is Section 3 of the Act, further indicates the purpose of the amendment by the use of the following language:

"Whereas, there is now no law permitting the maintenance of menageries, museums or zoological exhibitions or carnival shows or combinations thereof, in cities or towns, without the payment of an excessive tax, and thereby such exhibitions are practically prohibited, creates an emergency, etc."

From this Act it plainly appears that it is the intention of the Legislature that carnival companies shall pay a tax of "Ten Dollars for every performance or exhibition in which fees for admission are received" unless such performances or exhibitions are "held under the auspices, direction or control of any Chamber of Commerce of any city or other similar organization for not longer during any one year of a period or periods aggregating thirty days," in which event it shall not be necessary for such companies "to pay any tax to the State, city or county * * * but there shall be assessed against said Chamber of Commerce a State tax of One Hundred Dollars."

There is no provision in the Act to the effect that carnival companies shall not pay any tax to the State, city or county when their shows or exhibitions are given under the auspices, direction or control of a charitable institution or a military organization, and if a carnival company has given exhibitions under the auspices, direction and control of organizations of this kind, it is liable for a tax of "Ten Dollars for every performance or exhibition, in which fees for admission" have been received, unless "charitable institutions and military organizations" come within the meaning of "Chamber of Commerce of any city or other similar organization" as these last words are used in the Act under construction.

The character of organization or institution recognized by our statutes as a Chamber of Commerce is as follows:

"Article 1121. The purposes for which private corporation may be formed are:

"Section 56. For the organization of cotton exchanges, chambers of commerce and boards of trade, with power to provide for more than suitable rooms for the conduct of their business, and to establish and maintain uniformity in the commercial usages of cities and towns, to require, preserve and designate valuable business information, and to adopt rules, regulations and standards of classification, which shall govern all transactions connected with the cotton trade and all other commodities where standards for classification are required, and generally to promote the interest of trade and increase of facilities of commercial transactions." tions."

This is the only character of Chamber of Commerce specifically recognized by our statutes. Chamber of Commerce is defined in Volume 11 of Corpus Juris as follows:

"An association which may or may not be incorporated, comprising the principal merchants, manufacturers and traders of a city, designated for convenience in buying, selling and exchanging goods and to foster the commercial and industrial interests of the place; a society of the principal merchants and traders of a city who meet to promote the general trade and commerce of the place."

Citing Black's L. D. and Bouvier's L. D.:

"Some of these are incorporated, as in Philadelphia. Similar societies exist in all the large commercial cities and are known by various names, as Board of Trade, etc." (Bouvier's L. D.)

We do not find anywhere that they are classed as charitable institutions or military organizations, and, indeed, they do not partake of the nature of, or have any features similar to charitable institutions or military organizations, as these last named terms are commonly used and understood.

From Volume 4 of the second series of "Words and Phrases" we quote the following definitions of the word "similar":

"The primary meaning of the word 'similar,' as given by Webster, is exactly alike. Krakowski vs. U. S., 161; Fed. 88; C. C. A. 252.

" 'Similar' means:

"(1) Exactly corresponding, resembling in all respects, precisely alike.

"(2) Nearly corresponding, resembling in many respects, somewhat alike, having a familiar likeness.

"(3) Homogeneous, uniform."

Frankel vs. German Tyrolean Alps Company, 97 S. W., 961; 121 Mo. App. 51.

Charitable associations or institutions are such as are constituted for the perpetual distribution of the free alms of their founders and contributors. The principal and distinctive features are that they have no capital stock and no provisions for making dividends or profits, but devolve their funds mainly from private and public charity and hold them in trust for the object of the institutions. The test of whether an enterprise is charitable is whether it exists

to carry out a purpose recognied in law as charitable, or whether it is maintained for gain, profit or private advantage.

In the case of Utica Trust, etc., Company vs. Thompson, 149 N. Y. Supp. 392, a charitable institution is denied to be one for the relief of a certain class of persons, either by alms, education or care.

We are unable to find in the law books any definition of the term "military organization," and your letter gives no information as to the nature and character of such organizations. Giving the words their ordinary signification, we take it that you refer to local organizations of returned and discharged soldiers or of persons enlisted in the State National Guard, somewhat similar in organization and purpose to local camps of Confederate Veterans, and created for the purpose of correctly preserving the history of their service, encouraging patriotism, etc. Such organizations in no sense partake of the nature of "a Chamber of Commerce of a city," as that term is defined in our statutes and by standard legal authorities.

Of course, the nature of an institution or organization, if incorporated, as well as its purposes and objects, must be determined from its charter or articles of association and not by extrinsic evidence. Citzhoffen vs. Sisters of the Holy Cross, etc., 32 Utah, 46; 8 L. R. A. (N. S.) 1161. If the institution or organization is unincorporated, its nature, purposes and objects would be questions of fact to be determined in each given case.

The Legislature has plainly shown by the language used in the act under construction that it was never intended that a carnival company should give exhibitions in the State unless a tax was paid, either by a Chamber of Commerce of a city or a similar organization or by the company itself. Under the provisions of the act, such tax must be paid by the carnival company, unless its exhibitions have been held under the auspices, direction or control of a Chamber of Commerce of a city, or other similar organizations.

We have no doubt that the object of the Legislature, in using the term "Chamber of Commerce of a City," was to fix the liability for the tax, when it was not to be paid by the company itself, upon a responsible corporation or association of this character, from whom a tax could be collected by suit or otherwise. It was not contended that carnival companies should be relieved of the tax, and that the State should rely upon collecting it from any and every character of association that might be formed for any and every kind of purpose.

You are, therefore, advised that each and every time a carnival company has given an exhibition in Texas, a tax has accrued to the State. Charitable institutions or military organizations not being organizations similar to "a Chamber of Commerce of a city," a tax of Ten Dollars for each exhibition, given by a carnival company under the auspices, direction or control of such an organization, should be collected from the carnival company. Any carnival company, which has heretofore given exhibitions under the auspices, direction or control of such organizations, owes a tax of Ten Dollars to the State "for every

performance or exhibition in which fees for admission" were received, and is now liable for such tax.

Yours very truly,
JOHN C. WALL,
Assistant Attorney General.

Op. No. 2221, Bk. 53, P. ——.

TAXATION—INHERITANCE TAXES—PENALTIES—COUNTY ATTORNEY'S FEES.

R. S., Articles 7502, 7491, 7497, 7490, 7493, Acts of the Thirty-sixth Legislature, Chapter 164.

1. The provisions of Chapter 164, Acts of the Thirty-sixth Legislature, for penalties and attorneys' fees apply to estates subject to inheritance taxes at the time said chapter became the law, as well as to estates which became taxable thereafter.

2. Tax county attorney can only receive the compensation for making the investigation and report required by Chapter 164, Acts of the Thirty-sixth Legislature, in cases where he actually makes the investigation and report.

AUSTIN, TEXAS, May 6, 1920.

Hon. J. C. Bracewell, Assistant Criminal District Attorney, Houston, Texas.

DEAR SIR: Your letter of the 26th ult., addressed to the Attorney General, has been received. It reads as follows:

"Will you please give us the construction of your department on the following questions from Chapter 164 of the General Laws of the Thirty-sixth Legislature, Regular Session, relating to fees in inheritance tax collection?

"1. The Act provides that 'in case the tax is not paid within the time herein prescribed a penalty of 2 per cent a month for the first ten months and two per cent a month thereafter until such tax is paid shall be added to such tax and collected as a fixed penalty for the failure to promptly pay such tax.' Does this apply to estates where the tax was due before the Act became effective, and, if so, from what date should the penalty be charged where no inventory has ever been filed?

"2. The Act provides that 'district attorneys of this State are authorized at any time after the expiration of the time above mentioned to institute suit in behalf of the State in any court of competent jurisdiction for the recovery of such tax and penalties owing thereon under this chapter and he shall receive, as compensation therefor, 10% on the amount of taxes payable hereinunder not to exceed, in any case, the sum of $200.00, which fee shall be added, and collected from said estate, in addition to the taxes and penalties herein provided for.' Is this extra fee chargeable to an estate on which the tax was due prior to the time the act became effective?

"3. Article 7491 of the same act, as amended, relating to the service of county attorneys for making investigations and reports provides 'For his services in making investigation and making report herein required, the county attorney shall receive a compensation of eight per cent of the taxes payable under this chapter, not to exceed in any one estate the sum of $60.00.' Is the county attorney, or district attorney, allowed this fee on all estates, or only on such estates as he investigates and reports?"

The law in this State dealing with the inheritance tax is to be found in Chapter 10, Title 126, of the Revised Civil Statutes, which

embraces Articles 7487 to 7502, inclusive. Articles 7491 and 7497 were amended by Chapter 164 of the General Laws of the Regular Session of the Thirty-sixth Legislature.

By the Amendment to Article 7490, it is provided that failure to pay the tax within the time prescribed by law subjects the tax to a penalty of 2 per cent a month until such tax is paid and authorized County and District Attorneys of this State to file suit in behalf of the State, at any time after the expiration of the time provided in which to pay said taxes, to recover the tax and the penalties owing thereon and in addition thereto 10 per cent on the amount of the taxes payable not to exceed in any one case $200.00 as attorneys' fees. Prior to the adoption of this amendment the statute did not provide for any penalties or attorney's fees to be collected; although interest was and is provided for in R. S. Article 7493, which is still effective.

The question then arises as to whether the penalties and attorney's fees provided for under the amendment are collectible where the taxes were due and payable prior to the date these amendments became effective.

Chapter 164 referred to amended an existing statute which applied alike to all estates and contains nothing which evidences an intent on the part of the Legislature to make it applicable only to taxes to become due after the enactment of the amendment. We conclude, therefore, that Chapter 164 was intended by the Legislature to apply to estates subject to the tax at the time of its enactment. In other words, if the Legislature had authority to make the provisions for penalties and attorney's fees applicable to estates then in course of administration, our opinion is that it has done so. It appears to be fundamental that the Legislature has power to declare that an inheritance tax shall accrue at any time while the law retains control of decedent's property and also may retroactively be applied to estates still in process of disposition, though the owner died prior to the statute, on the theory that the tax is on the right to receive and may be imposed on the legatee at any time before he actually receives the property.

Gleason and Otis on Inheritance Taxation, page 32;
Kachen vs. Brewster, 203 U. S., 543;
Ferry vs. Campbell, 81 N. W., 604;
Gelsthorpe vs. Furnell, 51 Pac., 267.

If the Legislature has the right to enact a law levying the tax after the death of the decedent, then it would follow that it has also the constitutional authority to attach penalties and attorney's fees for a failure to pay the tax previously enacted by statute. We have examined the authorities cited and they appear to be conclusive of the question. Since these authorities are available to you, we deem it unnecessary to quote the same.

Having concluded that Chapter 164 providing for penalties and attorney's fees is applicable to estates which have not been distributed and upon which the tax was due when this chapter was enacted, we will next inquire as to when these provisions for pen-

alties and attorney's fees accrue as to estates in course of administration when the law was passed. Chapter 164 provides that every executor, administrator or trustee of the estate of a decedent, leaving property subject to taxation under this Act, or other person coming into possession of any portion of such estate, shall have three months after coming into possession of such property to make report thereof in duplicate. We conclude that such person would have three months in which to make report as to an estate then subject to taxation after this chapter became effective. The Act became effective ninety days after the adjournment of the Legislature, and the report referred to should be made three months after the expiration of this ninety days. Such person is also required to file with the Comptroller and with the County Clerk, as is provided for in said chapter, a complete inventory within one year after coming into possession of property. As to estates upon which the tax was due when this law was enacted, such person would have one year from the time Chapter 164 went into effect. If the tax is not paid on such character of estate within one year after Chapter 164 became a law, then the penalties provided for in said Chapter 164 become applicable and County and District Attorneys, after the expiration of such time, would be authorized to institute suit and would be entitled to receive attorney's fee as is provided for in said Chapter 164.

You are advised, therefore, that the penalty provisions and provisions for attorney's fees contained in Chapter 164 apply to and are effective against estates subject to the tax at the time said chapter became the law, as well as to estates which became taxable after the law was enacted.

In reply to your third question in which you desire to know if the County Attorney is entitled to receive a compensation of 8 per cent of the taxes payable under this chapter, not to exceed in any one estate the sum of $60.00, whether the County or District Attorney makes an investigation and report or not. Article 7491, as amended by Chapter 164 of the Regular Session of the Thirty-sixth Legislature, reads as follows:

"Article 7491. It shall be the duty of the county attorney of each county of this State to carefully investigate and keep informed concerning estates subject to the payment of taxes under this chapter and if the notice required by the preceding article is not given within three months from the death of any person leaving an estate subject to the payment of taxes under this chapter such county attorney shall report the condition of said estate to the county judge of the county in which said decedent resided at the time of his death or where the principal part of his estate was located, and if such report is not made as required in the preceding article within six months from the death of such person it shall be the duty of the county judge to appoint an administrator of said estate. *For his services in making the investigation and making the report herein required, the county attorney shall receive a commission of eight per cent* of the taxes payable under this chapter, not to exceed, in any one estate, the sum of $60.00, and the county shall receive a commission of two per cent of the taxes collected under this chapter, not to exceed in any one estate the sum of $15.00, which fees shall be cumulative of all other fees and compensation provided by law. Such compensation shall be paid by the collector of taxes on the certificate of the county judge out of the taxes

paid to him on the property belonging to such estate. In case a report is filed by more than one county attorney, then the fee herein provided shall be allowed only to the county attorney who first filed said report."

It will be observed from the reading of this article that it makes it the duty of the County Attorney of each county of this State to carefully investigate and keep informed concerning estates subject to the payment of taxes under this chapter, and if the notice required to be filed under the provisions of Article 7490 has not been filed, such County Attorney shall report the condition of said estate to the County Judge of the county in which said decedent resided at the time of his death, and if such report is not made within six months from the death of such person, it shall be the duty of the County Judge to appoint an administrator of said estate. For his services in making the investigation and making the report herein required, the County Attorney shall receive a commission, etc. The provisions of this article are plain and unequivocal—the County Attorney is to be paid for services actually rendered. If he renders no services, he receives no pay.

It is the opinion of this department, and you are so advised, that in order for the County Attorney to receive the compensation provided for in Article 7491, he must not only make the investigation required therein, but must also make the report as required in said article, before he is entitled to compensation provided for therein.

Yours very truly,
C. M. CURETON,
Attorney General.

Op. No. 2232, Bk. 53, P. ——.

TAXATION—INTANGIBLE TAXES—STATE TAX BOARD—DUTIES OF.

1. The Intangible Tax Law puts upon the State Tax Board the duty of finding the value of intangibles, and of equalizing these intangible values with the values of tangible properties for purposes of taxation in the counties of the State; and it is the equalized value which the Board, under the law, must certify to the tax assessor.

2. In finding the true value, for purposes of certification and taxation, the Board should find such a value as will be, under the Constitution of the State, just, fair, equitable and lawful, and in order to do this intangibles must not be taxed at any higher proportion of their actual value than is tangible property in any particular county to which intangible values, for purposes of taxation, may be certified.

State Constitution, Article 8, Section 2 and Section 18.
Revised Statutes, Article 7420.

AUSTIN, TEXAS, June 12, 1920.

Hon. James A. King, Chairman State Tax Board, Capitol.

DEAR SIR: In response to the discussion of the fourteen suits recently filed by the railroads of the State against the Tax Board, I beg to advise you as follows:

Primarily and fundamentally, these suits are based upon an alleged discrimination in the taxation of the intangible values of the

railroads. They allege that this discrimination is brought about by the fact that the State Intangible Tax Board has fixed the valuations of their intangibles at face, or one hundred per cent value; while property in the various counties of the State is valued for taxation purposes at from thirty-five to sixty per cent of its actual value. So that a citizen, for example, of Travis County who has $10,000 worth of tangible property would pay taxes on, say, from $3,500 to $6,000; while a railroad company, having $10,000 worth of intangibles, in the same county, would be compelled to pay on the entire amount of $10,000.

This, it is claimed, is a discrimination prohibited by the Constitution.

Section 2 of Article 8 of the Constitution expressly declares:

"All taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations other than municipals, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law."

The system of discriminatory taxation, which we have above suggested, has been expressly declared by the courts of this State to be in violation of the Constitution; and that portion of intangible taxes, based upon values certified by the board in excess of the general values at which property is taxed, in any specific county, has been enjoined. Lively vs. M. K. & T. R. R. Co., 102 Tex. 543.

The same holding in principle is made by the United States courts. Green vs. Louisville & Interurban Railway Company and Louisville Railway Company, 244 U. S. 99.

In the last named case, the Supreme Court of the United States expressly declared that discrimination resulting from an assessment of intangible property of railroad corporations at seventy-five per cent of its actual value, while the property of individuals and other classes of corporations taxed at the same rate is generally and systematically assessed by other and independent taxing authorities of the State at not more than 60 per cent of actual value, to be in violation of the constitutional provision requiring uniform taxation in proportion to value. It follows from these cases, that the intangible values cannot be fixed for taxation at a grater proportion of their actual value than that which is generally and uniformly applied to tangible values in any particular county. In other words, if a county lists other property at sixty per cent of its actual taxation, then intangible values must be listed at sixty per cent of the valuations of the taxes.

Section 18 of Article 8 of the State Constitution declares:

"The Legislature shall provide for equalizing, as near as may be, the valuation of all property subject to or rendered for taxation."

It is true that this same section makes the County Commissioners' Court a Board of Equalization, but it does not appear to make them the exclusive agent of the State for the purpose of equalizing the taxes. The intangible assets law does not provide for the equalization of intangible taxes. See Chapter 4, Article 126, R. C. S.

However, the Constitution has commanded the Legislature to provide some method of equalizing all taxes, which of necessity includes taxes on intangible values.

We must look, therefore, to some other source for equalizing intangible values, if the constitutional mandate is to be obeyed. The question is one of some difficulty. It would appear, according to the letter of the statutes, that the Board must find and certify the actual values of intangibles for the purpose of taxation; and that they must be taxed at these values. But the courts have already held that they cannot be taxed at these values, where it produces a discrimination.

Of course, it is quite true that the general taxation system contemplates the rendition of all property at its full value. But this is not always done. In fact, we have understood, as a matter of current history, that it is not done. We have looked into the statutes regulating the action of your board, and find in Article 7420 language which we believe was intended to enable your board to equalize the intangible values so that the constitutional mandate providing for equal and uniform taxation shall be carried out. In other words, the true value which you are required to find is the true value for taxation. That is to say, the lawful value for taxation. taxation.

At the close of Article 7420, the statute provides as follows:

"In apportioning the value of the aforesaid properties, said Tax Board shall have the right, and it shall be its duty, to make use of, and consider, all evidence which may be put before it and all material facts at its command; and, if it shall believe that some method of calculation, other than that specifically presented in this chapter, is necessary in order to produce *just and lawful results*, said Board shall follow that method of calculating which it believes best calculated, under all circumstances, to bring about *a just, fair, equitable and lawful valuation and apportionment of such property.*"

A valuation of one hundred per cent of the value of intangibles certified to a county where the general value of property for taxation is only fifty per cent of its actual value would not, for purposes of taxation, "bring about *a just, fair, equitable and lawful valuation.*"

The Constitution, in express language, fixes what is just, fair and lawful: that is to say, a taxation which is equal and uniform. The courts in the cases cited have already held that such a discriminatory tax levy as we have heretofore referred to would not be equitable, because, in the case cited, they grant equitable relief against just such inequitable and discriminatory tax.

It would follow, therefore, that if you are to certify a valuation which is just, fair, equitable and lawful under the Constitution of this State, it must be a valuation which will cause the taxation of intangibles in no greater proportion of their value than that at which other property in any particular county is taxed.

In finding the true value for purposes of certification and taxation, we are of the opinion that you should find such a value as will be, under the Constitution of this State, just, fair, equitable and lawful; but that in order for it to be just, fair, equitable and lawful,

intangibles must not be taxed at any higher proportion of their actual value than is tangible property in any particular county to which you may certify.

In other words, our interpretation of the intangible tax law is that it not only puts upon you the duty of finding the value of intangibles, but it puts upon you, and you alone, the duty of equalizing these intangible values with the values of tangible properties in the counties of the State; and that it is the equalized value which you are required, under the law, to certify to the tax assessor. Any other construction of this law, in our judgment, renders it, under the opinions of the Supreme Court of this State, and of the United States, unconstitutional and void.

Yours very truly,
C. M. CURETON,
Attorney General.

Op. No. 2216, Bk 53, P. 271.

TAXATION OF PERSONAL PROPERTY.

Personal property permanently located within this State is subject to taxation in this State regardless of the domicile of the owner.

AUSTIN, TEXAS, April 28, 1920.

Hon. A. R. Anderson, County Attorney, Post, Texas.

DEAR SIR: Your letter of the 26th instant, addressed to Hon. M. L. Wiginton, Comptroller, has been referred to this department for advice and we are requested to direct such information to you. The contents of your letter have been noted with a great deal of care, and replying thereto, your attention is respectfully directed to Article 7503, Vernon's Sayles' Texas Civil Statutes, which provides:

"All property, real and personal, except such as is required to be listed after expressly exempted, is subject to taxation and the same shall be rendered and listed as herein prescribed."

There is no exemption made for such property as mentioned in your letter to Comptroller Wiginton. Article 7510, Vernon's Sayles' Texas Civil Statutes, relating to where property should be rendered, makes the following provision:

"All proprty, real and personal, except such as is required to be listed and assessed otherwise, shall be listed and assessed in the county where it is situated; and all personal property subject to taxation and temporarily removed from the State or county, shall be listed and assessed in the county of the residence of the owner thereof, or in the county where the principal office of such owner is situated."

Article 7566 provides as follows:

"If the assessor of taxes shall discover in his county any property, or

outside of his county but belonging to a resident of the county, and personal property which has not been assessed or rendered for taxation every year for two years past, he shall list and assess the same for each and every year thus omitted which it has belonged to said resident, in the manner prescribed for assessing other property; and such assessment shall be as valid and binding as though it had been rendered by the owner thereof."

Article 7505, Vernon's Sayles' Texas Civil Statutes, defines and names such property as is included in personal property and further makes this provision:

"All personal estate of moneyed corporations, whether the owners thereof reside in or outside of this State,"

shall be included for the purposes of taxation. The object of this Article was to amplify and increase the scope, if possible, of Article 7503 and not to confine taxation to the property of inhabitants of the State. Hall vs. Miller, 110 S. W., page 169.

Personal property which has its permanent situs within the State is subject to taxation therein, regardless of the domicile of the owner. But personal property of a non-resident owner temporarily within the State is not subject to taxation. Cormody vs. Clayton, 154 S. W., 1067.

You are therefore respectfully advised that all goods, chattels and effects, and all moneys, credits, bonds and other evidences of debt owned by parties mentioned in your letter to the Comptroller, provided that such personal property be permanently located within this State, is subject to taxation, as provided for under the statutes of this State and for all previous years as provided for in Article 7566, supra.

Yours very truly,
C. L. STONE,
Assistant Attorney General.

Op. No. 2205, Bk. 53, P ——.

DELINQUENT TAXES—MINERAL RIGHTS—DUTIES OF TAX ASSESSOR—COMMISSIONERS' COURTS—COUNTY ATTORNEY.

It is the tax assessor's duty to assess all property in his county.

It is the commissioners' court's duty to order list made of property omitted from tax rolls subsequent to 1884, and fix compensation therefor, and when such list is made same should be certified to Comptroller.

Neither the commissioners' court, nor Comptroller, can contract for collection of delinquent taxes and allow therefor any portion of such taxes collected as compensation.

The reservation of mineral rights in land by grantor is property subject to taxation.

It is the county attorney's duty in independent school districts located in such county to file suit for the collection of delinquent taxes governed by the same provisions as the city attorney in incorporated cities or towns relative to collection of delinquent taxes.

April 6, 1920.

Hon. A. S. McKee, County Attorney, Jasper, Texas.

DEAR SIR: The Attorney General has your letter of March 29, 1920, which reads as follows:

"In regard to the questions on which we requested your opinion on December 11th, 1919, involving the methods, etc., of collection of taxes on excess acreage contained in tracts of land, over that shown by the State Abstract of Land Titles, will state that they were substantially as follows:

"1st: When the tax assessor ascertains from the deed records, or other records of the county that a survey of land contains acreage in excess of that shown in the Abstract of Land Titles is it his duty to assess the same for taxes against the owner or owners thereof?

"2nd: If such assessment can be made by the assessor and the taxes collected under such assessment, how many years' back taxes can be assessed and collected?

"3rd: When it is brought to the notice of the commissioners' court that a survey is probably excessive, and the court orders the county surveyor to make a survey and certify the field notes to the tax assessor, and he does so, is that not sufficient to make the assessment of this excess acreage legal, or is it necessary for field notes to be certified also to the Land Commissioner, and the State abstract books corrected before any assessment could be made?

"4th: If you should hold that taxes assessed in the manner proposed above are collectible as in other cases, we will, in order to locate this excess acreage intelligently, have to employ some local man familiar with the land titles of the county, to work in conjunction with the county surveyor in discovering and locating this excess acreage, and furnishing such description thereof to the tax assessor as is necessary. Would a contract with such a person for a percentage of the increase in revenue derived therefrom be legal?

"5th: Could the State or Comptroller's Department join with the county in defraying the expenses of such work?

"6th: In case this cannot be done, how could we manage to pay for such work?

"There are several thousand acres of this land in the county representing a valuation of thousands of dollars which has heretofore and will continue to go unassessed for taxes unless we can arrive at some method of determining the amount thereof, and getting the assessment legally made.

"We would be glad, indeed, to have you outline the proper steps you consider necessary to be taken in handling the above matter.

"7th: The deed records disclose many transfers of real estate which transfers reserve to the grantors the mineral rights, rights of way privileges for tram roads, etc. Is not the reservation of reserved mineral rights in a tract of land taxable the same as a mineral lease?

"8th: Could we employ an abstracter to furnish such information as is necessary to the tax assessor in order that the assessment could be intelligently made?

"It is our desire to straighten the above matters out, not only for the increased revenue which would be derived therefrom, but also to equalize the valuations of the property. We also desire to give the tax assessor such aid and assistance in the matter as will enable him to make the proper assessments. Hence these inquiries.

"We will appreciate your earliest reply."

Your inquiries will be answered in the order in which they are
First: Article 7683, Vernon's Sayles' Civil Statutes, provides:
presented above.

"For the purpose of taxation, real property shall include all lands

within the State, and all buildings and fixtures thereon and appertaining thereto, except such as are expressly exempted by law."

Article 7563 provides:

"If the assessor of taxes discovers any real property in his county subject to taxation, which had not been listed to him, he shall list and assess such property in the manner following, to-wit:
"(1) The name of the owner; if unknown, say unknown.
"(2) Abstract number and number of certificate.
"(3) Number of the survey.
"(4) The name of the original grantee.
"(5) Number of acres.
"(6) The true and full value thereof, and give such other description of a lot or parcel of land as may be necessary to better describe and identify the same; and such assessment shall be as valid as if rendered by the owner thereof."

You are therefore advised that if the tax assessor of a given county has ascertained that the owner or owners of any lands located in such county, which has not heretofore for any year or years been listed to and assessed by such tax assessor, that it would become his duty to assess same as provided for in Article 7563, Vernon's Sayles' Texas Civil Statutes.

Second: It is provided by Article 7702, Vernon's Sayles' Texas Civil Statutes:

"Whenever the commissioners' court of any county in this State shall discover, through notice from the tax collector or otherwise, that any real property has been omitted from the tax rolls for any year or years since 1884 * * * they (commissioners court) may, at any meeting of the court, order a list of such properties to be made in duplicate and fix a compensation therefor. (See State vs. Adams, 126 S. W., 674.)"

You are therefore advised under the statutory provisions, as above set out, that such delinquent taxes may be collected for any year or years, dating back to and including the year of 1885.

Third: You will note from a careful reading of Article 7702, cited above, that such article defines the duties of the Commissioners' Court, when such lands have been brought to their notice, or attention directed to same, and you are therefore advised that it is necessary that the same be certified to the Comptroller.

Fourth and Fifth: You are advised that prior to the latter part of July, 1915, that Article 7707 provided that the Commissioners' Court, joined by the Comptroller of this State, was permitted to contract with parties for the collection of delinquent taxes and in making or allowing compensation they were permitted to allow as such compensation a per cent, which should not exceed ten per cent, except in the case of absolute necessity to employ an attorney to push the filing and prosecution of tax suits and to pay for the report of an abstracter if the owner of property assessed as unknown and unrendered, in which case fifteen per cent additional may be allowed. Article 7707 was repealed by the Thirty-fourth Legislature, Chapter 147, pages 250, 251 and 252. Since the repeal of this article there is now no statutory provision whereby the Commissioners' Court or the Comptroller of this State could contract with

any party for the collection of delinquent taxes and allow a per cent of such taxes collected as compensation for such services.

Sixth: This inquiry is answered in connection with No. 4 and 5, as you were advised above. That there was no statutory provision, authorizing the Commissioners' Court or the Comptroller of this State to contract for the collection of delinquent taxes, by the statute, makes it the duty of the county tax collector, county and district attorneys and other officers charged with such duties under Title 126, Chapter 15 of the Civil Statutes of 1911, and such duty is not merely directory but is mandatory and a penalty for failure to perform such duty is by fine not less than one hundred dollars, nor more than one thousand dollars, and in addition thereto shall be subject to removal from office, nor can such officers make settlement with the Commissioners' Court of his county or the Comptroller of this State until he shall have performed the duties required of him under said Title 126, Chapter 15, of the Civil Statutes of 1911.

Seventh: You are advised that the reservation of mineral rights in such lands by the grantor is property, and, therefore, subject to taxation. You are advised that the Commissioners' Court, not having any statutory powers except those conferred upon it by the Legislature of this State, would not have the power or authority to employ an abstracter to furnish such information to the tax assessor of such county.

Eighths You are advised that Article 2861, Vernon's Sayles' Texas Civil Statutes, provides that in the collection of delinquent taxes for independent school districts the county attorney of a county in which the independent school district is located shall perform the duties which in such cases devolved upon the city attorney of an incorporated city or town under the provisions of Chapter 103, General Laws of the Regular Session, Twenty-fifth Legislature.

Yours very truly,
C. L. STONE,
Assistant Attorney General.

Op. No. 2219, Bk. 53, P. ——.

FILING OF DELINQUENT TAX SUITS—NOTICES.

All of the statutory provisions must be strictly complied with in the filing of delinquent tax suits.

Notices to such delinquent taxpayer must be mailed each and every year, during the months of April or May or as soon thereafter as practical, in order to successfully prosecute a suit for the collection of delinquent taxes and the foreclosure of the constitutional lien.

April 30, 1920.

Hon. Robert J. Sullivan, County Attorney, Conroe, Texas.

DEAR SIR: The Attorney General has your letter of the 23rd instant, together with attached copy of your letter dated April 2, 1920, in which you propound this inquiry:

"Now that the publication has been had and that prerequisite of the law has been complied with, will the notices that were sent to the delinquent be sufficient upon which to base a tax suit, and a recovery be had thereon with interest which may have accrued since the notices were dated and mailed out? If you say that your opinion is that such notices now be necessary showing the amount due in delinquent taxes, with costs, penalties and interest up to the date of the new notice to form the proper basis for a suit?"

Replying to the above inquiry, your attention is called to the General Laws of the First and Second Called Sessions of the Thirty-sixth Legislature, Chapter 64, page 164, wherein the Act passed in the Regular Session of the Thirty-fourth Legislature, Chapter 146, General Laws, is amended so as to read as follows:

"During the months of April and May each year, or as soon thereafter as practical, the collector of taxes in each county of this State shall mail to the address of each record owner of lands or lots, situated in the county, a notice showing the amount of taxes delinquent or past due and unpaid against all such lands and lots as shown by the delinquent tax records of the county. * * * Such notices shall also contain a brief description of the lands and lots appearing delinquent and the various sums or amount due against such lands and lots for each year they appear delinquent."

In order to prosecute, to a successful determination, these suits authorized by the Acts here under discussion, certain duties are enjoined by the tax collector, and the statement of the performance of those duties and of certain facts is absolutely essential to be alleged and proved; then it would be necessary to allege that the tax collector had mailed out such notices each year in the months of April and May, or as soon thereafter as practical, to the address of each record owner of any lands or lots appearing to be delinquent; it would not only be necessary to make such allegations but the same would have to be established by proof. The provisions of the statute governing the filing of suits for the collection of delinquent taxes must be followed and strictly complied with, or any acts thereunder will be null and void.

State vs. Seidell, 194 S. W., 1118. Cooley on Taxation, page 484, lists the following rule:

"Any notice required as to assessment or as to any subsequent proceedings must be given, and the time and the mode prescribed, and it must appear that the statute has been pursued strictly and strict compliance with its provisions followed."

This was also held in the case of Payson vs. People, 175 Ill., 267; 51 N. E., 588.

You are therefore advised that in the months of April or May, or as soon thereafter as practical, it is mandatory that the tax collector mail out each year such notices as are required by law.

Yours very truly,

C. L. STONE,

Assistant Attorney General.

MISCELLANEOUS OPINIONS.

Op. No. 1979, Bk. 52, P. 27.

ATTORNEY GENERAL—OPINIONS.

The Attorney General will not render an opinion on an abstract question of law. His duties are confined to advice concerning matters actually involved in administering the duties of some office.

AUSTIN, TEXAS, February 12, 1919.

Hon. C. J. O'Connor, County Attorney, Breckenridge, Texas.

DEAR SIR: I have your letter of February 7th, addressed to the Attorney General, reading as follows:

"An election is soon to be held in this town to determine whether or not it shall be incorporated, and as there is a great "boom" in the entire county over the development of the oil interest, it will be necessary for me to gain an opinion from your department as to what the results of the incorporation might be as affecting drilling operations within the incorporate limits of the town, in order that I might intelligently advise the voters as to the possibilities.

"In your opinion, can the Mayor and Commissioners of an incorporated town or city absolutely prohibit the drilling of oil wells within such incorporated limits of the town? If so, would it be possible for a town to obtain a charter containing a clause permitting the drilling of oil wells and prohibiting the Mayor or Commissioners from passing such ordinances as would prohibit or restrict the drilling of any such wells? Also, would it be possible for the city officials to place such restrictions on the drilling of any such wells as would or might affect the drilling of them?

"This is a much mooted question at this time as there is an oil well about three miles south of the town and indications would seem to indicate that the field lay in the direction of the town; therefore, the people do not want to incorporate in case their rights to have the lots drilled on might be affected, either prohibited or restricted to so great an extent as to almost prohibit it."

The Attorney General would be very glad to comply with your request and furnish you with an opinion on the subject contained in your letter, if he could clearly see that it would be proper for him to do so in view of the law which prescribes the duties of this department.

The opinion called for in your letter is an abstract question of law, and in addition is for political use and is clearly beyond the duties and privileges of this office. I quote from the syllabus of an opinion of the Attorney General of the United States, wherein he declined to furnish the Secretary of War with an opinion on an abstract question of law.

"The Attorney General will not give a speculative opinion on an abstract question of law which does not arise in any case presented for the action of an executive department."

(11 Opinions of the Attorney General 189.)

I also respectfully call your attention to the fact that the questions contained in your letter are not such as require any official

action on your part; instead they are purely hypothetical questions, entirely theoretical in their character, and thus not within the duties and privileges of this department as prescribed by Chapter 5, Title 65, Vernon's Sayles' Civil Statutes, 1914.

Hon. Geo. W Wickersham, Attorney General of the United States, in an opinion addressed to the Secretary of Commerce and Labor, wherein he declined to pass upon a hypothetical question, said:

"It is also to be observed that the case to which your inquiry relates is not one pending in your department and requires no official action on your part. For that reason, if for no other, the Attorney General would be compelled, in deference to a well-established practice of this department to decline to pass upon the question referred to."
(29 Opinions of the Attorney General 101)

You are, therefore, respectfully advised that the Attorney General will not render an opinion on an abstract question of law. His duties are confined to advice concerning matters actually involved in administering the duties of some office.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

Op. No. 2247, Bk. 53, P. ——.

BOARD OF CONTROL—CONSTRUCTION OF STATUTES.

1. The Board of Control has not the power to audit all departments of State government, but only those specifically named in the Act creating such Board. (Chapter 167, General Laws, Regular Session, Thirty-sixth Legislature, 1919.)
2. The true intention of the Legislature in passing a particular Act may be determined by resorting to legislative records.
3. Where the title of an act contains a provision conferring a power, but the body of the act does not contain any provision relating thereto, such title provision will be treated as surplusage. (Lewis Sutherland Statutory Construction, Second Edition, paragraph 133.)

AUSTIN, TEXAS, August 24, 1920.

Chairman State Board of Control, Austin, Texas.

DEAR SIR: You have submitted to this Department the following question:

"Has the Board of Control the power to audit *all* State departments?"

The question involves a construction of the Act creating the Board of Control, and defining its powers and duties. (Chapter 167, General Laws of the Thirty-sixth Legislature, Regular Session, 1919.)

By referring to the Act, it will be at once noted that the title thereto plainly sets out that it shall be the "duty of the Board to audit all departments and institutions of the State government," etc., but the question arises whether or not the Legislature intended

to confer upon the Board such power so expressed in the title, and if it did so intend, whether or not in the provisions of the Act itself, it used language sufficient to carry out and effectuate such intention and purpose.

In seeking to determine the true intention of the Legislature, where there is an element of doubt as to the meaning intended, it is permissible to refer to the actual proceeding as disclosed by the legislative records during the passage of the Act (Ruling Case Law, paragraph 271, Statutes). Referring to the various steps taken by the Legislature in passing the Act, we find that the bill originated in the Senate; that the original bill was reported adversely with a favorable committee substitute; that on second reading, the substitute was amended in certain respects, not germane to the issue under discussion, and that the substitute bill was passed by the Senate, with certain amendments, on February 21, 1919.

It was engrossed on the 22nd day of February, 1919, and on March 13, 1919, it was reported from the House, after having been passed by that body, with amendments.

On March 14, 1919, the Senate refused to concur in House amendments, and asked for a conference committee. On March 15, the conference committee recommended that certain amendments be concurred in and adopted. On March 17, 1919, the Senate concurred in the House amendments to the bill, and thereafter, as amended, the bill was signed and enrolled. (Senate Journal, pages 1390, 159, 267, 477, 483, 520, 828, 957, 960, 974, 975, 976, 1003, 1022, 1264 and 135)

The bill, as amended by the House, contained the following:

"Section 6. The Board shall be authorized to place a chief auditor in charge of its division of auditing, and to employ such other auditors, bookkeepers, and clerical help as may be necessary in the operation of said division, or in carrying out the auditing duties conferred on the Board of Control * * * It shall also be the duty of the Board to audit or cause to be audited the accounts and books of every department, institution and school of this State, including the Prison System, at least three times each year, and at such other times as may be practicable and necessary."

This amendment was amended in the following language:

"Amend C. S. S. B. No. 147, Section 6, page 921, of the House Journal, by striking out *all of the first paragraph* and inserting in lieu thereof the following: 'For the performance of the duties imposed upon the Board by this section of the Act, it shall be and is hereby authorized to employ auditors, bookkeepers and clerical help as hereinafter provided within the limits of the appropriations that may be made for the work of said Board, which shall, in no case, be exceeded; provided, that the Board of Control shall prepare and furnish to the next Biennial Session of the Legislature an itemized budget for use by the Legislature in making appropriations for said Board, and that thereafter, no employee shall be employed for which an appropriation has not been made by the Legislature.' "

It will thus be seen that during the passage of the Act through the Legislature, the law-makers had before them the specific provision providing for the auditing by the Board of Control of *all*

State departments, and that they refused to give to such Board this power. They contented themselves with passing in lieu thereof an amendment providing for the employment of auditors, bookkeepers and clerical help, etc., in order to perform the duties conferred upon such Board by such section. Had it been the plain purpose and intention of the Legislature to grant the power to, or place the duty on the Board of Control to make audits of all departments of the State government, the amendment first above referred to would have accomplished such object, and the Legislature would neither have emasculated such provision by the passage of another amendment, nor excluded such amendment so granting the power from the Act.

It is true that the introductory clause to the amendment above referred to is as follows:

"Amend C. S. S. B. No. 147, Section 6, page 921, of the House Journal, by striking out all of the *first paragraph* and inserting in lieu thereof the following," etc.

If it was the purpose of the amendment to the amendment to strike out all of *first paragraph* of Section 6, it is apparent that the provision relating to the auditing of the State departments, being paragraph 4 of Section 6, would not have been affected by such amendment, and it might be argued that it was the intention of the Legislature not to remove from the Act the paragraph as to auditing the State departments.

We think, however, that the introductory clause referred to should be read: "By striking out all *after* the first paragraph."

If we are wrong in this conclusion, it is immaterial for the reason that the bill as enrolled does omit therefrom *all* after the first paragraph of Section 6 as originally drawn, and such enrolled bill imports absolutely verity. The courts will not go beyond an enrolled bill to the legislative records, journals or other evidence to ascertain the *terms* of a statute. (Ruling Case Law, paragraph 147 Statutes; In re Tipton, 13 S W., 610, and authorities cited.)

The adverse action of the Legislature on the specific provision before it relating to the auditing of all departments of the State government by the Board of Control, and the absence of a plain, direct and positive provision in the body of the Act itself conferring such power, leads us to conclude that it was not the intention of the Legislature that such Board should exercise such power or perform such duty.

It appearing that it was not the intention of the Legislature that such power should be exercised by the Board of Control, we may not expect to find within the body of the Act any language, either by construction or otherwise, that would justify the exercise of such power by the Board. A careful reading of the provisions of the statute, as a whole, discloses that no language susceptible of any such interpretation or construction is contained therein. The language used in the title of the Act, hereinabove quoted, providing for the auditing of all State departments, may be treated as

surplusage, and discarded. (Lewis Sutherland Statutory Construction, Second Edition, paragraph 133.)

We are of the opinion that the auditing duties of the Board are limited to those departments which were abolished by the Act creating the Board of Control and whose administrative and other duties were taken over by the Board under the express and specific terms of the Act.

You are, therefore, advised that, in the opinion of this Department, the Board of Control is without authority to audit all State departments, but is authorized to audit only those departments expressly named in the Act referred to.

Yours very truly,
W. W. MEACHAM, JR.,
Assistant Attorney General.

Op. 2118, Bk. 53, P. 263.

OIL—GAS.

1. Under the provisions of Chapter 155, General Laws of the Thirty-sixth Legislature, natural gas and crude oil or petroleum shall not be produced in the State of Texas in such manner and under such circumstances as to constitute "waste."

2. The term "waste" with reference to crude oil or petroleum under the provisions of said bill has its ordinary meaning.

3. It is the duty of all operators, contractors or drillers, pipe line companies and distributing companies drilling for or producing crude oil or natural gas or piping oil or gas for any purpose to use every possible precaution in accordance with the most approved method to stop and prevent "waste" of oil and gas, or both, in drilling and producing operations, storage or in piping or distributing. They are inhibited from wastefully utilizing oil or gas or to allow same to leak or escape from natural reservoirs, wells, tanks, containers, or pipes. (Article 2, Chapter 155, Acts Thirty-sixth Legislature, Regular Session.)

4. It is the duty of the Railroad Commission of Texas to make and enforce such reasonable rules and regulations for the conservation of oil and gas; it has authority to prevent the waste of oil and gas in drilling and producing operations and in the storage, piping and distribution thereof and to make the necessary rules and regulations for that purpose.

It is likewise the duty of the Railroad Commission to do all things necessary for the conservation of oil and gas and to establish such other rules and regulations as will be necessary to carry into effect the provisions of said Act above referred to and to conserve the oil and gas resources of the State. (Article 3, Chapter 155, Acts Thirty-sixth Legislature, Regular Session, approved March 31, 1919.)

5. It has been affirmatively decided by the Supreme Court of the U. S. that the Legislature of a state has the right to enact and to enforce a law which has for its purpose the conservation of the oil and gas resources of that State. Such a law is not violative of the Constitution of the U. S. and its enforcement as to persons whose obedience to its commands were coerced by injunction is not a taking of private property without adequate compensation and does not amount to a denial of due process of law contrary to the provisions of the 14th Amendment to the Constitution of the U. S., but is a lawful regulation by the state of a subject matter within its control. Ohio Oil Co. vs. Indiana, 177 U. S., 190.

6. By the provisions of this Act, Chapter 155, Acts of the Thirty-

sixth Legislature, the Railroad Commission has no authority to restrain the production of oil on account of overproduction if the producers thereof have sufficient facilities at hand, such as tanks, reservoirs or pipe lines, to store the same without committing waste.

7. On the other hand if such producer of oil has inadequate means of storing or transporting oil or gas when produced and is unable to care for same and therefore commits the waste thereof, the Railroad Commission of Texas would have the authority to make and enforce a rule or regulation prohibiting such party from producing and transporting said oil or gas until such time that he had the facilities at hand for the storing or transporting of same. The Railroad Commission has the authority under the provisions of the Act quoted above to fix and enforce reasonable rules and regulations for the prevention of waste of natural gas, crude oil or petroleum.

AUSTIN, TEXAS, July 16, 1919.

Hon. Allison Mayfield, Chairman Railroad Commission, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter of recent date, which reads as follows:

"Your attention is respectfully directed to Chapter 155, Acts of the Thirty-sixth Legislature, Regular Session, approved March 31, 1919, effective June 18, 1919, which provide for conservation of the oil and gas resources of the State; to define "waste" in the production of said minerals; to invest the Railroad Commission of Texas with authority to make and enforce such rules and regulations with respect to such resources, etc.

"A petition has been presented to the Railroad Commission by interested parties setting forth that in a certain oil field within this State, to-wit: the Northwest Extension of the Burkburnett oil field, there is an excessive production of oil, in so far as transportation facilities for the movement thereof from the oil field; that on account of lack of transportation facilities, such as storage tanks, pipe lines and tank cars, that a greater or less amount of oil will go to waste, and the power of the Commission is invoked to issue an order suspending the production of oil in this field for a period of time, and to regulate the production thereof to correspond with the facilities for taking care of the same without waste.

"Your advice is respectfully solicited as to whether or not the Railroad Commission has the power to make the order asked of it as above outlined, and to what extent the powers of the Commission are with respect to the defining of 'waste' in the absence of the Act failing to prescribe or define in specific terms what constitutes 'waste.'

"Your attention is called to the fact that the Act does in terms prescribe what constitutes 'waste' in so far as the conservation of gas is concerned, but as to oil only general terms are employed. The question seriously presented to my mind is whether or not this Commission being purely an administrative tribunal, has the power to declare what constitutes 'waste' which is a legislative function, and whether or not our power is confined to the administration of rules and regulations to prevent waste after it has been defined by the Legislature. The matter is pressing before us and your early attention is respectfully requested.

"We beg also to submit herewith in this connection, copy of an order this day issued by the Railroad Commission, which explains itself, and we respectfully solicit your advice and opinion as to whether or not this action is warranted under the law."

Articles 1, 2 and 3, of Chapter 155, of the General Laws of the Thirty-sixth Legislature, passed at its Regular Session, relating to the conservation of the oil and gas resources of the State; defining waste and empowering the Railroad Commission to make and enforce reasonable regulations with reference to same, all of which being pertinent to the inquiry submitted by you, reads as follows:

"Art. 1. Natural gas and crude oil or petroleum should not be produced in the State of Texas in such manner and under such conditions as to constitute waste. The term 'waste' in addition to its ordinary meaning shall include (a) escape of natural gas in commercial quantities into the open air from a stratum recognized as a natural gas stratum; but this is not intended to have application to gas pockets in high points in strata recognized as oil strata; (b) drowning with water of a gas stratum capable of producing gas in commercial quantities; (c) underground waste; d) the permitting of any natural gas well to wastefully burn; (e) the wasteful utilization of such gas; (f) burning flambeau lights except when casing head gas is used in same; provided not more than four may be used in or near the derrick of a drilling well, and (g) the burning of gas for illuminating purposes between 8 o'clock a. m. and 5 p. m., unless the use is regulated by meter.

"Art. 2. Whenever natural gas in such quantity and quantities, in a gas bearing stratum known to contain natural gas in such quantities, is encountered in any well drilled for oil or gas in this State, such gas shall be confined to its original stratum until such time as the same can be produced and utilized without waste and all such strata shall be adequately protected from infiltrating waters. All operators, contractors or drillers, pipe line companies, gas distributing companies drilling for or producing crude oil or natural gas or piping oil or gas for any purpose shall use every possible precaution in accordance with the most approved method to stop and prevent waste of oil and gas, or both, in drilling and producing operations, storage or in piping or distributing and shall not wastefully utilize oil or gas, or allow same to leak or escape from natural reservoirs, wells, tanks, containers, or pipes.

"Art. 3. It shall be the duty of the Railroad Commission to make and enforce rules and regulations for the conservation of oil and gas, and it shall have authority to prevent the waste of oil and gas in drilling and producing operations and in the storage, piping and distribution thereof, and to make rules and regulations for that purpose; it shall be its duty to require dry or abandoned wells to be plugged in such way as to confine oil, gas and water in the strata in which they are found and to prevent them from escaping into other strata and to establish rules and regulations for that purpose. It is empowered to establish rules and regulations for the drilling of wells and preserving a record thereof, and it shall be its duty to prevent injury to the adjoining property, and to prevent oil and gas and water from escaping from the strata in which they are found into other strata, and to establish rules and regulations therefor; it shall be its duty to establish rules and regulations for shooting wells and for separating oil from gas; it shall have authority to require records to be kept and reports made by oil and gas drillers, operators and pipe line companies and by its inspectors; it is authorized to do all things necessary for the conservation of oil and gas whether here especially enumerated or not, and to establish such other rules and regulations as will be necessary to carry into effect this Act and to conserve the oil and gas resources of the State."

"Waste" is defined in the Century Dictionary and Encyclopedia to mean: "gradual loss, diminution, or decay, as in bulk, substance, strength, or value, from continued use, wear, disease, etc.; as, waste of tissue; waste of energy."

Webster's Revised Unabridged Dictionary defines "waste" to be: "The act of wasting or the state of being wasted, a squandering, needless destruction, useless consumption or expenditure; devastation; loss without equivalent gain; gradual loss or decrease by use, wear or decay; as a waste of property, time, labor, words, etc."

Article 1 of said Chapter 155, of the General Laws of the State of Texas passed by the Thirty-sixth Legislature at its Regular Session, provides that: "Natural gas and crude oil or petroleum shall not be produced in the State of Texas in such manner and under such

conditions as to constitute 'waste.'" The term "waste" is given its ordinary meaning, which includes both definitions as given above.

It is provided in part by Article 2 of said Section that:

"All operators, contractors or drillers, pipe line companies, and distributing companies, drilling for or producing crude oil or natural gas or piping oil or gas for any purpose shall use every possible precaution in accordance with the most approved methods to stop and prevent waste of oil and gas, or both, in drilling and producing operations, storage or in piping or distributing and shall not wastefully utilize oil or gas, or allow same to leak or escape from natural reservoirs, wells, tanks, containers, or pipes."

Under the provisions of Article 3, of said chapter, it is provided in part that:

"It shall be the duty of the Railroad Commission to make and enforce rules and regulations for the conservation of oil and gas; it shall have authority to prevent the waste of oil and gas in drilling and producing operations and in the storage, piping and distribution thereof; and to make rules and regulations for that purpose. * * * It (the Railroad Commission) is authorized to do all things necessary for the conservation of oil and gas whether here especially enumerated or not, and to establish such other rules and regulations as will be necessary to carry into effect this Act and to conserve the oil and gas resources of the State."

These quotations from the provisions of said Act are the material provisions affecting the duty and powers of the Railroad Commission of Texas, authorizing them to establish the necessary rules and regulations for the conservation of the oil and gas resources of the State.

It has been affirmatively decided by the Supreme Court of the United States in the case of the State of Ohio Oil Company vs. Indiana, 177 U S., 190, that the Legislature of a State has the right to enact a law which has for its purpose the conservation of the oil and gas resources of a State. The State of Indiana enacted a law providing in substance that, "It shall be unlawful for any person firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air without being confined within such well or proper pipes or other safe receptacle, for a longer period than two days next after gas or oil shall have been struck in such well; and thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacle."

The Supreme Court of the United States held that the State of Indiana had the right to enforce the provisions of this Act and that it was not a violation of the Constitution of the United States and that its enforcement as to persons whose obedience to its commands was coerced by injunction is not a taking of private property without adequate compensation and does not amount to a denial of due process of law contrary to the provision of the Fourteenth Amendment to the Constitution of the United States, but is only a regulation by the State of Indiana of a subject which especially comes within its lawful authority.

Therefore, we conclude in conformity with this opinion of the Supreme Court of the United States that the Legislature of the State of Texas has the lawful authority to pass the act above quoted, Chapter 155, Acts of the 36th Legislature, regular session, approved March 31, 1919, which provides for the conservation of the oil and gas resources of the State and that the Railroad Commission of Texas under the provisions of said Act has the lawful authority to make and enforce the necessary reasonable rules and regulations for the enforcement of the provisions of said Act.

As to what are the necessary reasonable rules and regulations to be promulgated by the Commission for the conservation of the oil and gas resources of the State presents in each instance a question of fact. In our opinion the Railroad Commission would not have the authority to issue an order to prevent a producer or handler of oil from producing the same simply on account of overproduction in that territory, and if such an order based alone upon the question of overproduction in that territory was issued, that such an order would be an arbitrary one and could not be sustained by the courts. If the producer or handler of oil had the means on hand, such as tanks, pipe lines, or reservoirs within which to store his oil when produced and did not permit waste thereof, in our opinion, he would have the right to produce, store or transport said oil and the Commission by any rule or regulation could not lawfully prohibit his production or transportation of oil or gas. On the other hand, if such producer or handler of oil had inadequate means of storing or transporting oil or gas and when produced under such circumstances thereby commits waste, then in our opinion the Railroad Commission of Texas would have the authority to make and enforce a rule or regulation prohibiting the production and transportation of said oil or gas by such party until at such time he had the facilities at hand for the storing or the transporting of same. We are further of the opinion that the Commission should have a hearing before the promulgation of any rule or regulation for the conservation of oil and gas and to hear testimony and to base their rules and regulations upon the evidence offered before any rule or regulation is promulgated. We fear that the promulgation of any rule or regulation upon the motion of the Commission or upon an ex parte hearing would be contrary to the Fourteenth Amendment to the Constitution of the United States and might be construed by the courts as taking of private property without due process of law.

Yours very truly,
W. J. TOWNSEND,
Assistant Attorney General.

Op. No. 1994, Bk. 52, p. 97.

SENTENCE IN CRIMINAL CASES.

1. When a party is condemned to the penitentiary for any term of months or years, he must be imprisoned in the penitentiary, but, after he has reached and actually been confined in said penitentiary, the term of his imprisonment may be estimated to begin from the date of sentence; provided, that such party is not entitled to any discount of his term of im-

prisonment, in cases where, by his own default, he has prevented the judgment of the court from being enforced against him; in such instances, the party's sentence begins from the *date* of his incarceration in the State penitentiary.

Sartain vs. State, 10 Cr. Appeals, 651; Petition of Moebus, 73, N. H. 352; 62 Atlantic, 171; Ex Parte Branch 39 S. W., 932.

2. Under the Code of Criminal Procedure, Article 882, providing that the term of one sentence to the penitentiary shall commence from the time of sentence, or from the time of affirmance of the sentence on appeal, where petitioner appealed and afterwards dismissed his appeal, the term of his sentence commenced when the mandate of the Appellate Court was issued.

Ex Parte Carey, 64, S. W., 241.

3. Where one convicted of a felony appealed to the Court of Criminal Appeals and after the confirmance of the conviction, filed two successive motions for rehearing and then asked for stay of mandate, in order that he might apply to the United States Supreme Court for a writ of error, which application was denied and the mandate then issued by the Court of Criminal Appeals, during all of which time, accused was out on recognizance, the sentence would not begin to run in any event until the mandate was issued by the Court of Criminal Appeals.

State ex rel Looney, Attorney General, vs. Hamblen, District Judge (F. E. Pye Case), 169 S. W., 679.

AUSTIN, TEXAS, March 13, 1919.

Hon. Fritz R. Smith, Board of Pardon Advisors, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter of even date, which reads as follows:

"We would thank you very kindly to advise us as to the following:

"One Obie King was convicted five years ago in Shelby County for a felony. No appeal was taken, sentence was passed upon him, thereby making a final judgment, but he was never incarcerated in the penitentiary.

"As we understand the statute, the time of his service began at the date of his sentence. After having run at large for some five years since the date of his sentence, is he now a subject of the penitentiary? Or, in other words, has his time expired without serving his term in the penitentiary?"

Replying thereto, we beg to advise that, in our opinion, the judgment of conviction against the defendant, Obie King, is still a valid subsisting judgment against him; and that he will be required to serve his term of conviction, unless pardoned by the Governor.

A similar question was passed upon by our Court of Criminal Appeals in the Case of Sartain vs. State, 10 Crim. Appeals, 651; the opinion being rendered by presiding Judge White, which opinion reads as follows:

"Appellant was convicted upon a charge of bigamy, and his punishment was assessed by verdict and judgment at one hour's imprisonment in the penitentiary. Sentence was pronounced upon him in accordance with the judgment. An hour or more after sentence was pronounced, he applied to the district judge for a discharge upon writ of *habeas corpus*, claiming his right to discharge by virute of the latter clause of Article 825, Code Crim. Proc. (act. Feb. 21, 1879), which provides that 'the term' (of imprisonment) after conviction and sentence in a felony case 'shall commence from the time of sentence.' Upon hearing of the writ the district judge refused discharge, but remanded appellant to the custody of the sheriff, to be kept until he could be conveyed by the legally constituted authorities to the penitentiary, there to be confined in compliance with the judgment. From this order and judgment he appeals here.

"The question is, does the statute invoked apply to a case of this kind, and was the defendant entitled to be discharged though the judgment and sentence had never been executed upon him, simply by virtue of the fact that his term of imprisonment had expired if it should be counted from the date of the sentence? In other words, it is insisted that a term of imprisonment can expire before there has ever been any imprisonment, and that a judgment can be executed without in fact ever having been executed. To state the proposition is to manifest its absurdity, and in passing the act referred to (art. 825), the Legislature could never have intended to defeat the very object of the penal law by depriving it of its power to enforce its judgments. One of the very objects of the Code of Criminal Procedure is declared to be 'the certain execution of the sentence of the law when declared.' Code Crim. Proc., Art. 1, Subdiv. 6.

"In felony cases 'a final judgment is the declaration of the court entered of record showing among other things 'that the defendant be punished as it has been determined by the jury in cases where they have the right to determine the amount, or the duration and the place of punishment, in accordance with the nature and terms of the punishment prescribed in the verdict.' Code Crim. Proc. Art. 791, Subdiv. 10.

"Art. 792. 'A sentence is the order of the court made in presence of the defendant and entered of record, pronouncing the judgment and ordering the same to be carried into execution in the manner prescribed by law.'

"Art. 820. 'Immediately after final sentence shall have been pronounced the convict *shall be conveyed to the penitentiary*, etc. The sheriff shall deliver the convict * * * to the superintendent of the penitentiary.' Art. 824. Felonies less than capital are punished by *imprisonment in the penitentiary*. Penal Code, Art. 54. The punishment for bigamy is '*by imprisonment in the penitentiary* for a term not exceeding three years.' Penal Code, Art. 324.

"In the very nature of things there can be no incarceration in the penitentiary without an actual imprisonment within its walls. But it is insisted that there is neither exception to the operation nor ambiguity in the language used in the statute invoked,—the language beng 'the term shall commence from the time of sentence, or in case of appeal from the time of the affirmance of the sentence by the Court of Appeals.' Code Crim. Proc. Art. 825. 'It will be found to be an established rule in the exposition of statutes that the intention of the law-giver is to be deduced from a view of the whole and of every part of the statute, taken and compared together.' * * * And 'where the intention of the Legislature is not apparent to that purpose, the general words of another and later statute shall not repeal the particular provisions of a former one. 'It cannot be contended,' says Lord Kenyon, 'that a subsequent act of Parliament will not control the provisions of a prior statute if it were intended to have that operation; but there are several cases in the books to show that where the intention of the Legislature was apparent that the subsequent act should not have such an operation, then, even though the words of statute taken strictly and grammatically would repeal a former act, the courts of law, judging for the benefit of the subject, have held that they ought not to receive such construction.' Potter's Dwarris, p. 110.

"'Courts are not confined to the literal meaning of the words employed in the construction of statutes, but, as was said in Burgett vs. Burgett, 10 Reports, 221, the intention of the law-makers may be collected from the cause or necessity of the act; and statutes are sometimes contrary to the literal meaning of the words. It has been decided that a thing within the letter was not within the statute unless within its intention. The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter. (4 Bac. title statute, 1, secs. 38, 45, 50.) Every statute should be construed with reference to its object and the will of the law-makers is best promoted by such a construction as secures that object and excludes every other.' Castner vs. Walrod, 83 Ill., 171; Walker vs. State, 7 Texas Ct. App. 245.

"Ch. J. Chase in Caesar Griffin's case says: 'On the other hand a construction which must necessarily occasion great public and private mischief must never be preferred to a construction which will occasion either or neither in so great degree, unless the terms of the instrument absolutely

require such preference.' Chase's Decisions, 364. And in Missouri Mutual Life Ins. Co. vs. King, 44 Mo., 283, it was held, 'Generally where words used in a statute are clear and unambiguous there is no room left for construction; but where it is perceived that a particular intention, though not precisely expressed, must have been in the mind of the legislator, that intention will be enforced and made to control the strict letter.'

"Now, applying these principles, it certainly never could have been intended by the Legislature to exempt entirely from punishment and imprisonment in the penitentiary any citizen who, after having violated the law, was fairly tried and condemned, and sentenced to such punishment for his crime. It could never have been intended that a party condemned to the penitentiary could claim that he had expiated his imprisonment when in fact he had never been imprisoned. It could not have been intended that all previous laws pertaining to the conviction, or rather the punishment, of convicted felons should be repealed. The obvious construction of Art. 825 is simply this,—that when a party is condemned to the penitentiary for any term of months or years he must be imprisoned in the penitentiary, but, after he has reached and been actually confined in said penitentiary, the term of his imprisonment may be estimated to begin from the date of sentence.

"To hold otherwise would be to relieve felons, such as appellant in this case, to a certain extent from the disgrace and the disabilities of actual imprisonment in the penitentiary, which is as much a part and parcel of the punishment as the term of imprisonment.

"We see no error in the judgment, and it is affirmed."

Again, the case of ex parte Carey, 64 S. W., 241, is illustrative of the principle of law involved in this case. Carey was tried and convicted in the district court of McLennan County on a charge of theft, and his punishment assessed at two years' confinement in the penitentiary, from which judgment he appealed to the Court of Criminal Appeals. While the cause was pending before said court, relator filed proper application in said court, withdrawing his appeal, which was duly granted. Subsequently, he was incarcerated in the penitentiary under sentence of a trial court adjudging him guilty of said theft. He afterwards sought by writ of habeas corpus to be released from said imprisonment on the ground that the appeal, being withdrawn by himself and no affirmance of the case by the Court of Criminal Appeals, that the sentence began from the time of his sentence in the lower court. Article 882 of the Code of Criminal Procedure provides:

"The further execution of the judgment (of conviction) and sentence shall be in accordance with the provisions of the law governing penitentiaries of the State. The term shall commence from the time of sentence, or in case of appeal, from the time of the affirmance of the sentence."

The Court of Criminal Appeals held in this case that, under the provisions of this article, the relator's sentence began from the date his cause was finally disposed of by the Court of Criminal Appeals, and when the mandate issued; for having appealed to this court, relator could not take advantage of his delay in the commencement of his sentence, and the term of his sentence began when he withdrew his appeal and the order granting same was entered. This holding of the court was sustained in the case of State ex rel Looney, Attorney General, vs. Hamblen, District Judge, (F. E. Pye Case), 169, S. W. 679.

One sentenced to imprisonment and release on bail, pending appeal

in habeas corpus proceedings, is not entitled to have the time spent in prosecuting the proceedings, or when at large on such bail, deducted from the term of imprisonment. Ex Parte Branch, 39, S. W., 932.

The defendant, Wharton Branch, in the case above cited, was convicted of aggravated assault and sentenced to imprisonment, and the judgment was affirmed on appeal. Afterwards, he sued out a writ of habeas corpus to relieve himself from said judgment of the court and on appeal the writ was denied him. The court of Criminal Appeals, in refusing the relief sought, in part, said:

"We have examined both the application and the statement of facts in connection therewith, and no cause is shown for relief of the applicant by virtue of the writ of habeas corpus. The claim set up by him, that, on account of the habeas corpus proceeding before the county judge and his enlargement on bond, he had constructively paid the fine and costs and served out the term of his imprisonment in the assault and battery case, is worthy of no consideration. It is frivolous. If this were true, should a prisoner escape and get at large, he could claim that he was serving out his term of imprisonment while at large. Nor is the relator entitled to any discount of his term of imprisonment as adjudicated by said court on account of any time taken up or consumed by him in prosecuting this writ of habeas corpus."

The doctrine was approved by the Supreme Court of Massachusetts in the case of Petition of Moebus, 73 N. H., 352; 62 Atlantic, 171; denying writ of habeas corpus where it appeared petitioner had been sentenced to ten years' imprisonment, that he escaped, was recapturd after five years, and then served five years.

In conformity with the opinions of our higher courts, as cited above, we are of the opinion that the defendant, Obie King, has not satisfied the judgment of conviction in his case; and that the judgment outstanding against him is a valid subsisting judgment, and that he is required, under the law, to fulfill its conditions by serving the two years' term in the penitentiary, unless pardoned by the Governor.

So far, he has not served any portion of his term, neither has he been incarcerated in the penitentiary; and in view of the fact that he failed and refused, until this time, to comply with the sentence of the court, he can not take advantage of his delay in complying with the judgment of said court and contend that his sentence has expired, in view of the fact that more than five years' time has expired since such two years' sentence was assessed against him, for to hold otherwise would mean that any person who should fail or refuse to comply with any judgment assessed against him might escape and get at large, and during this time claim that he was serving out his term of imprisonment while at large, which contention, we believe, is not sound and can not be lawfully sustained.

Yours very truly,

W. J. TOWNSEND,

Assistant Attorney General.

Op. No. 2115, Bk. 5, P.—

WITNESSES—EXPENSES OF OUT OF STATE WITNESSES.

The law of this State makes no provision for the payment of expenses of State witnesses incurred by State witnesses in traveling from some point outside of Texas to the State line of Texas.

After reaching Texas, such witnesses could be subpoenaed and from that point to the place of trial they would be entitled to their per diem and mileage, as is provided for by law.

AUSTIN, TEXAS, July 5, 1919.

Hon. D. A. McAskill, District Attorney, San Antonio, Texas.

DEAR SIR: I have your letter of July 1st, addressed to the Attorney General, which in part reads as follows:

"At the March term, 1919, of the District Court of this county, the cases of the State of Texas vs. Anson Hazelwood and State of Texas vs. Charles Hazelwood, wherein said parties were charged with the murder of B. M. Hall, were tried.

"The killing out of which these cases grew occurred on December 11th, 1918, and on the same day of the killing, the Justice of the Peace held an examining trial and inquest, both in one hearing, the defendants being present. This hearing was completed at about six o'clock in the afternoon on said date, and at the close thereof the Justice announced his judgment, remanding the defendants without bail, and issued his mittimus, committing them. After this had been done, the State discovered two eye witnesses to the killing, they being a lady, who was then named Miss Nona Robinson, and C. M. Thompson, and also learned that said witnesses contemplated marrying on the next day and immediately leaving the State to take up their permanent residence in Virginia; upon receiving this information the assistant district attorney procured a reopening of the examining trial and inquest, caused said witnesses to be summoned before the justice holding same, the defendants being present with their council, and took the testimony of these witnesses in writing.

"On the trial of the case, the State offered the deposition of these witnesses as given at said examining trial and inquest in evidence, and the same was objected to by the defendant's counsel upon the ground that the justice of the peace having announced his judgment, remanding the defendants without bail and having issued his mittimus, his jurisdiction then ceased, and he had no jurisdiction to reopen the examining trial and inquest proceeding and hence the testimony of said witnesses taken at such reopening of said hearing was not taken before a court having jurisdiction of the case, and that therefore the statements of said witnesses were inadmissible.

"This objection, in the opinion of the district attorney's office, raised a very serious question, and in order to avoid the same, the district attorney, by arrangement with said witnesses, who were then in Baltimore, Maryland, paid their expenses in coming to San Antonio to testify in person, same amounting to $329.97, for which amount said witnesses filed their sworn account with the district attorney.

"The district attorney in filing his monthly report of expenses of his office, under Article 3897 Vernon's Sayles' Civil Statutes, included said expense account of said witnesses therein, and said item of expense was rejected by the County Auditor upon the ground that the same was not an expense permitted to be credited to the district attorney's office, there being no provision of law for same."

You also direct our attention to Article 3903, Vernon's Sayles' Civil Statutes, 1914.

In reply, your attention is respectfully directed to a part of Article 3897, Vernon's Sayles' Civil Statutes, 1914, which reads as follows:

"At the close of each month of his tenure of such office such officer whose fees are affected by the provisions of this Act shall make, as a part of the report now required by law, an itemized and sworn statement of all the actual and necessary expenses incurred by him in the conduct of his said office, such as stationery, stamps, telephone, traveling expenses and other necessary expenses. If such expenses be incurred in connection with any particular case, such statement shall name such case. * * *"

Article 3903, Vernon's Sayles' Civil Statutes, 1914, to which you direct our attention was amended by Chapter 55 of the Acts of the Thirty-fifth Legislature at its Regular Session, and it was there provided that in counties having a population in excess of one hundred thousand the district attorney in the county of his residence or the county attorney, where there is not a district attorney, shall be allowed by order of the commissioners court of the county where such official resides such compensation as in the judgment of the commissioners court may be necessary to the proper administration of the duties of such office, not to exceed, however, the sum of Fifty Dollars per month. Such amount as may be thus necessarily incurred shall be paid by the commissioners court upon the affidavit made by the district attorney or the county attorney, showing the necessity for such expense and for what same was incurred.

Said Chapter 55 was amended by Chapter 47 of the Acts of the Thirty-sixth Legislature at the Regular Session, and the above provisions contained in Chapter 55 were omitted from Chapter 47 of the Acts of the Thirty-sixth Legislature. However, said Chapter 47 did not become effective until June 18, 1919. Therefore, at the time the expenses were incurred, as related by you in the Hazelwood cases, the provisions of said Chapter 55, Acts of the Thirty-fifth Legislature, were in full force and effect. It follows then that the commissioners court could allow the sum of Fifty Dollars per month for necessary and proper expenses incurred in administration of the duties of the district attorney's office of Bexar County. However, the account which you presented was for $329.97, which could not be allowed in order paid under the provisions of said Chapter 55, for the reason that Fifty Dollars a month was the maximum expense account allowed by said Chapter 55.

We pass now to a consideration of the provisions of Article 3897, which we have hereinabove quoted. By the provisions of this article, the district attorney is entitled to have deducted from the amount, if any, due by him to the county on the actual and necessary expenses incurred by him in the conduct of his said office "such as stationery, stamps, telephone, traveling expenses and other necessary expenses." There are only two items enumerated in this Article which need to be considered in determining whether the amount of $329.97, paid by the district attorney to Mr. and Mrs. C. M. Thompson in payment of their expenses in coming from Baltimore, Md., to San Antonio, Texas, to testify for the State in the Hazelwood cases, to-wit: "traveling expenses" and "other necessary expenses." So far as the "other necessary expenses" item is concerned, you are advised that the expenses of Mr. and Mrs. C. M. Thompson are not such "other necessary expenses" as to justify the payment of their claim according to the rule, which is commonly called the "ejusdem generis" rule. Under this rule, the use of the phrase "other necessary expenses",

as used in said Article 3897 can only refer to those items of expense which are specifically enumerated in said Article 3897, to-wit: stationery, stamps, telephone and traveling expenses. Mr. Black, in his admirable work on Interpretation of Laws, page 141, writes as follows:

"This rule is commonly called the "ejusdem generis" rule, because it teaches us that broad and comprehensive expressions in an act, such as "and all others," or "any others," are usually to be restricted to persons or things "of the same kind" or class with those specially named in the preceding words. It is of very frequent use and application in the interpretation of statutes. For example, where a statute gave certain property and business rights to "any married woman whose husband, either from drunkenness, profligacy, or any other cause, shall neglect or refuse to provide for her," it was held that the words "any other cause" must be understood of causes ejusdem generis with those enumerated, and hence would not include mere poverty, sickness, intellectual inferiority, or physical inability of the husband, not caused by vice."

We next pass to a consideration of the item, "traveling expenses," as used in said Article 3897. It now becomes necessary to determine whose traveling expenses the Legislature intended should be paid under this item. It is the opinion of this Department, and you are so advised, that it was clearly intended that the item, "traveling expenses," should apply to the officer, his deputy or assistant, and should be incurred by them only when traveling on official business for the State or county, and it was never intended to apply to the traveling expenses of witnesses. We reach this conclusion by reason of the fact that the Legislature has made provision for the payment of out of county witnesses in criminal cases. It is true that there is no provision by which a witness, brought from without the State, can receive any per diem or traveling expenses to be paid by the State or the county. However, this is a legislative matter and the failure of the Legislature to provide for such a contingency does not justify a county, which is a political subdivision of the State, in paying expenses when there is no provision of law authorizing the payment of such expenses. We realize that by reason of the fact that the Legislature, having failed to provide for the payment of expenses of out of State witnesses, may frequently cause a miscarriage of justice in criminal cases. Yet, it must be remembered that a State court has no jurisdiction beyond the boundaries of the State, and that no court in Texas can compel the attendance of out of State witnesses.

You are, therefore, respectfully advised that there is no law which authorizes the county auditor to pay the expenses of Mr. and Mrs. C. M. Thompson, incurred in traveling from their home in Baltimore, Md., to San Antonio, Texas, to appear as witnesses in behalf of the State in the Hazelwood cases. These witnesses could have been served with a subpœna the moment they crossed the State line, and thereafter would have been entitled to per diem and mileage, precisely the same as any other out of the county witnesses.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

Op. No. 2017, Bk. 52, P. 266.

BUTCHERS' BOND—BUTCHERS.

Vernon's Sayles Revised Civil Statutes, Article 7179; Penal Code, Articles 1361 to 1371.

A merchant who sells meat and does not kill or slaughter same, but buys it already slaughtered and dressed, is not a butcher in contemplation of the statutes referred to, and such person is not required to give a butcher's bond as set out in Article 7179.

AUSTIN, TEXAS, April 2, 1919.

Hon. G. C. Jackson, County Attorney, Crystal City, Texas.

DEAR SIR: We have yours of the 29th instant in which you inquire as to whether or not a person who sells meat as a merchant, but who does not himself slaughter the meat, is required to give bond as a butcher under Article 7179 of the Revised Statutes.

The definition of the term "butcher" does not seem to have been considered by any court in Texas, so far as I have been able to find, but in 9 Corpus Juris, page 1107, the word "butcher" is defined as follows:

"One whose occupation is to kill animals for food; one whose occupation is to kill animals for the table; a person who kills animals to sell their flesh; one who slaughters animals for the market; one who slaughters animals or dresses their flesh for market; a person who cuts up and sells meat."

In all cases cited in the text in which the last definition is used, it applies to ordinances or statutes enacted to regulate the vending of meat and the word "butcher" in such ordinance or statute is used in the sense of butcher shop or meat market and in no other cases that I can find is the word "butcher" used synonymous with meat dealer.

In the case of Henback vs. State, 25 American Reports, 651, in defining the word "butcher" as used in an indictment for carrying on the business of butcher without a license, the Supreme Court of Alabama, in addressing itself to an exception to the changes of the court, says:

"For aught that appears in the bill of exceptions, the animals that furnished this meat may have been killed elsewhere, and by other persons, from whom the appellant purchased the meat after they had been killed. It may have been sent down from the country in carcasses and quarters. We all know it is common for this to be done—for meat in this form to be sent from the interior to the produce sellers of our large towns and cities. From this class of merchants defendant may have bought the meat he cut up and sold. If he did, this would not constitute him a butcher, or a person engaged in the business of a butcher. A butcher might, or might not, cut up and sell by retail in the market the bodies of the animals he had slaughtered. It is a common thing, no doubt, for him to do so; and hence it may seem to be, and indeed would be, a part of the business of a butcher. But we have to disregard the true meaning and origin of the word as explained in dictionaries if we hold that he who buys the bodies of animals that have been slaughtered for meat, and cuts them up and retails them, without more, becomes thereby a butcher, or engaged in the business of a butcher."

In Blumhardt vs. Rohr, 17 Atlantic, 266, the Maryland Court says:

"The ordinary natural understanding of the word 'butcher' is one who kills and sells cattle for human food."

In the case of City of Rockville vs. Merchant, 60 Mo. App., 365, the Court says:

"It is quite well to designate one conducting a meat shop as a butcher. Yet, it is perhaps improper and it would be more correct to say that he who slaughters the animals and prepares them for market is a butcher, while he who sells the flesh is the keeper of a meat market."

Article 7179 of the Revised Statutes has the same wording as Article 1365 of the Penal Code. This statute was evidently enacted to prevent and protect against cattle theft, and from a reading of the associated articles, to-wit: 1361 to 1371 inclusive, it will readily be seen that the Penal Statutes relate to the person who is engaged in the business of slaughtering animals and that in the article requiring bonds the words "butcher" or "slaughterer" are used synonymously.

We therefore advise you that the merchant who sells the meat and does not kill or slaughter same, but buys it already slaughtered and dressed, is not a butcher in contemplation of the statutes referred to, and such person is not required to give a butcher's bond as set out in Article 7179.

Yours very truly,
JOHN MAXWELL,
Assistant Attorney General.

Op. No. 2192, Bk. 53, P.—

CONVICT BONDS—COUNTY JUDGES—COUNTY AUDITORS—SHERIFFS—COMMISSIONERS' COURT—COMMISSIONS.

It is the duty of county judges to approve convict bonds and to collect the money due thereon.

It is not the duty of a sheriff to collect money on convict bonds, and he is not entitled to a commission for collecting the same, though he collects money due under a convict bond, at the request of the county judge.

When warrants are issued by the county judge to officers in payment of their fees due under convict bonds, it is necessary to have the approval of the county auditor but not that of the Commissioners' Court, before the county treasurer is authorized to pay the same.

Article 1194, Code of Criminal Procedure; Chap. 4, Title 104, Revised Civil Statutes; Article 6251; Article 6254; Article 1732; Article 6256; Article 1481; Article 1485; McLennan Co. vs. Boggess, et al, 139 S. W. 1054.

ATTORNEY GENERAL'S DEPARTMENT, March 13, 1920.

Hon. Homer Jennings, County Attorney, Falls County, Marlin, Texas.

DEAR SIR: Your letter of the fifth instant, addressed to the Attorney General, has been reecived. It reads as follows:

"We ask an opinion from your department on the following proposition: A few days ago the County Judge of this county collected in full the fine and costs due upon a convict bond made in pursuance of Arts. 6249 to 6256

of the Revised Statutes, defendant having previously been convicted of a misdemeanor in County Court.

"Question: Is the Sheriff or Constable entitled to his commission of 5% under Arts. 1194 of the Code of Criminal Procedure of Texas which reads as follows: 'The Sheriff or other officer who collects money for the State or County, under any of the provisions of this Code, except jury fees, shall be entitled to retain five per cent thereof when collected.'

"The County Judge in the instant case does not consider himself entitled to the commission under the law, nor does he claim the same. The County Attorney's and County Clerk's commissions of ten and five per cent respectively, are determined by Art. 1193 of the Code of Criminal Procedure. It is not my opinion that Art. 1194 should be strictly construed to mean the actual physical collection of the fine and costs by the Sheriff was necessary but in a case of this kind where the bond was made payable to the County Judge and therefore presumed to be paid over directly to him, the Sheriff's commission would be due under the article where he had been instrumental in getting the bond made and secured the bondsmen or assisted in doing so. If you do not agree with me in that contention, then do you not think that the Sheriff or Constable could act as agent, as it were, of the County Judge—that is, the amount of fine and costs on the bond be paid through him, the Sheriff or Constable, and by him turned over to the County Judge in exactly the same manner that the Sheriff or Constable earns his commission under Art. 1194 by collecting and paying over the amount due under the judgment?

"This question of collecting the money by the Sheriff or Constable has been construed in an opinion of the Attorney General's Department, page 513 of your last Biennial Report; also in the case McLennan County vs. Boggess et al, 139 SW 1054. Both opinions hold that the officer had to collect the money before his commission was due. In the case of Lee vs. Broocks et al 131 SW 1195, a civil case, the Court of Civil Appeals in construing the last provisions of Art. 2460 of the Rev. Statutes, an article similar to the one in hand, which provides sheriff's commissions on executions and orders of sale by means of sale and without sale, the court held that the officer was not entitled to the commission because the complete service was not rendered. In that case judgment was rendered foreclosing a vendor's lien, order of sale gotten out, advertisements made, etc., and practically everything done except the actual selling, when just a day or so before public sale was to be made debtor came in and paid creditor the amount of judgment and costs. The court held that the Sheriff was not entitled to the commissions under that article. While one is a construction with reference to civil law or statute and the other criminal law, however I should think the same rule of construction applies pretty well in both.

"But in the instant case, I think the Sheriff has earned his commission in contemplation of Article 1194 where he has taken either or both of the steps described above. He couldn't do more in collecting under a convict bond, yet where he has exercised such diligence and energy I should think he was entitled to his 5% commission.

"In this same connection we have this further question with reference to payment of costs under a convict bond: Is it necessary for the officers to wait and have their warrants countersigned by the County Auditor and approved by the Commissioners Court before they can get their fees and commissions due in such case, or would the County Treasurer be warranted in executing his warrant or check on the depository when the County Judge's warrant is presented directly to him?

"Art. 6254 of the Rev. Statutes provides that amounts collected by the County Judge under the bond shall be 'by him paid into the County Treasurer' and Art. 6256 provides that 'whenever the amount realized from the hire of convict is sufficient to discharge in full the fine and costs adjudged against him, the county judge shall issue a warrant upon the county treasurer in favor of each officer, to whom costs may be due, for the amount of his costs, and the same shall be paid out of the road fund of the county, or out of any other funds in the county treasury not otherwise appropriated'.

"Art. 1481 Rev. Statutes, the latter part, provides that 'no claim, bill or account shall be allowed or paid until same shall have been examined and approved by the county auditor'. Art. 1485 Rev. Statutes is as follows: 'All warrants on the County Treasurer, except warrants for jury service, must be countersigned by the County Auditor'.

"I have been unable to find any opinion or court decision construing our inquiry but in the absence of a special statutory provision as to this particular bond or fund, which I have been unable to find, I am of the opinion the statutes are plain enough and that the warrants have to be approved and countersigned as stated above, or at least countersigned by the County Auditor whether approved by the Commissioners Court or not. I shouldn't think the latter necessary but know of no provision making exceptions to warrants of this kind, those issued by the County Judge upon the County Treasurer.

"Kindly give us your opinion on the above matters at your earliest convenience. An approval from your Department of the above opinions, if same are your opinions, is desired before certain officers care to act upon the particular matters in hand."

In answer to your first question, will cite you to the provisions of Article 1194, Code of Criminal Procedure, which reads:

"The sheriff or other officer who collects money for the State or county, under any of the provisions of this Code, except jury fees, shall be entitled to retain five per cent thereof, when collected."

In the case cited by you of McLennan County vs. Boggess, et al., it was held that under the provisions of this article only one commission could be collected, and that the commission was due to the officer who mahe the collection.

Chapter 4, Title 104, of the Revised Civil Statutes, deals with the subject of convict bonds. Article 6251 provides the requisition of the convict bond, and the first paragraph of that article reads as follows:

"*Hirers of convicts shall execute bond, payable to the county judge of the county*, with two or more good and sufficient sureties, in the amount of hire agreed upon, conditioned as follows: * * *"

Article 6254 reads:

"*All moneys arising from hiring out convicts shall be paid over to the county judge, and by him paid into the county treasury*, and in every case the convict shall receive full credit for the amount of his labor, to be counted and entered in discharge of the fine and costs adjudged against him; and, whenever his earnings shall be sufficient to pay in full such fine and costs, he shall be discharged."

Article 1732, Revised Civil Statutes, prescribes the oath of office required to be taken by the county judge in the following language:

"The county judge shall, before entering on the duties of his office, execute a bond with two or more good and sufficient sureties, to be approved by the Commissioners' Court of his county, in a sum of not less than one thousand dollars nor more than five thousand dollars, the amount of said bond to be determined and fixed by the County Commissioners' Court, payable to the treasurer of his county, *conditioned that he will pay over to the person officer entitled to receive it all moneys that may come into his hands as county judge, within thirty days after he shall have re-*

ceived the same, and take the oath of office prescribed in the Constitution, and the further oath required of the several members of the Commissioners' Court."

In your letter, quoted above, you take the position that;

"Article 1194 should not be strictly construed to mean the actual physical collection of the fine and costs by the sheriff, but that in a case of this kind where the bond was made payable to the county judge, and, therefore, presumed to be paid over directly to him, that the sheriff's commission would be due under the article where he had been instrumental in getting the bond made and secured the bondsmen, or assisted in doing so."

We cannot agree with you in this contention. It is made no part of the duty of the sheriff to assist in any manner in hiring out a convict or in securing or assisting in securing proper bondsmen for him. By the provisions of the statute, as quoted above, it is made the duty of the county judge to hire out convicts; to make convict bonds payable to the county judge and to collect the money due on the bond and to pay the same into the county treasury. His official bond makes this mandatory, as well as the provisions of Article 6254. The sheriff does not even have the authority to accept money due on convict bonds and the maker of the bond has no authority whatever to pay money due on the convict bond he makes to anyone, save the one to whom it is made payable, and that is fixed by the statute to be the county judge. If the maker of a convict bond should pay the amount of the bond, or any part of it, to anyone other than the county judge, the county would not be bound by the payment, should the money not be, by the person receiving the same, paid over to the county.

There is another important question involved here and that is the authority of the county judge to delegate his authority to collect the money due on a convict bond to the sheriff or anyone else. We do not believe that the county judge has any more authority to appoint the sheriff as his agent to collect this money than he would have to delegate to the sheriff the authority to try a case. The statute has made it the duty of the county judge to hire convicts, approve bonds that are made payable to him, and to collect the same under the terms and conditions of the bond. In our opinion, this excludes the idea that any other person may do any of these things legally.

You state that the county judge does not claim the commission due for making these collections on convict bonds. This is in accordance with the holdings of this Department. See opinions Nos. 475 and 532, copies of which I herewith enclose.

It is the opinion of this Department, and you are so advised, that the sheriff is not entitled to any commissions whatever for collecting moneys due on convict bonds though he collects the same at the request of the county judge.

By your second inquiry you desire to know if it is necessary for the county auditor and the Commissioners' Court to approve the warrant issued by the county judge upon the county treasury in favor of each officer to whom costs may be due upon the collection of a convict bond.

Article 6256, Revised Civil Statutes, reads:

"Whenever the amount realized from the hire of a convict is sufficient

to discharge in full the fines and costs adjudged against him, the county judge shall issue a warrant upon the county treasurer in favor of each officer to whom costs may be due for the amount of his costs, and the same should be paid out of the road fund, or out of any other funds in the county treasury, not otherwise appropriated."

Article 1481, R. S., reads:

"All claims, bills and accounts against the county must be filed in ample time for the auditor to examine and approve same before the meetings of the Commissioners' Court; and no claim, bill or account shall be allowed or paid until same shall have been examined and approved by the county auditor."

Article 1485 reads:

"All warrants on the county treasurer, except warrants for jury services, must be countersigned by the county auditor."

We would not think it necessary for the county auditor to approve this kind of warrant if it were not for the provisions of Article 1485, quoted above. Clearly, it is not his duty to approve these warrants under the provisions of Article 1481, but by the provisions of Article 1485 it is made his duty to approve all warrants on the county treasurer, except warrants for jury services. The Legislature, by making one exception to the general rule, excludes the idea that any other exceptions are to be made. There is no occasion whatever for these warrants to be submitted to the Commissioners' Court. The statute does not so provide. At the time Article 6256 was adopted there was no County Auditors' Law and the Legislature intended that the warrants issued by the county judge to the officers in payment of their costs, under the provisions of Article 6256, should be presented to the county treasurer and that that officer should honor the same immediately upon presentation; but by the adoption of the County Auditors' Law, and the writing into the same of the provisions of Article 1485, it appears to us that it is necessary to have his approval on said warrants before the county treasurer would be justified in paying the same. However, his approval is a mere matter of form and when such warrants are presented to him, it is his duty to approve the same.

It is the opinion of this Department, and you are so advised, that when warrants are issued by the county judge to officers for their costs, under the provisions of Article 6256 of the Revised Civil Statutes, that before the county treasurer is authorized to honor the same the approval of the county auditor must be had. It is unnecessary to obtain or secure an allowance of these warrants by the Commissioners' Court.

Yours very truly,
BRUCE W. BRYANT,
Assistant Attorney General.

VETERINARIANS' LICENSE—REMOVAL FROM ONE COUNTY TO ANOTHER.

Veterinarians who were permitted to practice as such under the five year clause of Chapter 76 of 1911 of the Acts of the Regular Session of the 32nd

Legislature and secured, by reason of such Act, a license under the provisions of Section 5, Chapter 58, Acts of the Second Called Session of the 36th Legislature 1919, can only practice as a veterinarian in the county in which he lives and if such veterinarian removes to another county he must take the examination provided for by the Act.

Chapter 76, Acts of the Regular Session of the 32nd Legislature.
Chapter 58, Acts of the 2nd Called Session of the 36th Legislature.

AUSTIN, TEXAS, June 10, 1920.

Hon. Henry Tirey, County Attorney, Waxahachie, Texas.

DEAR SIR: This will acknowledge receipt of your letters of the 24th ultimo and the 7th instant, addressed to the Attorney General, in which you ask this Department to give you a construction of certain provisions of Chapter 58 of the Acts of the 2nd Called Session of the 36th Legislature.

We are very sorry that we have not been able to give you an opinion at an earlier date, but there are only eleven men in this office and for the last twenty days more than one-half of them have been out of the office on official business, and with the Legislature on our hands, this Department has not had an opportunity to answer but little of the accumulated correspondence. We regret very much the delay, but it has been unavoidable.

Your first question is:

"Can a veterinarian who is a non graduate, but who has secured a non graduate license in Hill County where he resides, and desires to change his residence to Ellis County, and if so, what would you suggest as the method?"

Your attention is called to the provisions of Section 5 of the Act and especially to those parts which read as follows:

"It shall be unlawful for anyone to practice veterinary medicine in any of its branches upon animals within the limits of this State who has not registered in the district clerk's office of the county in which he resided, his authority for so practicing, as herein prescribed, together with his age, post office address, place of birth and name of school of veterinary medicine from which he graduated. Provided that nothing in this Act shall prohibit any person, who has heretofore registered as a veterinary surgeon in the county of his residence according to the provisions of Chapter 76 of the Acts of the regular session of the Thirty-second Legislature who had previous to the year 1911 practiced veterinary medicine or veterinary surgery as his principal occupation for five years in the State of Texas prior to the year 1911, from practicing in the county of his residence only securing a license from the State Board of Veterinary Medical Examiners by filing satisfactory evidence of his former compliance with the requirements of said Act, Chapter 76, Acts of the regular session of the Thirty-second Legislature, together with an affidavit that he has practiced veterinary medicine or veterinary surgery continuously for five years prior to 1911, in which affidavit he shall state the place where he has practiced veterinary medicine or veterinary surgery for five consecutive years immediately prior to 1911, together with his place of residence during said period. Upon the face of such license shall be printed the words, non graduate. Provided further that after the passage of this Act, it shall be unlawful for any person to register under the five year practicing clause of this section, but the object of this provision is to permit persons who have heretofore lawfully registered to continue practicing under the five year clause. That in case if the oaths herein provided for are wilfully false, it shall subject the person making same to conviction and punishment for false swearing. The fact of such oath shall be endorsed upon the certificate or license as the

case may be, but if such person shall remove from such county of residence, he shall comply with all the requirements of this Act before he shall be allowed to practice."

It will be observed from the provisions of the law as above quoted, that an exception is made in favor of any person who has heretofore taken advantage of the provisions of Chapter 76 of the Acts of the regular session of the 36th Legislature and secured his license to practice veterinary medicine or surgery, by reason of the fact that this had been his principal occupation for five years immediately preceding the Act of 1911; and that such person is authorized to practice in the county of his residence only by securing a license from the State Board of Veterinary Medical Examiners, by filing satisfactory evidence of his former compliance with requirements of the Act of 1911. In other words, section 5 permits a person who obtained his license under the Act of 1911, by virtue of the 5 year clause to continue under this Act by doing certain things, but his practice must be limited to the county of his residence. This limitation to practice only in the county of his residence does not apply to those who stand the examination and are issued license under the provision of section 8 of the Act. Such practitioners may practice in any county when they have once stood the examination and obtained their license by complying with the provisions of the first paragraph of section 5, but the Legislature has seen fit to say to the practitioner who has not been granted a license under the provisions of section 8, that if he desires to practice in another county other than the county of his residence, he must stand the examination as provided for in Section 8 and meet all the requirements thereof. This is the only construction you can place upon that part of the last paragraph of section 5 which reads as follows:

"If such person (meaning the person who has obtained license not by examination, but by virtue of the 5 year clause) shall remove from such county or residence, he shall comply with all the requirements of this Act before he shall be allowed to practice."

The portion of section 5 quoted in your letter and which is the first paragraph at the top of page 145 of the Acts of the Second Called Session of the 36th Legislature, is but explanatory of that part of the same section as first quoted and does not show that it was the intention of the Legislature to let that class of practitioners under consideration practice in counties other than that of their residence without having first complied with the provisions of section 8.

This construction is borne out by the provisions of section 22, which in part reads as follows:

"Any veterinarian or veterinary surgeon who has successfully passed examination on the subjects prescribed in Article 7340 of the Revised Civil Statutes of 1914, or in section 10 of this Act, and who has been granted license by said Board to practice veterinary medicine, veterinary surgery or veterinary dentistry in this State and has recorded his license as provided for in this Act, may go from one county to another in this State on professional business and may practice veterinary medicine, veterinary surgery or veterinary dentistry in any county in this State to which he may go, without recording or registering said license in any county to which he may go or in which he may practice."

This provision merely permits the practitioner, who has passed his examination as provided for in section 10, to go from one county into another and temporarily practice his profession without recording his license in the office of the county clerk of each county as is provided for in the first paragraph of section 5. You will note that no mention whatever is made of the practitioner who obtained his license by virtue of the five year clause. We quote the rest of section 22:

"Provided, that any veterinary or veterinary surgeon who has successfully passed these said examinations and recorded his license as provided for in this Act, and who removes his residence from the county in which his license is recorded, shall again record his license in the county to which he removes his residence, * * *"

You will observe that the Legislature has used great precaution in saying that those practitioners "who have successfully passed the examination" could do the things provided for in section 22, and have not used general words to cover all practitioners.

The opinion written by Hon. C. W Taylor, Assistant Attorney General, a copy of which you enclose, has no application to the question here at issue. He was writing with reference to registered veterinarians. Under the Act of 1911, licenses were only granted by the Board of Veterinary Medical Examiners to those who had successfully stood the examination before the Board as prescribed in the Act. Section 8 of the Act of 1911, and referred to in Judge Taylors' opinion, permitted only such persons as had a certificate of license from the Board of Veterinary Medical Examiners to practice in a county other than that of their residence by filing in the office of the District Clerk of the county to which he removes his certificate of license. This provision of the Act could not possibly apply to the veterinarian who was permitted to practice in the county without a license. If such practitioner had no license, he certainly could not comply with the provision of Section 8 by recording his certificate of license in the county to which he removes. Judge Taylor's opinion only applies to registered veterinarians. Those who practice under the five year clause of 1911 were not registered veterinarians.

We have carefully considered the Act in its entirety and it appears to have been the intention of the Legislature to limit the practice of those vetrinarians who acquired their license by virtue of the 5 year clause in both the Act of 1911 and 1919 to the confines of their respective counties. This is the opinion of this Department and you are so advised.

By your second question you desire to know if a person qualified as a veterinarian in Hill County under the 5 year clause of the Act of 1911, and who has recently moved to Ellis County, may secure a non-graduate license to practice in Ellis County. We think not. The Act of 1911 only permitted a practitioner of this kind to practice in Hill County without a license. He could not remove to another county and practice his profession without standing the examination. The Act of 1919 permits such a practitioner to continue practicing in the county of his residence by securing a license from the State Board of Veterinarian Medical Examiners by filing satisfactory evi-

dence of his former compliance with requirements of the Act of 1911 with reference to the 5 year clause. The license granted such persons is known as non-graduate license. In this connection your attention is again called to the fact that under the Act of 1911 those who qualified to practice only in the county of their residence were not granted license, but under the Act of 1919 such persons are granted license, but such license is only good in the county in which the practitioner resides at the time he receives the same. It appears from your letter that the resident of Hill County, who desires now to move to Ellis County, has obtained such license under the Act of 1919 for Hill County. The provisions of Section 5 of the Act of 1919 also make it unlawful for person to register under the 5 year practicing clause of said section and provide further "but the object of this provision is to permit persons who have heretofore lawfully registered to continue practicing under the five year clause."

If this paragraph stood alone, we might conclude that it was broad enough to permit the practitioner in the instant case to transfer his license to Ellis County, or to any other county, but it is a well known principle of statutory construction that the provisions of the entire Act must be construed together so as to arrive at the intent and purpose of the Legislature, and the very same section from which the above quotation is taken shows that it was the intention of the Legislature to permit those persons who qualify under the Act of 1911 to continue to practice only in the county of their residence by doing the things provided for in said Section 5. In this connection we again call attention to the provision of Section 22 of the Act of 1919, as heretofore quoted and which authorizes only that class of practitioners who have successfully passed examination provided for in the Act 6 to practice in counties other than their residence upon removal to such county by recording their license with the District Clerk of the county to which they move.

This law may work a great hardship upon veterinarians who are permitted to practice under the 5 year clause of the Act of 1911 and who have secured by virtue of said clause a license under the Act of 1919, but the Legislature has seen fit to prescribe those limitations and if hardships result therefrom, it is the business of the Legislature to remedy the same.

Yours very truly,
BRUCE W. BRYANT,
Assistant Attorney General.

Op. 2104, Bk. 53, P. 196.

MEDICAL PRACTICE—MASSEURS.

(1) Masseurs in acting within their particular sphere of labor, who publicly represent themselves as such, are exempt from the law requiring a certificate of their authority to be recorded before practicing that art.

(2) Persons who represent themselves to be masseurs, acting within their particular sphere of labor but who, in fact, attempt and undertake to cure diseases for pay, and represent themselves as able to cure diseases in that manner, cannot do so legally without the proper medical certificate in the clerk's office.

Vernon's Sayles Civil Statutes, Article 5742.

AUSTIN, TEXAS, June 25, 1919.

Hon. Tom C. Stevenson, County Attorney, Orange, Texas.

DEAR SIR: We have your communication of June 24th, addressed to this office, which is as follows:

"Enclosed please find a copy of an opinion handed down by Mr. Looney while he was Attorney General in 1913, which is self explanatory, but what I want is a later opinion from your department with reference to this law.

"At the same time, please advise me if you think Professor Williams comes within the meaning of the law with reference to masseurs, as per his advertising herewith enclosed."

Replying thereto will state that there has been no change in the law relating to masseurs since the opinion given out by Mr. Looney, then Attorney General, in July, 1913. The Act regulating the medical practice in this State and the section thereof exempting masseurs from its application is found in Vernon's Sayles Revised Civil Statutes, Article 5742. This article reads in part as follows:

"This law shall not apply to * * * masseurs in their particular sphere of labor who specifically represent themselves as such."

This provision of the statutes has been frequently construed by the courts of this State.

In the case of Milling vs. State, 150 S. W., 434, the Court of Criminal Appeals said:

"It was entirely proper, therefore, for the court to charge, as it did, that masseurs in their particular sphere of labor who publicly represent themselves as such are exempt from the law requiring a certificate of their authority to be recorded before practicing that art, but that if, notwithstanding he so represents himself as a masseur, he undertakes to cure disease for pay, and represents himself as able to cure diseases in that manner, he could not do so legally without the proper certificate registered in the clerk's office, etc. In other words, he could not hold himself out as a masseur, claiming to treat diseases without pay, and as a matter of fact treat human beings for disease and disorder as a doctor and indirectly charge them therefor, without a certificate registered, etc."

Thus you see that a question of fact arises in each case as is noted in the opinion of Attorney General Looney, as to whether or not a person holding himself out as a masseur does in actual practice treat or offer to treat diseases, and whether or not he receives for such services, either directly or indirectly, pay in any form. This rule is followed in Germany vs. State, 137 S. W., 130; in Newman vs. State, 124 S. W., 956; Dankworth vs. State, 136 S. W., 788.

It is not necessary, in view of the holdings in these cases, further to add to the opinion of Attorney General Looney, a copy of which you now have. There have been no amendments to this article of the law as it was then.

Yours very truly,

JOHN MAXWELL,

Assistant Attorney General.

Op. No. 2186, Bk. 53, P.—

WIDOWS OF CONFEDERATE SOLDIERS—PENSIONS—CONSTITUTION.

The Legislature cannot enact a law in contravention of a plain provision of the Constitution.

That portion of Section 2 of Chapter 86, Acts of the Regular Session of the Thirty-sixth Legislature, which disqualifies widows of Confederate soldiers from drawing a pension unless they were married to such soldiers prior to March 1, 1880, is in conflict with that portion of Section 51, Article 3 of the State Constitution which provides that pensions may be granted to widows of Confederate soldiers who were married to such soldiers prior to January 1, 1900.

Where one provision of a law is invalid and the others valid, the latter are not affected by the void provision, unless they are plainly dependent upon each other, and so inseparably connected that they cannot be divided without defeating the object of the statute.

Chapter 86, Acts Thirty-sixth Legislature; Section 51, Article 3 of the Constitution; Sutherland on Statutory Construction, Chapter 9, Volume 1.

ATTORNEY GENERAL'S DEPARTMENT, February 19, 1920.

Hon. M. L. Wiginton, State Comptroller, Capitol.

DEAR SIR: Your letter of the 9th instant, addressed to the Attorney General, has been received. It reads as follows:

"I am submitting the following matter for your consideration and advice:

"The widow of a Confederate soldier has filed with me an application for a Confederate pension, all requirements for approval having been complied with except the date of her marriage to the man on whose service record the pension is applied for. This shows to have been February 21, 1884.

"House Bill No. 103, passed at the Regular Session of the Thirty-sixth Legislature (Chap. 86, General Laws), provides that widows of Confederate soldiers or sailors must have been married to such soldier or sailor prior to Mach 1, 1880, before application may be approved.

"In connection with the passage of this Bill your attention is directed to Sec. 51, Article 3, of the State Constitution. Also to House Bill No. 25, passed by the Regular Session of the Thirty-third Legislature.

"Will the date of the marriage of this applicant forbid the approval of her application, or will the date fixed by the Constitution prevail? If date fixed by House Bill No. 103 is not to be observed will other provisions of this Bill be affected by such action?

In reply thereto, beg to advise that a portion of Section 2 of Chapter 86, Regular Session of the Thirty-sixth Legislature, reads as follows:

"* * * and to every widow of such a Confederate soldier or sailor who is in indigent circumstances and who became a resident of the State of Texas prior to January 1, 1900, and has been a bona fide resident of said State continually since January 1, 1900, and who was married to such soldier or sailor prior to *March 1, 1880*, and the fact of re-marriage since the death of the soldier or sailor shall not bar his surviving widow from receiving a pension hereunder if she be now a widow and in indigent circumstances, if she shall have been the wife of such soldier or sailor at the time of his death and left by him as his widow * * *"

The authority by which the Confederate Pension Law was enacted by the Legislature is to be found in Section 51, Article 3 of the State Constitution as amended at the November election 1912. That portion

of the Constitution which is applicable to the question under consideration reads, in part, as follows:

"The Legislature may create aid to indigent and disabled Confederate soldiers and sailors who came to Texas prior to January 1, 1900, and their widows in indigent circumstances, and who have been bona fide residents of the State of Texas since January 1, 1900, and *who were married to such soldiers and sailors anterior to January 1, 1900.*"

It will be observed from reading the Constitution that it was the intention of the people of the State to grant benefits to certain widows of Confederate soldiers who were married to such soldiers and sailors anterior to January 1, 1900. This provision of the Constitution is plain and unequivocal. The Legislature had no authority to place a limitation as to the date of marriage other than that fixed by the Constitution and when legislative enactments are contrary to the provisions of the Constitution, the latter must control.

You are, therefore, advised that that portion of Section 2 which attempts to deprive the widows of Confederate soldiers from the benefits of the pension act by limiting the time of their marriage to a date prior to March 1, 1880, is unconstitutional and void. You should read this Act and give it the effect as if the words "March 1, 1880" read "January 1, 1900."

In other words, the widows of Confederate soldiers who were married prior to January 1, 1900, and who meet all the other requirements of the Act, are entitled to the benefits of this law and the date of their marriage cannot be limited by the Legislature to any date anterior to January 1, 1900, the date fixed by the Constitution.

Yours very truly,
BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 2238, Bk. 53, P.—

MARTIAL LAW.

The Governor has authority to order the militia into active service whenever or wherever he may deem it necessary to secure the safety or welfare of the commonwealth, or to preserve the peace or lives or property of citizens of the State.

The recital in the Governor's proclamation establishing Martial Law in a portion of Galveston County cannot be controverted. He is made the sole judge of the necessity that may seem to demand the aid and assistance of the military forces of the State in suppressing disorder and restoring obedience to the law.

The acts of the Governor in exercising his constitutional power to suppress insurrection, preserve the peace, and execute the laws of the State cannot be interfered with by the courts so long as he does not exceed the power conferred upon him.

The militia, in suppressing an insurrection, preserving the peace and executing the laws under the Governor's orders, may, without turning them over to the civil authorities, seize and detain insurrectionists, and those aiding and abetting them, until the insurrection is suppressed and obedience to the law has been restored.

The arrest of insurrectionists, or those guilty of disorderly conduct, or

those aiding and abetting them, by the militia when acting under orders from the Governor to suppress an insurrection and to execute the laws does not violate the constitutional provision that the militia shall be subordinate to the civil power, since the act of the Governor is in his civil capacity.

The Governor as the Chief Executive, nor as Commander-in-Chief of the military forces of the State does not have the authority to suspend the laws of this State, this power being vested in the Legislature.

The Governor, who is the Chief Civil Magistrate of the State, has the authority under the Constitution "to call forth the militia to execute the laws of the State." And it is also made his duty to "cause the laws to be faithfully executed."

Where the local civil officers in a district declared to be under Martial Law make no attempt to enforce the law, suppress the insurrection and disorderly conduct, and make no attempt to restore obedience to the law, or where the local civil officers aid and encourage the lawless element in their unlawful acts, the Governor, as the Chief Civil Magistrate, has the power, if in his judgment it is necessary in order "to execute the laws of the State" and to "cause the laws to be faithfully executed," to suspend such officers from office during the period that Martial Law is in force in the district.

When the local officers have been suspended, the militia, under instructions from the Governor, as the Chief Civil Magistrate of the State, may proceed to enforce the civil law in the district declared to be under Martial Law.

Words and Phrases defining the term "Military Law", and the term "Martial Law."

AUSTIN, TEXAS, July 13, 1920.

To His Excellency Hon. W. P. Hobby, Governor of Texas, Austin, Texas.

SIR: In compliance with your request to be advised by this Department concerning certain phases of the situation existing in Galveston, you are advised concerning said legal questions as follows:

The Governor of the State of Texas has authority to order the militia into active service whenever or wherever he may deem it necessary to secure the safety or welfare of the commonwealth, or to preserve the peace, or lives, or property of citizens of the State.

The power to declare Martial Law is primarily a legislative one, which the Legislature may exercise whenever in its discretion the public affairs demand this extreme measure. Despan vs. Olney, 1 Curt, 306; 7 Fed. Cases No. 3822. In most jurisdictions the power has by general statute been delegated to the Executive.

For the present it is not necessary to determine the question whether or not, under the Constitution and laws of this State, the Governor has the power to declare Martial Law in the absolute sense; certainly he has the power to declare Martial Law in the qualified or restricted sense.

In Franks vs. Smith, 142 Ky. 232, 134 S. W. 484, the court, after reviewing the statutes conferring on the Governor the power to use the militia for the maintenance of law and order, said:

"We find from these sections of the Constitution and statute that the Governor is the chief civil officer of the commonwealth and is charged with the duty of taking care that the laws of the State are faithfully executed. That he has authority to order the militia into active service whenever or wherever he may deem it necessary to secure the safety or welfare of the commonwealth, or to preserve the peace or lives or property of citizens of

the State. That the militia can only be ordered into active service by him, but that it shall be at all times in strict subordination to the civil authorities. It will be observed that there is no limitation either in the Constitution or statute upon the power vested in the Governor to order into active service the militia of the State or to direct into what locality they shall go or operate. He is made the sole judge of the necessity that may seem to demand the aid and assistance of the military forces of the State in suppressing disorder and restoring obedience to the law. The presumption of course is that he will not exercise this high power unless it becomes necessary to maintain peace and quiet and protect the life or property of the citizen, after the local civil authorities have shown themselves unable to cope with or control the situation. But to his good judgment and sound discretion the law has left the final decision as to whether the military arm of the State shall be ordered into active service. If he acts wisely and prudently, well and good. If he acts hastily or unwisely or imprudently, there is no power in the courts to control or restrain his acts * * * He may act independently of any other civil authority if he desires to do so, or he may act in conjunction with the other civil authorities. He may on his own initiative order out the state militia, or he may wait until requested to do so by the local authorities in the community in which they are needed. He mav place the militia at the disposal of the civil authorities, or he may through military channels control and direct, within lawful bonds, their movements and operations. Which of these courses he will pursue, he alone is to judge."

In case of a local disturbance or insurrection which the local authorities are unable or unwilling to cope with, the Governor of a State may act of his own motion. In the case of In Re Boyle, 6 Idaho, 609, 45 L. R. A. 832, the Court said:

"The action of the Governor in declaring Shoshone county to be in a state of insurrection and rebellion, and his action in calling to his aid the military forces of the United States for the purpose of restoring good order and the supremacy of the law, has the effect to put into force, to a limited extent, martial law in said county. Such action is not in violation of the Constitution, but in harmony with it, being necessary for the preservation of government. In such case the government may, like an individual acting in self-defense, take those steps necessary to preserve its existence. If hundreds of men can arm themselves and destroy vast properties, and kill and injure citizens, thus defeating the ends of the government, and the government be unable to take all needful and necessary steps to restore law and maintain order, the State will then be impotent, if not entirely destroyed, and anarchy placed in its stead. It is no argument to say that the executive was not applied to by any county officer of Shoshone county to proclaim said county to be in a state of insurrection, and for this reason the proclamation was without authority. The recitals in the proclamation show the existence of one of two conditions, viz., that the county officers of said county, whose duty it was to make said application, were either in league with the insurrectionists, or else, through fear of the latter, said officers refrained from doing their duty. Under the circumstances, it was the duty of the executive to act without any application from any county officer of Shoshone county. This conclusion is based upon what we deem a correct construction of the provisions of our Constitution and statutes in force, construed in pari materia. It having been demonstrated to the satisfaction of the Governor after some six or seven years' experience that the execution of the laws in Shoshone county, through the ordinary and established means and methods, was rendered practically impossible, it became his duty to adopt the means prescribed by the statute for establishing in said county the supremacy of the law, and insure the punishment of those by whose unlawful and criminal acts such a condition of things has been brought about; and it is not the province of the courts to hinder, delay or place obstructions in the path of duty prescribed by law for the executive, but rather to render to him all the aid and assistance in their

power in his efforts to bring about the consummation most devoutly prayed for by every good and law-abiding citizen in the State."

The power is one based on necessity, finding its justification in civic self-defense. Griffin vs. Wilcox, 21 Ind. 370, wherein it was said:

"The right, in the military officer, to govern by martial law, as we have said, arises upon the fact of existing or immediately impending force, at a given place and time, against legal authority, which the civil authority is incompetent to overcome; and it is exercised precisely upon the principle on which self-defense justifies the use of force by individuals, robbers and burglars, and, in some cases rioters may be resisted and even slain, in self-defense, by private individuals. That is, there are cases where force must be resisted by force, instead of waiting for the civil authorities."

Similarly it was said in Luther vs. Borden, 7 How. 1, 12 U. S. (L. Ed.) 581:

"Unquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the State of this Union as to any other government."

The circumstances justifying the declaration of martial law in case of a domestic insurrection were stated in Commonwealth vs. Shortall, 265, Pa. St. 165, 98 Am. St. Rep. 759, wherein it was said:

"It is infrequently said that the community must be either in a state of peace or war, as there is no intermediate state, but from the point of view now under consideration this is an error. There may be peace for all the ordinary purposes of life and yet a state of disorder, violence and danger in special directions, which though not technically war has in its limited field the same effect, and if important enough to call for martial law for suppression, is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war. The condition in fact exists, and the law must recognize it, no matter how opinions may differ as to what it should be most correctly called. When the civil authority, though in existence and operation for some purposes, is yet unable to preserve the public order and resorts to military aid, this necessarily means the supremacy of actual force, and demonstration of the strong hand usually held in reserve and operating only by its moral influence, but now brought into active exercise, just as the ordinary criminal tendency in the community is held in check by the knowledge and fear of the law, but the overt law breaker must be taken into actual custody. When the mayor or burgess of a municipality finds himself unable to preserve the public order and security and calls upon the sheriff with the peace comitatus, the latter becomes the responsible officer and therefore the higher authority. So if in turn the sheriff finds his power inadequate, he calls upon the larger power of the State to aid with the military. The sheriff may retain the command, for he is the highest executive officer of the county, and if he does so, ordinarily the military must act in subordination to him. But if the situation goes beyond county control, and requires the full power of the State, the Governor intervenes as the supreme executive and he or his military representative becomes the superior and commanding officer. So too if the sheriff relinquishes the command to the military, the latter has all the sheriff's authority added to his own powers as to military methods."

Section 7, Article 4 of our State Constitution referring to the Governor says:

"He shall be commander-in-chief of the military forces of the State * * * He shall have power to call forth the militia to execute the laws of the State, to suppress insurrection * * *"

Section 10, Article 4, of our State Constitution, referring to the Governor, says:

"He shall cause the laws to be faithfully executed * * *"

Article 5892, Revised Statutes of 1911, provides that:

"Whenever any portion of the military forces of this State is employed in aid of the civil authority, the Governor, if in his judgment the maintenance of law and order will thereby be promoted, may, by proclamation, declare the county or city in which the troops are serving, or any specified portion thereof, to be in a state of insurrection."

The serious condition of affairs existing in Galveston subsequent to the 15th day of March, 1920, having been called to the attention of his Excellency, Hon. W. P. Hobby, Governor of Texas, and he having had such investigation of the facts made as to him seemed right and proper, he did on the 7th day of June, A. D. 1920, issue the following proclamation:

"Whereas, the congestion in the movement of commerce through the port of Galveston is preventing the receipt of goods by Texas merchants and threatening the outward shipment of Texas crops almost ready for market, and this condition has reached proportions affecting the business interests and material welfare of Texas and the property rights of citizens; and

"Whereas, this condition has heretofore caused acts of violence on citizens of the State and there is now imminent danger of insurrection, tumult, riot and breach of the peace, and serious danger to the inhabitants and property of citizens in the territory hereafter described; and

"Whereas, Section 19 of Article 1 of the Constitution of Texas provides in part: "No citizen of this State shall be deprived of life, liberty, property * * * except by the due course of the law of the land"; and

"Whereas, Section 10 of Article 4 of the Constitution charges the Governor with the faithful execution of the laws of the State; and

"Whereas, Section 7 of Article 4 of the Constitution of the State declares the Governor shall call forth the militia to execute the laws of the State and suppress insurrections.

"Now, therefore, I, W. P. Hobby, Governor of Texas and commander in chief of the military forces of the State, do, by virtue of the authority vested in me under the Constitution and laws of this State, declare that the conditions above described are clearly violative of the Constitution and laws of this State, and that by reason of which the conditions contemplated in Article 5892 of the Revised Civil Statutes of Texas, 1911, exist in the following described territory, to-wit:

"The City of Galveston, the Port of Galveston, and all water fronts and bays, including the causeway and Virginia Point of the mainland of Galveston, Pelican Island, and such portion of Bolivar Peninsula as is situated in Galveston County, and all water fronts and bays adjacent thereto, and I do declare martial law in said territory, effective at 12 o'clock m., 7th day of June, A. D. 1920; and I hereby direct Brigadier General Jacob F. Wolters to assume command of the situation in the territory affected, subject to orders of the Governor of Texas, the commander in chief of the military forces of this State, as given through the adjutant general.

"In testimony whereof, I have hereunto signed my name and caused the seal of State to be hereto affixed at my office at Austin, Texas, this 7th day of June, A. D. 1920, at 10:35 o'clock a. m. (Signed) W. P. Hobby, Governor of Texas. By the Governor, C. D. Mims, Secretary of State."

The recitals in the Governor's proclamation establishing martial law in the portion of Galveston County cannot be controverted, for as was said in the case of Franks vs. Smith, supra: "He," that is the Governor, "is made the sole judge of the necessity that may seem to demand the aid and assistance of the military forces of the State in suppressing disorder and restoring obedience to the law," and as said in the case of In Re Moyer, 35 Colo. 159, 85 Pac. 190:

"By the reply it is alleged that, notwithstanding the proclamation and determination of the governor that a state of insurrection existed in the county of San Miguel, that, as a matter of fact, these conditions did not exist at the time of such proclamation or the arrest of the petitioner, or at any other time. By Sec. 5, Art. 4, of our Constitution, the governor is the commander in chief of the military forces of the State, except when they are called into actual service of the United States; and he is thereby empowered to call out the militia to suppress insurrection. It must therefore become his duty to determine as a fact when conditions exist in a given locality which demand that, in the discharge of his duties as chief executive of the State, he shall employ the militia to suppress. This being true, the recitals in the proclamation to the effect that a state of insurrection existed in the county of San Miguel cannot be controverted. Otherwise, the legality of the orders of the executive would not depend upon his judgment, but the judgment of another coordinate branch of the State government. Re Boyle, 6 Idaho, 609, 48 L. R. A. 832, 96 Am. St. Rep. 286, 57 Pac. 706; Luther vs. Borden, 7 How. 1, 12 L. ed. 581; Ex parte Moore, 64 N. C. 802; Martin vs. Mott, 12 Wheat. 15, 6 L. ed. 537."

In Luther vs. Borden, supra, the Supreme Court of the United States said:

"It is true that in this case the militia were not called out by the President. But upon the application of the governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority, if it should be found necessary for the general government to interfere; and it is admitted in the argument that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed constitution. The interference by the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. For certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government, or in treating as wrong-doers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the act of congress to the sovereign States of the Union.

"It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a wilful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the constitution and laws of the United States, and must, therefore, be respected and enforced in its judicial tribunals."

And again in the case of Matin vs. Mott, 12 Wheat. 29, the Supreme Court of the United States said:

"whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of these facts."

The case above mentioned arose out of a call made by the President, by virtue of the power conferred upon him to call out the militia to repel invasion.

The acts of the Governor in exercising his constitutional powers to suppress insurrections, preserve the peace, and execute the laws of the State cannot be interfered with by the courts so long as he does not exceed the power conferred upon him. In Re Meyer, supra, it was said:

"By the Constitution, the supreme executive power of the state is vested in the governor, and he is required to take care that the laws be faithfully executed. Sec. 2, Art. 4. To this end, he is made commander in chief of the military forces of the State, and vested with authority to call out the militia to execute the laws and suppress insurrection. Sec. 5, supra. This authority is supplemented by Laws 1897, p. 204, Chap. 63, Sec. 2, whereby it is provided that, when an insurrection in the State exists or is threatened, the governor shall order out the National Guard to suppress it. These are wise provisions, for the people in their sovereign capacity, in framing the Constitution, as well as the general assembly, recognized that an insurrection might be of such proportions that the usual civil authorities of a county and the judicial department would be unable to cope with it. Through the latter, parties engaged in such insurrection might be punished, but its prompt suppression could only be secured through the intervention of the militia. Being vested with authority to employ the militia for a specific purpose, and it appearing from the return to the writ that the governor has called it into requisition for that purpose, his action through his subordinates cannot be interfered with, so long as he does not exceed the power which, under the fundamental law of the State and the acts of the Legislature in conformity therewith, he is authorized to exercise. People ex rel. Alexander vs. District Court, 29 Colo, 182, 205, 68 Pac. 242."

The militia, in suppressing an insurrection, preserving the peace and executing the laws under the Governor's orders, may, without turning them over to the civil authorities, seize and detain insurrectionists and those guilty of disorderly conduct and disobedience to the law, and those aiding and abetting them, until the insurrection and disorderly conduct has been suppressed, and obedience to the law has been restored.

In Re Moyer, supra, it was said:

"If, then, the military may resort to the extreme of taking human life in order to suppress insurrection, it is impossible to imagine upon what hypothesis it can be successfully claimed that the milder means of seizing the persons of those participating in the insurrection or aiding and abetting it may not be resorted to. This is but a lawful means to the end to be accomplished. The power and authority of the militia in such circumstances are not unlike that of the police of a city, or the sheriff of a county, aided by his deputies or posse comitatus in suppressing a riot. Certainly such officials would be justified in arresting the rioters and placing them in jail without warrant, and detaining them there until the riot was suppressed. Hallett,

J., in Re Application of Sherman Parker (no opinion for publication). If, as contended by counsel for petitioner, the military, as soon as a rioter or insurrectionist is arrested, must turn him over to the civil authorities of the county, the arrest might, and in many instances would, amount to a mere farce. He could be released on bail, and left free to again join the rioters or engage in aiding and abetting their action, and, if again arrested, the same process would have to be repeated, and thus the action of the military would be rendered a nullity. Again, if it be conceded that, on the arrest of a rioter by the military, he must at once be turned over to the custody of the civil officers of the county, then the military, in seizing armed insurrectionists and depriving them of their arms, would be required to forthwith return them to the hands of those who were employing them in acts of violence, or be subject to an action of replevin for their recovery, whereby immediate possession of such arms would be obtained by the rioters, who would thus again be equipped to continue their lawless conduct. To deny the right of the militia to detain those whom they arrest while engaged in suppressing acts of violence and until order is restored would lead to the most absurd results. The arrest and detention of an insurrectionist, either actually engaged in acts of violence or in aiding and abetting others to commit such acts, violates none of his constitutional rights. He is not tried by any military court, or denied the right of trial by jury; neither is he punished for violation of the law, nor held without due process of law. His arrest and detention in such circumstances are merely to prevent him from taking part or aiding in a continuation of the conditions which the governor, in the discharge of his official duties and in the exercise of the authority conferred by law, is endeavoring to suppress. When this end is reached, he could no longer be restrained of his liberty by the military, but must be, just as respondents have indicated in their return to the writ, turned over to the usual civil authorities of the county, to be dealt with in the ordinary course of justice, and tried for such offense against the law as he may have committed."

In the case of Luther vs. Borden, supra, the Supreme Court of the United States said:

"It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest any one, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it."

Thus in the suppression of an insurrection the military authorities may arrest and hold in military custody persons who are active in fomenting or participating in a disturbance of the peace. In the case of Moyer vs. Peabody, 212 U. S. 78, the Supreme Court of the United States said:

"It would seem to be admitted by the plaintiff that he was president of the Western Federation of Miners, and that, whoever was to blame, trouble was apprehended with the members of that organization. We mention these facts not as material, but simply to put in more definite form the nature of the occasion on which the Governor felt called upon to act. In such a situation we must assume that he had a right under the state constitution and laws to call out troops, as was held by the Supreme Court of the State. The constitution is supplemented by an act providing that 'when an invasion of or insurrection in the State is made or threatened the Governor shall order the National Guard to repel or suppress the same.' Laws of 1897, c. 63, Art. 7, Sec. 2, p. 204. That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and, of course, that

he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief."

In the case of In Re Jones, 71 W. Va. 567, 77 S. E. 1029, a state of war having been declared to exist by the Governor in a certain portion of the State of West Virginia, it was held in that case that the Governor may have caused to be apprehended, in or out of the military zone, all persons who shall willfully give aid, support, or information to the insurgents, and detain or imprison them, pending the suppression of the insurrection.

Again, in the case of Commonwealth vs. Shortall, supra, it was said:

"The effect of martial law, therefore, is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned, there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection. What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful. Whatever force is necessary for self-defense is also lawful. This law, applied nationally, is the martial law, which is an off-shoot of the common law, and although ordinarily dormant in peace, may be called forth by insurrection or invasion. War has exigencies, that cannot readily be enumerated or described, which may render it necessary for a commanding officer to subject legal citizens, or persons who though believed to be disloyal have not acted overtly against the government, to deprivations that would under ordinary circumstances be illegal; and he must then depend for his justification, not on the laws of war, but on the necessity which, as has been here seen, may warrant the taking of life, and will therefore excuse any minor deprivation."

The Governor, in employing the militia to suppress an insurrection, or when he calls forth the militia to execute the laws of the State, is merely acting in his capacity as the Chief Civil Magistrate of the State, and, although exercising his authority conferred by law through the aid of the militia under his command, he is but acting in a civil capacity. Thus in Re Moyer, supra, it was said:

"Nor do these views conflict with Sec. 22, Art. 2, of the Bill of Rights, which provides that the military shall always be in strict subordination to the civil power. The governor, in employing the militia to suppress an insurrection, is merely acting in his capacity as the chief civil magistrate of the State, and, although exercising his authority conferred by the law through the aid of the military under his command, he is but acting in a civil capacity. In other words, he is but exercising the civil power vested in him by law through a particular means which the State has provided for the protection of its citizens. No case has been cited where the precise question under consideration was directly involved and determined, but, in cases where the courts have had occasion to speak of the authority of the military to suppress insurrection and the means which may be employed to that end, it has been stated that parties engaged in riotous conduct render themselves liable to arrest by those engaged in quelling it. Re Kemp, 16 Wis. 382; Luther vs. Borden, supra; Johnson vs. Jones, 44 Ill. 142, 92 Am. Dec. 159."

The arrest of insurrectionists or those engaged in disorderly con-

duct, or those acting in disobedience to the law, or those aiding or abetting them, by the militia acting under orders of the Governor to suppress an insurrection and to execute the laws does not violate the constitutional provision that the militia shall be subordinate to the civil power since the act of the Governor is in his civil capacity. In addition to the last quotation taken from the Moyer case, the court in that case, continuing, said:

"The same rule necessarily applies to those found in the zone of the disaffected district who are aiding and abetting the insurrectionists; for such conduct, unless repressed, would result in the continuation of the insurrection, or at least render it more difficult to suppress. We therefore reach the conclusion that, independent of the questions of the authority of the governor to declare martial law, or suspend the privilege of the writ of habeas corpus, that the petitioner, on the showing made by the return, is not illegally restrained of his liberty. In reaching this conclusion we are not unmindful of the argument that a great power is recognized as being lodged with the chief executive, which might be unlawfully exercised. That such power may be abused is no good reason why it should be denied. The question simply is: Does it exist? If so, then the Governor cannot be deprived of its exercise. The prime idea of the government is that power must be lodged somewhere for the protection of the commonwealth. For this purpose laws are enacted and the authority to execute them must exist, for they are of no effect unless they are enforced. Neither is power of any avail unless it is exercised. Appeals of a possible abuse of power are often made in public debate. They are addressed to popular fears and prejudices and often give weight in the public mind to which they are not entitled. Every government necessarily includes a grant of power lodged somewhere. It would be imbecile without it. 1 Story, Const. Sec. 425; 1 Bailey, Jurisdiction, Sec. 296, p. 309."

The Governor as the Chief Executive, nor as Commander-in-Chief of the military forces of the State, does not have the authority to suspend the laws of this State, this power being vested solely in the Legislature.

Section 28, Article 1, of our State Constitution, provides that "no power of suspending laws in this State shall be exercised except by the Legislature."

The Governor, as the Chief Civil Magistrate of the State, has the authority under the Constitution "to call forth the militia to execute the laws of the State." Section 7, Article 4, of the State Constitution. And it is made the duty of the Governor to "cause the laws to be faithfully executed." Section 10, Article 4, State Constitution.

Where the local civil officers in a district declared to be under martial law make no attempt to enforce the law, or to apprehend those guilty of insurrection, or disorderly conduct, and make no attempt to cause the laws of the State or the municipality to be obeyed, but by their acts and conversation aid and encourage the lawless element in their unlawful acts, the Governor, as the Chief Civil Magistrate, has the power, if in his judgment it is necessary in order "to execute the laws of the State" and in order that the laws of the State may "be faithfully executed," to suspend such officers from office during the period that martial law is in force in the district.

In the case of Moyer vs. Peabody, supra, the Supreme Court of the United States said:

"When it comes to a decision by the head of the State upon a matter in-

volving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. See Keely vs. Sanders, 99 U. S. 441, 446. This was admitted with regard to killing men in the actual clash of arms, and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent apprehended harm. As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a State law authorizing the Governor to deprive citizens of life under such circumstances was consistent with the Fourteenth Amendment, we are of opinion that the same is true of a law authorizing by implication what was done in this case."

It seems to our mind to be self-evident that if the Governor, as the Chief Civil Magistrate of the State, in enforcing the laws of the State by aid of the militia has the right in order that the laws of the State may be enforced and properly executed to take human life, that he would certainly have the lesser power of suspending from office minor officials who by their acts are interfering with and delaying the proper execution and enforcement of the law.

The existence of martial law depends fundamentally on necessity. It does not supersede the civil authority, but finding that authority destroyed by insurrection it establishes a martial government to avoid the anarchy which would otherwise be inevitable. The powerlessness of the civil arm of government is therefore a condition precedent to the exercise of military authority. As was said in the case of In Re Egan, 5 Blatchf, 319, 8 Fed. Cas. No. 4303:

"This being the nature and extraordinary character of martial law, which, as observed by Sir Matthew Hale, is not law, but something indulged rather than allowed as law, all authorities agree that it can be indulged only in cases of necessity, and that when the necessity ceases, martial law ceases. When a government or country is disorganized by war, and the courts of justice are broken up and dispersed, or are disabled, through the prevalence of disorder and anarchy, from exercising their functions, there is an end of all law; and the military power becomes a necessity, which is exercised under the form, and according to the practice and usage, of martial law. As has been said by a distinguished civilian, 'when foreign invasion or civil war renders it impossible for courts of law to sit, or to enforce the execution of their judgments, it becomes necessary to find some rude substitute for them, and to employ for that purpose the military, which is the only remaining force in the community; and, while the laws are silenced by the noise of arms, the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society; but no longer.' This necessity must be shown affirmatively by the party assuming to exercise this extraordinary and irregular power over the life, liberty and property of the citizen, whenever it is called in question."

It follows that where the courts are open and their process unobstructed the arrest and trial of persons by military authority is unauthorized.

In re Egan, 5 Blatchf. 319, 8 Fed. Cas. No. 4, 303;
Ex parte Merryman, Tancy 246, 17 Fed. Cas. No. 9, 487;
Ex parte Hilligan, 4 Wall, 2, 18 U. S. (L. ed.) 281;
Bean vs. Beckwith, 18 Wall. 510, 21 U. S. (1 ed.) 849;
Johnson vs. Jones, 44 Ill. 142, 92 Am. Dec. 159;
Sheehan vs. Jones, 44 Ill. 167;
Carver vs. Jones, 45 Ill. 334;
Griffin vs. Wilcox, 21 Ind. 370;

McLaughlin vs. Green, 50 Miss. 453;
Jones vs. Seward, 40 Barb. (N. Y.) 563;
Matter of Eagan, 6 Park. Crim. (N. Y.) 675;
Ex parte Benedict, 4 West L. Month (Ohio) 449, 3 Fed. Cas. No. 1, 292;
In re Kemp, 16 Wis. 359.

In ex parte Vallandigham, 5 West. L. Month 37, 28 Fed. Cases No. 16816, however, the arrest of a citizen and his trial by military commission for disloyal utterances in the State of Ohio during the Civil War was sustained on the ground that the scene of actual war was so close and disloyalty so prevalent that the mere fact that the courts were open and unobstructed did not exclude the military government. In the leading case of ex parte Milligan, 4 Wall. 2, 18 U. S. (L. ed.) 281, it is laid down as the test of whether a civil government exists, precluding martial law, that the courts must be open and their process unobstructed. In Commonwealth vs. Shortall, supra, it was denied that martial law can exist only where the courts are closed; that case, however, involving no question of military arrest or trial but only the guarding of threatened property in a time of insurrection.

In the case of State vs. Brown, 71 W. Va. 519, 77 S. E. 243, the court held that martial law may be maintained an doffenders arrested and tried by military commission in a district which is in a state of insurrection though courts having jurisdiction over offenders in such district are in undisturbed session elsewhere.

The Constitution of the State authorizes and empowers the Governor "to call forth the militia to execute the laws of the State." Section 7, Art. 4, State Constitution. It is made the duty of the Governor to "cause the laws to be faithfully executed." Section 10, Art. 4, State Constitution.

The power given to the Governor to execute the laws of the State must be exercised in a constitutional manner, but no authority exists that can constitutionally interfere with or prevent the Governor from exercising this power given him by the Constitution. As previously stated, the Governor is the sole and only judge as to when and where the necessity exists for calling forth the militia to execute the laws of the State.

When the law in a certain county or district is not being faithfully executed either because of inability or unwillingness on the part of local officers to faithfully execute the laws, it then becomes the constitutional duty of the Governor to "cause the laws to be faithfully executed," and as an aid in performing this duty, he has the power to "call forth the militia to execute the laws of the State." In the exercise of the power given him by the Constitution and in the discharge of his duty under the Constitution, he has the power to do any and everything necessary to be done in order that the laws of the State may be faithfully executed except as he may be restricted by other provisions in the State Constitution.

It follows then that in the event the Governor should decide as a matter of fact that in order for him to exercise the power given him by the Constitution, and to discharge the duty laid upon him by the Constitution with reference to enforcing and executing the laws of this State, that certain local officers in the district in which martial law has been declared were not only failing and neglecting to execute the

law or to attempt to have the law executed themselves, but instead were engaged by acts and conversation in interfering with and preventing the Governor himself, with the aid of the military forces, to faithfully execute the laws, that the Governor may, in pursuance of his duty as laid upon him by the Constitution and under the authority given him by the Constitution, suspend such officers from the discharge of their official duties, pending the existence of martial law.

This exact question on the right of the Governor to suspend local officials who fail and neglect to execute the laws themselves and who aid and assist the lawless elements in their attempt to disobey the law, has never been, so far as we have been able to find, before the courts. However, two text-book writers have stated unqualifiedly that the Governor has this authority. Birkhimer, Military Government and Martial Law, 496. Bargar Law of Riot Duty, 143. The latter writer has this to say:

"As, however, a civil officer apparently trying to properly perform his duty cannot be arrested, the occasions when it will be necessary to arrest him in order to oust will be extremely rare and on these occasions the governor might simply treat the civil officer as a lawless private person. He will then remove him and may at once appoint a successor."

When the local officials have been suspended, the militia, under instructions from the Governor, the Chief Civil Magistrate of the State, may proceed to enforce the civil law in the district declared to be under martial law.

The case of State vs. Brown, supra, decided by the Supreme Court of West Virginia, discusses several phases of martial law and the power and authority of the Governor in enforcing the law with the aid of the militia. We quote the opinion in full:

"L. A. Mays and S. F. Nance, in the custody of M. L. Brown, warden of the penitentiary of this State, under sentences of a military commission, appointed by the Governor to sit in a territory corresponding in area and boundaries with the magisterial district of Cabin Creek, in the County of Kanawha, in which the said Governor had declared a state of war to exist, by proclamation duly issued and published, seek discharges and liberation upon writs of habeas corpus duly issued by this court. Upon these writs, lack of authority in the Governor to institute, in cases of insurrection, invasion, and riot, martial law is denied in argument. A further contention is that his power to do so extends only to the inauguration or establishment of a limited or qualified form of such law, subordinate to the civil jurisdiction and power to a certain extent; and certain provisions of the State Constitution are relied upon as working this restraint upon the executive power, among them the provisions of section 4, of article 3, saying, "The privilege of the writ of habeas corpus shall not be suspended," and the provision of section 12 of the same article saying, "The military shall be subordinate to the civil power; and no citizen, unless engaged in the military service of the State, shall be tried or punished by any military court, for any offense that is cognizable by the civil courts of the State." A minor question is whether offenses committed immediately before the proclamation of martial law, but connected with the insurrection and operative therein, may be punished by a military commission, acting within the period of martial occupation and rule.

All agree as to the character and scope of martial law, unrestrained by constitutional or other limitations. The will of the military chief, in this instance the Governor of the State, acting as commander in chief of the army, is, subject to slight limitations, the law of the military zone or theatre of war. It is sometimes spoken of as a substitute for the civil law. It is said,

also, that the proclamation of martial law ousts or suspends the civil jurisdictions. These expressions are hardly accurate. The invasion or insurrection sets aside, suspends, and nullifies the actual operation of the Constitution and laws. The guaranties of the Constitution, as well as the common law and statutes, and the functions and powers of the courts and officers, become inoperative by virtue of the disturbance. The proclamation of martial law simply recognizes the status or condition of things resulting from the invasion or insurrection, and declares it. In sending the army into such territory to occupy it and execute the will of the military chief for the time being, as a means of restoring peace and order, the executive merely adopts a method of restoring and making effective the Constitution and laws within that territory, in obedience to his sworn duty to support the Constitution, and execute the laws.

(1) This power is a necessary incident of sovereignty. It is necessary to the preservation of the State. Subject to the jurisdiction and powers of the federal government, as delegated or surrendered up by the provisions of the federal constitution, this State is sovereign and has the powers of a sovereign State. Like all others, it must have the power to preserve itself. Where that power resides, and how it is to be exercised, are questions about which there has been some difference of opinion among jurists and statesmen. Whether the executive, without legislative authority, may exercise it need not be discussed. Section 92 of chapter 18 of the Code confers upon the Governor authority to declare a state of war in towns, cities, districts and counties in which there are disturbances by invasion, insurrection, rebellion, or riot. Moreover, section 12 of article 7 of the Constitution itself seems to confer such authority upon the Governor, saying he "may call out" the military forces "to execute the laws, suppress insurrection, and repel invasion." Hence we may say the inauguratión of martial law in any portion of this State, by proclamation of the Governor, has both constitutional and legislative sanction in express terms.

(2) The provisions against the suspension of the writ of habeas corpus and trial of citizens, by military courts, for offenses cognizable by the civil courts cannot, in the nature of things, be actually operative in any section in which the Constitution itself and the functions of the courts have been ousted, set aside, or obstructed in their operation by an invasion, insurrection, rebellion, or riot. In such cases, the constitutional guaranties of life, liberty and property have ceased to be operative and efficacious. The lives, liberty and property of the people are at the mercy of the invading, insurrectionary, rebellious, or riotous element in control. Their will and desires, not the Constitution and laws, rule and govern. There is no court with power to grant or enforce the writ of habeas corpus within the limits of such territory. There is no court in which a citizen can be tried, nor any whose process can be made effective for any purpose. No doubt the Constitution and laws of the State are theoretically or potentially operative; but they are certainly not in actual and effective operation. The exercise of the military power, disregarding, for the time being, the constitutional provisions relied upon, is obviously necessary to the restoration of the effectiveness of all the provisions of the Constitution, including those which are said to limit and restrain that power.

To ascertain the extent and purpose of the incorporation of these restrictive provisions of the Constitution, they must be read in the light of principles developed by governmental experience in all ages and countries, and universally recognized at the date of the adoption of the Constitution, and not expressly abolished or precluded from operation by any terms found in the instrument. In the interpretation of contracts, statutes and constitutional provisions, words are often limited and restrained to a scope and effect somewhat narrower than their literal import, upon a presumption against intent to interfere with, or innovate upon, well-established and generally recognized rules and principles of public policy not expressly abolished. Railway Co. vs. Conley & Avis, 67 W. Va. 129, 165, 67 S. E. 613; Reeves vs. Ross, 62 W. Va. 7, 57 S. E. 284; Brown vs. Gates, 15 W. Va. 131; Cope vs. Doherty, 2 Deg. & J. 614; Dillon vs. County Court 60 W. Va. 339, 55 S. E. 382. Nothing can be higher in character or more indispensable than this

power of self-preservation. The experience of all civilization has demonstrated its necessity as an incident of sovereignty. In the organization of the state, its citizens likely did not intend to omit or dispense with a power vital to its very existence or the maintenance and efficiency of its powers, under circumstances which inevitably arise in the life of every state. Hence there is strong ground for a presumption in favor of the retention of the power in question, which finds support in other constitutional provisions, authorizing the maintenance of a military organization, and the use of it by the executive in the repulsion of invasion and suppression of insurrections and riots. Art. 7, Sec. 12. No rebuttal of the presumption nor abolition of this sovereign power is found in any express terms of the Constitution.

The guaranties of supremacy of the civil law, trial by the civil courts, and the operation of the writ of habeas corpus should be read and interpreted so as to harmonize with the retention in the executive and legislative departments of power necessary to maintain the existence of such guaranties themselves. It is unreasonable and logical. Otherwise, the whole scheme of government may fail. So interpreted, they have wide scope and accomplish their obvious purpose. The attempt to extend them further would be futile and result in their own destruction. The interruption is of short duration. It is only while military government is used as an instrument of warfare that the commander's will is law. New Orleans vs. Steamship Co. 20 Wall, 387, 22 L. Ed. 354; Ex parte Milligan, 4 Wall, 2, 127, 18 L. Ed 281. That a military occupation of a territory, in a state of peace and order, differs radically from the prosecution of a war in the same territory is well established. In Ex parte Milligan, cited in the former case, the military is subordinate to the civil power, no matter whether the occupancy under tranquil condition precedes or follows the military operations. Martial law is operative only in such portions of the country as are actually in a state of war, and continues only until pacification. Ordinarily the entire country is in a state of peace, and, on extraordinary occasions calling for military operations, only small portions thereof become theaters of actual war. In these disturbed areas, the paralyzed civil authority can neither enforce nor suspend the writ of habeas corpus, nor try citizens for offenses nor sustain a relation of either supremacy or subordination to the military power, for in a practical sense it has ceased. But, in all the undisturbed, peaceable, and orderly sections, the constitutional guaranties are in actual operation and cannot be set aside. Ex parte Milligan, cited. In most, if not all, of the instances in which the civil courts have treated sentences of military commissions as void, the commissions acted, and the sentences were pronounced, in tranquil territory, not covered by any proclamation of martial law, in which there was no actual war, and in which the Constitution and laws were in full and unobstructed operation. An insurrection in a given portion of a state, or an invasion thereof by a foreign force, does not produce a state of war outside of the disturbed area. A nation may be at war with a foreign power, and yet have no occasion to institute martial law anywhere within its own boundaries, as in the case of the United States in the war with Spain. So, during the Civil War, there were vast areas and whole states in which there was no actual war.

(3) It seems to be conceded that, if the Governor has the power to declare a state of war, his action in doing so is not reviewable by the courts. Of the correctness of this view, we have no doubt. The function belongs to the executive and legislative departments of the government, and is beyond the jurisdiction and powers of the courts. There is room for speculation, of course, as to the consequences of an arbitrary exercise of this high sovereign power; but the people, in the adoption of their Constitution, may well be supposed to have proceeded upon a well-grounded presumption against any such action, and assumed that the evil likely to flow from an attempt to hamper and restrain the sovereign power in this respect might largely outweigh such advantages as could be obtained therefrom. We are not to be understood as saying there would be a lack of remedy in such case. The sovereign power rests in the people, and may be exerted through the Legisislature to the extent of the impeachment and removal from office of a Governor for acts of usurpation and other abuses of power.

(4) Power to establish a military commission for the punishment of offenses committed within the military zone is challenged in argument; but we think such a commission is a recognized and necessary incident and instrumentality of martial government. A mere power of detention of offenders may be wholly inadequate to the exigencies and effectiveness of such government. How long an insurrection or a war may last depends upon its character. Such insurrections as are likely to occur in a state like this are mild and of short duration. But no man can foresee and foretell the possibilities, and a government must be strong enough to cope with great insurrections and rebellions, as well as mild ones.

(5) That the courts of Kanawha county sit within the limits of that county and outside of the military zone does not preclude the exercise of the powers here recognized as vested in the executive of the state. These petitioners were arrested within the limits of the martial zone. There the process of the courts did not and could not run during the period of military occupation, and presumptively the state of affairs in that district, at the time of the military occupation and immediately before, was such as to preclude the free course and effectiveness of the civil law and the process of the court, however effective they may have been in other sections of Kanawha county. The Constitution and laws themselves admit the obvious inadequacy and insufficiency of ordinary process and penalties, in cases of insurrection, by authorizing military suppression thereof. Participants therein, arrested and committed to the civil authorities, could easily find means of delaying trial, and, liberated on bail, return to the insurrectionary camp and continue to render aid and give encouragement by unlawful acts; and demonstration of their ability to do so would itself contribute to the maintenance of the uprising. The civil tribunals, officers and processes are designed for vindication of rights and redress of wrongs in times of peace. They are wholly inadequate to the exigencies of a state of war, incident to an invasion or insurrection. So the Legislature evidently regards them, since its expressly authorizes the Governor, "in his discretion," to "declare a state of war in towns, cities, districts and counties." He is not required, by any principle of international or martial law, the Constitution, or statute, to institute it, when proper by counties. On the contrary, the statute authorizes it as to a town, city, or a district, and he is not limited to towns, cities, and districts in which the courts sit in times of peace, nor forbidden to put a town, city, or district of a county under martial law rule by the sitting of courts elsewhere in the county. Section 2 of chapter 17 of the Virginia Code of 1860 was the same in principle, authorizing the Governor to call forth the militia to suppress combinations for dismembering the state or establishing a separate government in any part of it, or for any other purpose, powerful enough to obstruct, in any part of the state, the due execution of the laws thereof, in the ordinary course of proceeding. The Virginia constitutional guaranties were then about the same as ours. "There was a provision against suspension of the writ of habeas corpus in any case." Article 4, Sec. 15. In these statutes are found legislative constructions of Constitutions, harmonizing with the conclusions here stated as to the relation and purposes of the constitutional provisions, and also the power to place a part of a county under martial rule, notwithstanding the courts may be open in some other part thereof.

(6) The offenses for which the petitioners were punished were committed in an interim between two successive periods of martial government. The first proclamation was raised about the middle of October, and the disturbances which had occasioned it immediately broke out again, and these offenses were of the kind and character which had made the occupation necessary. About the middle of November there was a second proclamation of a state of war. Just a few days before this second declaration, those offenses were committed, and the offenders were found within the military zone, and were arrested, tried and convicted. If the offenses had been wholly disconnected with the insurrection and not in furtherance thereof, there might be doubt as to the authority of the military commission to take cognizance of them, although there are authorities for such jurisdiction and power as to any sort of offense committed within the territory over which martial

law has been declared, and remaining unpunished at the time of the declaration thereof.

We are not reviewing the sentences complained of, nor ascertaining or declaring their legal limits. Our present inquiry goes only to the question of legality of the custody of the respondent at the present time and under the existing conditions. The territory in which the offenses were committed is still under martial rule. It suffices here to say whether the imprisonment is, under present conditions, authorized by law, and we think it is. We are not called upon to say whether the end of the reign of martial law in the territory in question will terminate the sentences, and upon that question we express no opinion."

The law of civil government under military occupation, prepared by Chas. E. Magoon, Law Officer, Bureau of Insular Affairs, War Department, and which was submitted to Hon. Elihu Root, Secretary of War, and prepared for publication at the request of Mr. Root, on page 29, says:

"It is important to ascertain whether or not the head of the military government of Porto Rico may now exercise the power of legislation. In time of war and interritory affected by military operations undoubtedly the head of a military government may exercise this power. War no longer exists in Porto Rico. The sovereignty of the United States has attached permanently to the island, and the Government of the United States is in peaceable possession of the territory. The right to legislate therefor now belongs to Congress, and I see no reason for asserting that the jurisdiction of Congress has been suspended or Congress in any way incapacitated for exercising this right. It is the inability of the duly authorized agency of government to perform its proper function which authorizes the performance of that function by martial rule. As to legislation for Porto Rico, this justification cannot be asserted.

Notwithstanding this want of authority to legislate, the head of the military government of civil affairs in Porto Rico is at liberty to issue military orders which the inhabitants are bound to obey. His warrant therefor is the vix major at his command and constitutes an authority akin to the police power of a State. Therefore such orders should relate exclusively to the internal or domestic affairs of the island. These orders differ from legislation in that they lack abiding force or permanency, since their force would cease upon the military government being withdrawn, unless Congress, by appropriate action, should continue them in force and effect.

In respect to the exercise of this authority, it is necessary for those charged with the high duty of administering military government to bear in mind that a military government in time of peace is not only a lawful government, but also a government of law, and that law is, to quote Blackstone, "a rule of civil conduct prescribed by the supreme power of the state; * * * not a transient, sudden order from a superior to or concerning a particular person, but something permanent, uniform and universal."

This would not mean that the Governor, or the commanding officer, would have the authority to annul or set aside the decree of the civil court which might be in session in the district under martial law, for in Raymond vs. Thomas, 91 U. S. 712, the court held void an order of General Canby, issued May 28, 1868, whereby he undertook to annul the decree of the Court of Chancery of South Carolina. The court said:

"It was an arbitrary stretch of authority needful to no good end that can be imagined. Whether Congress could have conferred the power to do such an act is a question we are not called upon to consider. It is an unbending rule of law, that the exercise of military power where the rights of the citi-

zens are concerned shall never be pushed beyond what the exigency requires. Citing Mitchell vs. Harmony, 13 How., 115; Worden vs. Bailey, 4 Taunt, 67; Fabrigas vs. Moyston, 1 Cowp. 161."

An interesting question presents itself as to how far martial law and civil law are inconsistent with each other. In Winter vs. Dickerson, 49 Ala. 92, the court quotes with approval from the opinion of the Attorney General Cushing, where he says that martial law suspends for the time being all of the laws of the land, and substitutes in their place no law, that is, the mere will of the military commander. That the civil law is suspended, or at least made subordinate and its place is taken by martial law under the supervision if not the direct administration of the military power.

Martial law is executive, the militia being on the spot to execute it where no civil authority exists; but where it does exist, it is held in Griffin vs. Wilcox, 21 Ind. 370, that the Constitution is imperative that it shall be paramount of the militia.

In Ex parte Milligan, supra, Mr. Justice Davis, writing the opinion, said:

"If, in a foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion, it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be 'mere lawless violence.'"

A minority opinion was filed which is discussed in Johnson vs. Johnson, 92 Am. Dec. 181, where it is said:

"The opinion of the minority was to the effect that martial law was not necessarily limited to time of war, but might be exercised at other periods of 'public danger,' and that the fact that the civil courts are open is not controlling against its exercise, since they 'might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish with adequate promptitude and certainty the guilty.' This opinion of the minority has been considered the sounder and more reasonable one. 2 Winthrop on Military Law, 38. And the opinion of the majority has been otherwise criticised as confusing martial law with military government: Pomeroy's Constitutional Law, Sec. 714; 2 Winthrop on Military Law, 39."

That martial law is not inconsistent with the administration of justice by the citizens in the civil courts, such courts being authorized by the military power to exercise their functions, is held in Kimbell vs. Taylor, 2 Woods, 37, Federal cases No. 7775:

In Johnson vs. Duncan, 3 Mart. (La.) 530, 6 Am. Dec. 675, it is said:

"Under the constitution and laws of the United States, the President has a right to call, or cause to be called, into the service of the United States, even the whole militia of any part of the Union, in case of invasion. This power exercised here by his delegate has placed all the citizens subject to militia duty under military authority and under military law. That I conceive to be the extent of the martial law, beyond which all is usurpation of power. In that state of things, the course of judicial proceedings is certainly much shackled, but the judicial authority exists and ought to be exercised whenever it is practicable. Even where circumstances have made it necessary to suspend the privilege of the writ of habeas corpus, and such suspension has been pronounced by the competent authority, there is no reason why the administration of justice generally should be stopped; for, because the citizens are deprived temporarily of the protection of the tribunals as to the safety of their persons, it does by no means follow that they cannot have recourse to them in all other cases."

There is a well-defined and recognized distinction between military law and martial law. The former applies to those rules enacted by the legislative power of the Government and regulation of the army and navy and the militia when called into the active service of the United States, while the latter applies to that government and control which military commanders may lawfully exercise over the persons and property of citizens and individuals not engaged in the land or naval service. Johnson vs. Jones, 44 Ill. 142, 92 Am. Dec. 159. In re. Kemp 16 Wis. 359.

The commanding officer in a district declared to be under martial law is charged with the execution of both the military law which applies to the troops under his command, and to the execution of the martial law which applies to all persons and property within the district declared to be under martial law.

Knowing the importance of getting this opinion prepared and in your hands at the earliest practicable moment, and in view of the large number of cases read and considered, and in view of having been interrupted many times with other matters and duties, we have not, in dictating this opinion, arranged the subjects considered and the authorities in support thereof with that degree of regularity and nicety which the precise, systematic and well-ordered mind demands. However, we believe that we have exhausted the American authorities on the subjects discussed, and we have largely refrained from expressing opinions, or from attempting to interpret the meaning of the decisions cited, preferring to quote the exact language of the courts instead.

This opinion is, therefore, transmitted to you with the sincere hope that it may be of some assistance to you in the proper discharge of your onerous and responsible duties as the Chief Executive and as the Commander-in-Chief of the military forces now in the district declared by your proclamation of June 7, 1920, to be under martial law.

Very truly yours,

E. F. SMITH,

Assistant Attorney General.

Op. No. 1990, Bk. 52, P. 74.

ROADS AND HIGHWAYS—MINERAL RIGHTS.

(1) Counties can not lease public highways for oil and gas purposes.
(2) Where highways are deeded to a county for road purposes, the county does not own the mineral rights thereunder.
V. S. R. S., Articles 6859-6861.

AUSTIN, TEXAS, March 5, 1919.

Hon. Richard Dyess, County Judge, Albany, Texas.

DEAR SIR: Your communication of February 17th, addressed to this office, is at hand, in which you ask the following questions:

"First: I should like to have your opinion as to whether a county can lease its public roads for oil and gas purposes.
"Second: If it is stipulated in the deed to the county that the land was deeded to the county for road purposes, does the county own the mineral rights to this land?"

Vernon's Sayles' Revised Statutes, Articles 6859 and 6861, read as follows:

"Art. 6859.—What roads are declared to be public.—All public roads and highways that have heretofore been laid out and established agreeably to law, except such as have been discontinued, are hereby declared to be public roads."
"Art. 6861.—Shall not be changed, except, etc.—No public roads shall be altered or changed, except for the purpose of shortening the distance from the point of beginning to the point of destination, unless the court upon a full investigation of the proposed change finds that the public interest will be better served by making the change; that said change shall be by unanimous consent of all the commissioners elected."

Elliott on Roads and Streets, 2d Edition, Section 645, says that:

"Public highways belong from side to side and end to end to the public and any structure or superstructure which materially encroaches upon a public street and impedes same is a nuisance per se, and may be abated, notwithstanding space is left for the passage of the public."

Thus we see from the statute and the text cited that county highways are set apart for public use.

It is practically universally held that land and especially highways, dedicated to public use, cannot be leased for private purposes. In 3 Dillon, 5th Edition, Section 997, these words are used:

"A city can not, as landlord or lessor, make a lease of real estate owned by it, which is held for public purposes, when the making of such lease is inconsistent with these purposes,"

citing in support thereof, among other cases,

Corpus Christi vs. Central Wharf Co., 8 T. C. App., 94;
Weekes vs. Galveston, 21 T. C. App., 102;
Lowrey vs. Pekin, 20 Ill., 575.

The author further says:

"It would seem that a lease of land, held for public purposes, is subject always to the paramount obligation of the municipality to devote it to these purposes, and if the use and occupation of the lands by the lessee at any time becomes inconsistent with and prevents the application of lands to these purposes, the lessee can not claim the right to hold same as against the obligation of the city to devote the lands to these purposes."

A full discussion of this principle is found in notes 25, L. R. A., N. S., 400, which shows practically the universal rule to be that lands set apart for streets and highways cannot be leased for private purposes.

Furthermore, counties have only such powers as are affirmatively granted to them by the Legislature.

15 Corpus Juris, page 457;
15 Corpus Juris, page 537;
Bland vs. Orr, 90 Texas, 492;
Baldwin vs. County, 88 Texas, 480;
Edwards County vs. Jennings, 33 S. W., 585;
Burnett vs. Abbott, 51 Ind., 255;
Von Rosenberg vs. Lovett, 173 S. W., 508.

In all of which cases it is held that the powers of the county are limited specifically to those powers affirmatively granted by the Legislature.

We find, therefore, that inasmuch as county highways are by statute dedicated to the public, that it is a universal rule that lands dedicated to public use cannot be used for private purposes except by action of the Legislature, and that the statutes of this State nowhere authorize counties to lease their highways for any purpose whatever.

I would, therefore, answer your first question in the negative and say that counties do not have the authority to lease their public roads for oil and gas purposes.

In answer to your second inquiry, in the case of Concel et ux vs. City of Sherman et al, 14 S. W., 31, and 25 S. W., 57, in which case plaintiffs sued the City of Sherman for a strip of land sold by them to said city "for street purposes and none other," and in the deed stipulated that no rights should pass to the city other than would have been acquired had the city procured, by condemnation, said strip for street purposes only and in which the facts further show that after procuring said right under said deed, said city contracted with private persons to sink wells for the purpose of furnishing water for city waterworks, the court said the rule that land taken by the public for public use cannot be appropriated for another use to the detriment of the owner, affords the only adequate protection of the citizen's constitutional right to be compensated for the condemnation or use of his property for the public benefit.

In the City of Dubuque vs. Benson, 23 Iowa, 248, it was held that where a city took land under a plat which said the streets and alleys were dedicated for street purposes and those only that the city only acquired an easement in the streets and that the city does not own the mineral rights thereunder.

Elliott on Roads and Streets, Sec. 230, 2d Edition, says:

"Rights of owner of fee where easement is taken.—Where nothing but the right to use the land is acquired, the owner of the fee retains a right to make such use of the land as is not inconsistent with the easement acquired by the corporation. Nothing can be done by him that will make the use of the way inconvenient or unsafe, nor can he do anything that will disturb the public in the free use of the way, but, subject to the superior right of the public, the owner is entitled to the use of the way and to all the profits that accrue from it."

It has been repeatedly held in this State that the abutting owner owns title in highways to the middle thereof and that where title to a street or highway is acquired by prescription, dedication or condemnation, the public acquires only an easement and right of user therein, and that the fee and all rights incident thereto remain in the original owner.

Lynn vs. McDonald, 14 S. W., 261;
Railway Company vs. Boles, 161 S. W., 914;
Right-of-way Oil Company vs. Gladys City Oil and Gas Manufacturing Company, 106 Texas, 94;
8th L. R. A., N. S., 422.

Therefore, in answer to your second inquiry, I would say that when land is deeded to the county for road purposes, the county does not own the mineral rights in said land.

Very truly yours,
JOHN MAXWELL,
Assistant Attorney General.

MUNICIPAL CORPORATIONS—PUBLIC HIGHWAYS—COUNTIES, EMINENT DOMAIN.

Op. No. 2109, Bk. 53, P. 219.

If a public highway or bridge interferes with the impounding of water by storage dams for a water works system for a city or town, it is the duty of the Commissioners' Court of the county to change or move said highway or bridge at the expense of said city or town so as to make it possible for such storage dam to be constructed.

If such commissioners' court should fail or refuse to change or move such bridge or highway, then the city could compel such action by proper legal proceedings.

Chapter 88, Acts of the Regular Session of the Thirty-fifth Legislature.

AUSTIN, TEXAS, June 28, 1919.

Hon. M. S. Long, County Attorney, Albany, Texas.

MY DEAR SIR: We have yours of the 26th inst. addressed to this office in which you make the following inquiry:

"The City of Stamford is contemplating the building of a reservoir on the Clear Ford of the Brazos River in the edge of this county, and the public road and a bridge crosses the stream at the place where the reservoir is to be built and it will be necessary for the bridge and road to be changed.

"Now, the question arises as to whether or not the City of Stamford can condemn said bridge and right of way.

"I find under Art. 769, V. S. C. S., that a city or town has the power to own and operate waterworks, etc., but I can't find anything that will throw any light on this question. I also find that in Vernon's Sayles' Supplement, Art.

768a, that a city has the right to condemn private property for public use but nothing is said as to public property. I further find under Art. 5006 Vernon's Sayles Statutes that corporations, etc., have the power to compel counties to remove bridges for waterworks, that is it is the duty of such counties to remove bridges for water works, etc., and that said corporations shall pay the expenses of same. Does this apply to cities and towns?"

In reply thereto, I will refer you to Chapter 88 of the General Laws of the Regular Session of the 35th Legislature. This Act regulates the use of all waters in the State and their manner of appropriation. You will observe that Section 1 dedicates all waters and declares same to be the property of the State. Section 2 sets out for what purposes same may be used and includes a construction and operation of waterworks for cities and towns. This same provision is found in Section 4. The remaining sections relate to other matters concerning the appropriation of water for various purposes and regulates the method of appropriation and distribution of same. Section 75 of this Act vests the right of eminent domain over private property in any person, association of persons, corporations, irrigation or water improvement district, or any city or town. Section 76 provides as follows:

"All persons, associations of persons, corporations, and water improvement or irrigation districts shall have the right to run along or across all roads and highways necessary in the construction of their work, and shall at all such crossings construct and maintain necessary bridges, culverts, or siphons, and shall not impair the uses of such road or highway; provided, that if any public road or highway or public bridge shall be upon the ground necessary for the dam site, reservoir, or lake, it shall be the duty of the commissioners' court to change said road and to remove such bridge that the same may not interfere with the construction of the proposed dam, reservoir, or lake; provided, further, that the expense of making such change shall be paid by the person, association of persons, corporation, water improvement or irrigation district desiring to construct such dam, lake or reservoir."

You will note that this section says "all persons, association of persons, corporations" shall have the right to exercise the privilege set out in the section. The entire Act relates, among other things, to the rights of cities and towns in procuring a sufficient water supply, authorizes them to build storage dams and other constructions necessary for the impounding and distribution of water for waterworks purposes.

It is evident, therefore, that in the use by the Legislature of the term "all corporations" it is intended to include both private and public corporations. It is true that this section does not vest the right of eminent domain over property set apart to public use, but does provide that county commissioners shall make the necessary changes as to roads or bridges at the expense of such corporation. If the commissioners' court should refuse to comply with this provision of the statute, then the authorities of the city could, by proper legal proceedings, compel a compliance therewith.

However, in this connection, I want to call your attention to a rule laid down by the Supreme Court in the case of Sabine and East Texas Railway Company vs. Gulf and I. Railway Company, 46 S. W. 784. In that case the court said:

"The law does not authorize the condemnation of property which has already been dedicated to a public use when such condemnation would practically destroy the use to which it has been devoted. No expressed authority is given by our statutes to condemn such property, and the authority can not be implied from the general power conferred by law, unless the necessity be so great as to make the enterprise of paramount importance to the public and can not be practically accomplished in any other way."

Since this opinion was handed down by the Court, Chapter 88, above referred to, was passed and does give the right to alter or change public highways to suit the necessity in impounding waters for the purpose of constructing a waterworks system for a city or town. However, there probably might arise a question of fact as to whether the plans proposed by the city are the most practicable for the purposes contemplated. That is to say, if the water can be impounded just as satisfactorily and at a reasonable expense without altering the bridge or road, then it is quite likely that legal proceedings would fail. This question, however, would, of necessity, have to be determined by the physical facts governing in each individual case.

I suggest that you read all the sections of Chapter 88 in order that the city authorities may take the proper steps with the Board of Water Engineers with reference to their right of impounding waters.

Very truly yours,
JOHN MAXWELL,
Assistant Attorney General.

DRAINAGE—CANAL COMPANIES & WATER IMPROVEMENT DISTRICTS.

Op. No. 2179, Bk. 53, P. 574.

The laying out of public highways and the expense of constructing bridges, culverts or syphons across same, and whether or not this expense would be incurred by canal companies, irrigation companies and water improvement districts, or whether it should be paid by the county or municipal corporation; it will be the duty of the drainage districts, canal companies and irrigation companies to build and maintain all bridges at all places where ditches or canals might cross or intersect public highways, provided, however, that such public highways were in existence before the construction of such ditches and canals.

Where such ditches and canals are owned and operated by such drainage districts, canal companies and irrigation companies and water improvement districts had obtained their respective rights of way, and such ditches and canals have been constructed prior to the laying out of such public highways, then and in that event the duty to build and maintain such bridges, culverts and syphons would devolve upon the county or municipal corporation.

Article 5006 Vernon's Sayles' Texas Civil Statutes, 1914.

AUSTIN, TEXAS, January 28th, 1920.

Hon. Oscar C. Dancy, County Attorney, Brownsville, Texas.

DEAR SIR: The Attorney General is in receipt of your letter, which has been placed on my desk for attention. This letter reads as follows:

"Our county is getting ready to construct a State Highway No. 12, under the direction of the Highway Department at Austin.

"As laid out, part of the new road will follow the lines of the old road, and parts will cover entirely new territory.

"This county is network of drainage ditches and irrigation canals. I have carefully looked under the heading of the road law, and drainage law and

irrigation law, and am unable to definitely decide or properly advise the Commissioners' Court as to whether or not it is within their power to compel the drainage districts and canal companies and Water Improvement Districts to place concrete syphons or concrete bridges, as required by the State Highway Commission where said roads cross said canals or drainage districts. Said canals and drainage districts now have bridges made out of wood, which, of course, are insufficient on a substantial highway.

"Most of said bridges have been constructed by the several drainage districts and canal companies, as the road was there first, but now the new roads will perhaps cross these drainage districts and canals at new places.

"There is a question as to whether or not the commissioners' court has authority to compel said companies to put in the required bridges or syphons, in accordance with the rules and regulations of the Highway Department.

"Art. 5006 as amended (see Sayles Supplement) is the only statute I can find that bears on the question; now in the construction of this new highway, the new highway will go over drainage ditches and irrigation canals already constructed and in operation. It will cross same in some instances at the same place where bridges now exist (constructed by said districts and companies) and in many instances in entirely new places.

"Now bearing in mind the foregoing, I propound to you the following question:—Have the Commissioners' Court of this County the right to assess and collect from the Drainage Districts and Canal Companies and Water Improvement Districts the expenses of construction concrete syphons or bridges, or make said Districts, etc., construct same, where

"The road already crosses the ditch or canals and such bridges were constructed after the road was built by the districts or canal companies, such crossing to be at the same place where said road now goes.

"The road crosses said canals or ditches at a new place, the old places being abandoned?"

In your letter above quoted you propound the following questions:

"Have the Commissioners' Court of this County the right to assess and collect from the Drainage Districts and Canal Companies and Water Improvement Districts the expenses of constructing concrete syphons or bridges, or make said Districts, etc., construct same where

(1) "The road already crosses the ditch or canals and such bridges were constructed after the road was built by the districts or canal companies, such crossing to be at the same place where said road now goes.

(2) "The road crosses said canals or ditches at a new place, the old places being abandoned?"

Replying to these inquiries, I beg to advise that when a person, an association of persons, corporations and irrigation companies or districts construct or cause to be constructed a ditch or canal across a public highway, it becomes the duty of such person, association of persons, corporations and irrigation companies or districts to build and maintain necessary bridges, culverts or syphons over such ditch or canal where it intersects such public highway, so that the highway may be safe and convenient for travel. Article 5006 Vernon's Sayles' Texas Civil Statutes, 1914.

However, where a county or municipal corporation accepts or provides for the laying out or dedication of a public highway across which a ditch or canal has been previously located and a right-of-way acquired, it takes the same subject to the prior rights of the owners of such ditch or the owners of such canal, and the duty to construct and maintain bridges, culverts or syphons whenever and wherever the public necessity and convenience may require devolves upon such county or municipal corporation and not upon the owner of such ditch or canal.

In the case of City of Denver vs. Mullin et al, 3 Pac. Rep. 693, this language is used: "When a city has acquired the fee and control of its streets in trust for the public, subject to the previous grant and dedication of a right-of-way for an irrigating and milling ditch, it must repair and render them passable, as the public necessity and convenience require, without interfering with the rightful and accustomed use of the ditch."

In the case of McCammely vs. Pioneer Irrigation Company, 105 Pac. Rep. 1076, it is said: "It is the duty of the county to construct bridges that are required to complete all roads intersecting ditches or canals laid out after the construction of such ditches or canals; but, when ditches or canals are constructed across an existing road or highway, one established by prescription or duly located by the county commissioners, then it is the duty of the owner to construct a proper bridge across such ditch or canal."

In the case of Franklin County vs. Wilt & Polly, 126 N. W. Rep. 1007, it is said: "But if the highway is laid out over an artificial waterway theretofore constructed, the proprietor of the canal, unless bound by the terms of a franchise or private contract, is under no duty to construct or repair a viaduct in the highway and over the waterway."

In the case of South Yuba Water Company vs. City of Auburn, 118 Pac. Rep. 101, the court said: "Civil Code, Section 551, requiring every water or canal corporation to construct and keep in good repair all bridges across their canal that the board of supervisors of the county where such canal is situated may require, * * * does not require such companies to construct culverts to carry streets established subsequent to the construction of the canal over the same; the duty to construct such culverts being on the city."

Orange County vs. Cow Bayou Canal Co., 143 S. W. 963. This case is not directly in point with the matters herein involved; however, it is the only case under the statutes of this State that I have been able to find.

There are many other cases that could be cited in support of this proposition, if it was deemed necessary to do so in this instance.

You are, therefore, advised that it will be the duty of the drainage districts, canal companies and improvement districts to build and maintain all bridges at all places where ditches or canals might cross or intersect your public highways, provided, however, that such public highways were in existence before the construction of such ditches and canals but where such ditches and canals owned and operated by such drainage districts, canal companies and water improvement districts had obtained their respective rights of way, and such ditches and canals had been constructed prior to the laying out of such public highways, then in that event and under those conditions, the duty to build and maintain such bridges, culverts and syphons would devolve upon the county.

Very truly yours,
C. L. STONE,
Assistant Attorney General.

OPINIONS ON MISCELLANEOUS SUBJECTS.

CONSTITUTIONAL LAW—APPROPRIATIONS—PRE-EXISTING LAW.

Op. No. 1978, Bk. 52, P. 20.

Where the appropriations made for the support and maintenance of State departments and institutions are exhausted, the officials in charge of those departments and institutions have no authority to contract debts in excess of such appropriations, such excesses are void and the Legislature has no power to make appropriations for their payment.

It is a misdemeanor punishable by fine for any official to contract debts against the State in excess of an amount appropriated by the Legislature. Section 44, Article 3, of the Constitution, Articles 119a, 119b Vernon's Sayles' Criminal Statutes.

AUSTIN, TXEAS, February 12, 1919.

Messrs. W. A. Poage, King of Throckmorton and Beasley, Sub-Committee of the Appropriation Committee, Thirty-sixth Legislature, House of Representatives.

GENTLEMEN: Under date of February 11th, you asked for an opinion of the Attorney General upon the folowing question, to-wit:

"Can the Legislature legally appropriate sums of money to pay accounts contracted by heads of State departments for which no pre-existing law authorizes; said accounts being for miscellaneous supplies bought after having exhausted the regular appropriation made by a former Legislature?"

When the people of this State adopted the Constitution of 1876, they incorporated therein certain sections safeguarding the money of the State in its treasury. In Section 6 of Article 8, they provided: "No money shall be drawn from the Treasury but in pursuance of specific appropriations made by law." To meet this section of the Constitution, the Legislature at its biennial term passes a general appropriation bill for the support and maintenance of the various departments of the State Government and institutions operated by the State.

As a further safeguard, there is incorporated in the Constitution Section 44, Article 3, which is as follows:

"Compensation of officers; payment of claims.—The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors, not provided for in this Constitution, but shall not grant extra compensation to any officer, agent, servant, or public contractors, after such public service shall have been performed or contract entered into for the performance of the same; nor grant, by appropriation or otherwise, any amount of money out of the Treasury of the State, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law; nor employ any one in the name of the State, unless authorized by pre-existing law."

It will be noted from a reading of the above quoted section of the Constitution that the Legislature is expressly prohibited from granting by appropriation or otherwise any amount of money out of the Treasury of the State when the same shall not have been provided

for by pre-existing law. By pre-existing law as applied to the question under discussion is meant a law previously passed and in force authorizing the heads of the various State departments to contract debts against the State, and those words must be construed as having the usual and ordinary meaning. The only authority the heads of the State departments or the boards of control of the various State institutions or their superintendents have for contracting debts on the part of the State is that found in the general appropriation bill enacted by the Legislature or such special appropriations as that body may see proper to make. They have no general authority, nor would the Legislature have the power to confer upon these officials the general power to contract debts against the State for the reason that the Legislature is the only authority with such power. This is expressly provided for by the Constitution. The expenditure of moneys made available by appropriation bill by the creation of accounts against the State is not in fact the creation of a debt against the State. The theory of these transactions is that purchases are made upon a cash basis through the machinery provided by the Constitution and the statutes for drawing money from the State Treasury.

Any accounts made by the officials in charge of the departments or institutions that are not authorized by some pre-existing law, as has been hereinabove defined, are absolutely void and the Legislature is powerless to pay such account.

State vs. Wilson, 9 S. W., 155;
Nichols vs. State, 32 S. W., 452;
State vs. Haldeman, 163 S. W., 1020.

In the case of State vs. Wilson, the plaintiff by consent of the Legislature sued the State for something over $7,000, being the amount the contractors who built the penitentiary at Rusk were forced to discount their warrants by reason of the fact there was no money in the Treasury at the time they were presented. The court held that the claim could not be paid for the reason that its payment was prohibited by Section 44 Article 3 of the Constitution, prohibiting the Legislature from paying any claim that shall not have been provided for by pre-existing law.

In the case of Nichols vs. the State cited above, suit was instituted by Nichols against the State to recover the excess in the cost of the erection of the old Land Office Building over and above the amount originally appropriated by the Legislature for that purpose. This suit was instituted under a special Act of the Legislature, giving permission to sue for an amount not to exceed $7,000. A prior Legislature had authorized the construction and erection of the Land Office Building and in express terms limited its cost to a sum not to exceed $40,000. Notwithstanding this limitation on the amount to be expended, the commissioners appointed under the original Act assumed the authority to make an additional contract with Nichols increasing the cost of the construction of the building about $12,000. It was claimed that the contract increasing the cost of building beyond the $40,000 authorized and the Act of the Legislature authorizing the appellant to institute suit violates Section 7 Article 7 of the Constitution of 1845, and Section 44 Article 3 of the present Constitution, which

two sections are identical. After quoting this section of the Constitution and holding that the provision with reference to extra compensation has no application in a case of this character, the court holds that the excess contracted for was not based upon any pre-existing law, and, therefore, void. The court says:

"But we are of opinion that the claim of appellant is not based upon any pre-existing law, and that such claim falls within the spirit and meaning of the prohibition contained in the latter part of the section of the constitution quoted. The apparent purpose of this provision of the constitution was to relieve the state from liability for all claims that were not authorized by a pre-existing law, and to prohibit the Legislature from paying them. State vs. Wilson, 71 Texas, 291, 9 S. W., 155. The law that authorized the commissioners to make a contract binding upon the State for the erection of the land office building, in express terms, declared that the cost of the building and furnishing it should in no case exceed the sum of $40,000. This was an express limitation upon the authority of the agents representing the State; and their efforts in this direction in attempting to impose upon the State a contract that increased its liability beyond the amount stipulated was clearly unauthorized, and an act not binding on the government. Mechem, Pub. Off. 828-834; Ferguson vs. Halsell, 47 Texas, 422; City of Bryan vs. Page, 51 Texas, 534; Curtis vs. U. S., 2 Ct. Cl. 144; Reichard vs. Warren Co., 31 Iowa, 387; 19 Am. & Eng. Enc. Law, 510, and notes. The claim of appellant to the extent of about $12,000 that grew out of the additional contract for the extra service was in excess of the amount provided by law for the construction of the building; hence there was an absence of a pre-existing law upon which to base this claim."

To like effect is the holding of the Court of Civil Appeals of this State in the case of State vs. Haldeman, supra. The Twenty-sixth Legislature made an appropriation of $47,500 for the erection of certain buildings at the State Lunatic Asylum. The contractors alleged that at their own expense they furnished material and labor on said buildings amounting to $13,393.44 not included in the original contract. This claim was presented to the Twenty-eighth Legislature, which allowed it in the sum of $12,000 and appropriated that sum for the payment of the buildings, but this Act of the Legislature was vetoed by the Governor. Afterwards, the claim was presented to the Twenty-ninth Legislature and allowed for the sum of $10,920.30. This item was also vetoed by the Governor. The Thirty-first Legislature passed a general appropriation bill carrying among the miscellaneous items an appropriation of $11,000 for the payment of claim against the State held by the wife of H. P. Haldeman growing out of extra work and material furnished the State Lunatic Asylum for an associate dining hall, provided such claim was established by any district court of the State, and authority was given to Mrs. Haldeman to institute suit. It was insisted that the appropriation above mentioned was void and of no effect because contrary to and in violation of Section 44 Article 3 of the Constitution of the State. The court held that the Act authorizing the construction of these buildings was not a pre-existing law upon which could be based a contract in excess of the amount originally appropriated, and said:

"Inasmuch as the claim herein sued on was not a legal debt against the State, for the reason that it was in contravention of Section 44, Article 3, of the Constitution, above referred to, we do not think that the Legislature had any authority to make an appropriation for the payment of said claim,

even had it done so absolutely, without rejuiring the same to be established by judgment of the court. Section 49, Article 3, of the Constitution of this State, provides as follows: 'No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war or pay existing debts.' The claim sued on herein was not for any of the items mentioned above, unless it be to pay 'existing debt.' If the debt was illegal, it did not exist; and the effect of the appropriation bill was to create as well as to pay the debt."

It was to meet the emergency arising by reason of the appropriations having become exhausted that the Legislature enacted what is now Article 4342 of the Revised Statutes of this State, authorizing the Governor to grant deficiencies to supply the needs of these institutions. This is the course expressly laid down by the Legislature for these officials to follow, and while this Act has met criticism in a concurring opinion, Terrell vs. Middleton 191 S. W. 1138, we are not prepared to say that it does not constitute a pre-existing law upon which the Legislature may base appropriations for the deficiencies.

Not only is there no pre-existing law authorizing officials to contract debts in excess of amounts specified in the appropriation bills, but the Legislature of this State has expressly prohibited such a procedure and made the same a misdemeanor punishable by imprisonment in the county jail for a period of not less than ten days nor more than six months, and expressly provided that all contracts, debts or deficiencies created contrary to the provisions of that Act are wholly and totally void and shall not be enforceable against the State. We quote Sections 1, 2 and 3 of Senate Bill No. 29 enacted by the First Called Session of the Thirty-third Legislature approved August 19th, 1913, as follows:

"Section 1. That it shall hereafter be unlawful for any regent, or regents. director or directors, officer or officers, member or members, of any educational or eleemosynary institution of the State of Texas, to contract or provide for the erection or repair of any building, or other improvement or the purchase of equipment or supplies of any kind whatsoever for any such institution, not authorized by specific legislative enactment, or by written direction of the Governor of this State acting under and consistent with the authority of existing laws, or to contract or create any indebtedness or deficiency in the name of or against this State, not specifically authorized by legislative enactment, or to divert any part of any fund provided by law to any other fund or purpose than that specifically named and designated in the legislative enactment creating such fund, or provided by law to any other fund or purpose than that specifically named and designated in the legislative enactment creating such fund, or provided for in any appropriation bill.

"Sec. 2. That any and all contracts, debts or deficiencies created contrary to the provisions of this act shall be wholly and totally void, and shall not be enforceable against this State.

"Sec. 3. That any regent, director, officer or member of any governing board of any educational or eleemosynary institution, who shall violate this act shall be at once thereafter removed from his position with such institution, and shall not thereafter be eligible to hold said position, and in addition thereto shall be guilty of a misdemeanor, and shall be punished by imprisonment in the county jail for a period of not less than ten days, nor more than six months, the venue of such case to be in the county in which may be located the institution affected by such acts of such offender."

We also call your attention to the emergency clause of this Act, which condemns this practice in the following language:

"The fact that the reckless and unwise creation of deficiencies in connection with some of our State educational and eleemosynary institutions constitutes great evils in the administration of said institutions, and the lateness of the session create an emergency * * *"

We, therefore, advise that all debts and contracts created in the manner indicated in your communication are wholly void and that the Legislature is without authority to make appropriations to pay the same.

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

Op. No. 2214, Bk. 5, P. —

APPROPRIATIONS—TRAVELING EXPENSES—LIEUTENANT GOVERNOR.

Traveling expenses of the Lieutenant Governor in going to and from the seat of government to act as Governor during the absence of the Governor may be paid from the item in the appropriation bill "to pay Lieutenant Governor for acting as Governor, to be used in two years, $500."

AUSTIN, TEXAS, April 24, 1920.

Hon. W. P. Hobby, Governor of Texas, Capitol.
For attention Hon. Ralph Soape, Secretary to Governor.

MY DEAR GOVERNOR: You have transmitted to this Department an account filed by Hon. W. A. Johnson, Lieutenant Governor, for salary as Acting Governor during your absence from the State on official business. Incorporated in the account of the Lieutenant Governor is an item for "Traveling expenses from Memphis to Austin and return, including sleeper, $31." You request an opinion from this Department upon the legality of the charge for traveling expenses and whether or not the same is a proper charge against the State, and if so, from what appropriation it may be paid.

By Section 16 Article 4 of the Constitution, it is provided in substance that there shall be chosen a Lieutenant Governor who is elected in the same manner, continues in office for the same time and possesses the same qualifications as the Governor. The Lieutenant Governor is by virtue of his office the President of the Senate, and in case of the death, resignation, removal from office, inability or refusal of the Governor to serve, or of his impeachment or absence from the State, he shall exercise the powers and authority appertaining to the office of Governor. By Section 17 of the same article, it is provided that during the time he administers the government as Governor, he shall receive in like manner the same compensation which the Governor would have received had he been employed in the duties of his office and no more.

Section 13 of Article 4 provides in substance that during the session of the Legislature, the Governor shall reside where its sessions are held and at all other times at the seat of government, except when by Act of the Legislature he may be required or authorized to reside elsewhere.

Section 18 of this article provides that the Lieutenant Governor during the entire term to which he may succeed, shall be under all the restrictions and inhibitions imposed in this Constitution on the Governor. It will thus be seen that when the Lieutenant Governor on account of the absence of the Governor from the State becomes the Acting Governor, he does so under all the restrictions and inhibitions imposed upon the Governor and must obey in all particulars the requirements of the Constitution relating to the Governor, among which, as we have seen, is the duty imposed upon him to reside at the seat of government, as is provided in Section 13 above referred to.

When Governor Hobby crossed the State line on his trip to Washington, where he was called to attend the Pink Boll Worm Conference, Hon. W. A. Johnson, Lieutenant Governor, became the Acting Governor of the State, and it was his duty as Acting Governor to repair to the seat of government and exercise the functions of the office of Governor. It was a duty imposed upon him by the Constitution as a public official. It was his duty as Lieutenant Governor to at once make the trip from his home in Memphis, Texas, to Austin, Texas. The trip thus made is not analogous to a case where a Governor-elect goes to the seat of government to be inaugurated. In such a case, he is traveling as a private citizen to a point where the Constitution provides that he shall receive the office the people have bestowed upon him. In the instant case, the Lieutenant Governor was traveling as a public official upon public business required of him under the Constitution, and not as a private citizen to receive an office.

We are, therefore, of the opinion that the trip made by Lieutenant Governor Johnson from his home in Memphis to the City of Austin was a trip made upon business of the State, and he is entitled to his traveling expenses.

The appropriation bill of the Thirty-sixth Legislature at page 400 of the printed Acts of the Second Called Session of that body contains an item of $500 for traveling expenses of the Governor for each year of the life of the appropriation. This clearly indicates a purpose on the part of the Legislature to pay the necessary traveling expenses of the Governor while traveling upon State business.

There is also included in this bill an item "To pay Lieutenant Governor for acting as Governor to be used in two years, $500." The last quoted item from the bill does not state that it is alone for the purpose of paying the salary of the Governor, but it is to pay him any and all proper and legal charges for his services.

Traveling expenses being a proper charge as hereinabove held, then we are of the opinion that the item of $31 contained in the Lieutenant Governor's account against the State may be paid from the item in the appropriation bill to pay the Lieutenant Governor.

I herewith return the account of the Lieutenant Governor.

Very truly yours,

C. W TAYLOR,

Assistant Attorney General.

Op. No. 1988, Bk. 52, P. 52.

ORDINANCES—CONFLICT WITH STATE LAWS.
STATE FIRE MARSHAL—PENALTIES.

(1) Ordinances proposed by State Insurance Commission to cities and towns do not conflict with State Insurance Commission Laws.
(2) Penalties in State Insurance Commission Laws and in Ordinances proposed to cities and towns, covering different acts and subject matter, are not in conflict.

AUSTIN, TEXAS, March 1, 1919.

Hon. S. W. Inglish, State Fire Marshal, Austin, Texas.

DEAR SIR: I have your letter of February 26th, last, addressed to Hon. C. M. Cureton, Attorney General, in which you ask this Department to give you an opinion as to whether or not the fire marshal ordinance, proposed to cities by your Department, is invalid and unenforcible for the reason that it attempts to provide local legislation upon a subject already covered by the State law, and, second, whether or not said State law and said city ordinance can be concurrently enforced, for the reason that the remedies provided for the violation of the State law and of the city ordinance are not the same.

The sections referred to in the State law are Sections 8, 9, 10 and 11. These sections set out the duties of the State Fire Marshal.

Section 8 empowers said Fire Marshal to investigate the causes of any and all fires that may occur within the State; to administer oaths; to cause the arrest of any persons against whom he has found sufficient evidence, charged with the crime of arson, and furnish testimony in his hands to assist in the prosecution of such person.

Section 9 empowers the State Fire Marshal to enter buildings and premises for the purpose of discovering the cause of fires, and also for the purpose of determining the condition of said premises and its contents, with reference to being the fire hazard.

Section 10 empowers the State Fire Marshal to designate some person other than himself to make such investigation, and

Section 11 provides that "No action taken by the State Fire Marshal shall affect the rights of any policy holder or company with respect to a loss by reason of any fire so investigated * * *"

The ordinance proposed by the State Fire Insurance Commission to cities and towns creates the office of City Fire Marshal, and authorizes said City Fire Marshal, in Sections 2, 3, 4, 6, 7 and 8, to inspect premises either for the purpose of discovering the cause of fires or for the purpose of discovering the condition of the property as creating a dangerous condition with reference to fires. There can be no conflict between the duties of these respective offices.

The duty of the State Fire Marshal is for the benefit of the citizenship of the State at large, and to furnish information to the State Fire Insurance Commission. He acts as a general officer; directs the acts and business of local officers, while the local officer is working primarily for the benefit of his local people, and as a subordinate, as it were, to the State Fire Marshal. There is no more conflict through the fact that the two of them have similar authority and duties in the gathering of information than there would be between the Sheriff

and the Chief of Police in discovering and arresting criminals in their respective jurisdictions. Therefore, I would hold that said Fire Marshal Ordinance is not invalid and unenforceable for the reason that it attempts to provide local legislation upon the subject already covered by State law.

In response to your second query, a careful reading of both instruments will show, first, that the only penalty set out in the State law is found in Section 26 and is directed against any insurance company affected by this Act or any officer or any agent or person acting for, or employed by, any insurance company who along or in convention with any corporation, agent or person, while the ordinance proposed by the Commission in Sections 5, 9 and 10 fixes a penalty as follows: Section 5: Against any witness who refuses to be sworn or who refuses to appear or testify, or who disobeys any lawful order of said Fire Marshal, or who fails or refuses to produce any book, paper or document touching any matter under examination, or who is guilty of any contemptuous conduct during any of the proceedings of said Marshal. * * * "

"Sec. 9: Against any owner or occupant of a building or of any structure or premises, who shall keep or maintain the same, when for want of repair, or by reason of age or dilapidated condition, or for any cause it is especially liable to fire, and which is so situated as to endanger buildings or property or contents * * *"

"Sec. 10: Against any owner or occupant of any building or other structure or premises, who shall keep or maintain the same with an improper arrangement of the stove, range, furnace or any heating appliance of any kind whatsoever, including chimneys, flues and pipes, with which the same may be connected, so as to be dangerous in the matter of fire, or health, or safety of persons or property of others. * * *"

Thus we see that the penalty in the State law is directed against the acts of an insurance company or those directly or indirectly connected with them while the penalty in the proposed ordinance is directed to witnesses before a court of inquiry or to the owners or occupants of buildings being investigated.

The penalties are applied to altogether different acts and do not cover the same subject matter at all; therefore, do not have to be the same. The only right a State Fire Marshal has with reference to the occupants or owners of buildings is to institute civil proceedings to compel said owner or occupant to put said premises in a safe condition, but said Act nowhere provides a penalty for the failure of said owner or occupant to keep his premises in a safe condition.

Therefore, inasmuch as said penalties cover different acts and different parties, there is no reason why said penalties should be identical.

Therefore, for the reasons stated, I would hold that said Fire Marshal Act and Fire Marshal Ordinance are not in conflict with each other, and on the question submitted said ordinance is valid and enforceable.

Very truly yours,
JOHN MAXWELL,
Assistant Attorney General.

Op. No. 2212, Bk. 53, P. —.

FIRE ESCAPES.

The State Fire Escape Law applies to all buildings enumerated in Section 1. The clause wherein public assemblies are permitted or sleeping apartments are provided applies only to buildings erected by municipal, county or State authorities and does not apply to the other buildings enumerated in that Section.

Clauses of limitation relate to and modify the language next preceding such clause and not to the remaining portions of the Act, unless from the language of the entire Act such an intent plainly appears.

AUSTIN, TEXAS, April, 23, 1920.

Texas Fire Insurance Commission, State Office Building, City.
For attention Mr. Upshur Vincent, Chief Inspector.

GENTLEMEN: The Attorney General has your letter of April 20th, asking an opinion of this Department upon the following questions:

"Is it necessary under the law for elevators and mills to be provided with fire escapes?

"Does the law except from its provisions all buildings in which no sleeping quarters are provided and where no public gatherings are permitted?"

In reply thereto, I beg to call your attention to Section 1 of the Fire Escape Law enacted by the Thirty-fifth Legislature. The buildings upon which fire escapes are required to be erected under this section may be sub-divided into the following general classes:

First: Hospitals, seminaries, colleges, academies, schoolhouses, dormitories, hotels, lodging houses, apartment houses, rooming houses, boarding houses;

Second: Theaters, places of public amusement, lodge halls, any hall used for public gatherings;

Third: Manufacturing establishments, industrial plants, wholesale or retail mercantile stores, workshops, warehouses, office buildings;

Fourth: Buildings erected by municipal, county or State authority, wherein public assemblies are permitted or sleeping apartments are provided on any floor above the second.

The contention is made by various parties in communications attached to your correspondence that the language "wherein public assemblies are permitted or sleeping apartments are provided" applies to each and all of the buildings enumerated in the section. The very nature of the buildings enumerated in the first class carries the idea of public gatherings or sleeping apartments or both. The buildings enumerated in the second class are essentially for public gatherings. Therefore, any limitation on these buildings as to public gatherings or to sleeping apartments would be useless. The question then arises: Does this language apply to those buildings enumerated in the third sub-division or only to those enumerated in the fourth If this language applies to those of the third sub-division, then, to our mind, one of the chief purposes of the law would be defeated, that is, the protection of those who labor in and about manufacturing establishments, stores, workshops, warehouses and office buildings. It is a matter of common knowledge that public gatherings are not held

in this character of establishment, nor are sleeping apartments provided therein. In our opinion, the language relating to public assemblies and sleeping apartments applies only to those buildings erected by municipal, county or State authorities and that such language is not a limitation upon the preceding classes of buildings upon which fire escapes must be erected.

It is the general rule of statutory construction that limitations engrafted upon a statute are to be construed with reference to the immediately preceding parts of the clause to which they are attached. Lewis Sutherland on Statutory Construction, Section 252. Of course, this rule does not apply where from a reading of the entire Act such limitations are clearly intended to apply to other matters therein contained. We regret, of course, that we are forced to differ from the opinion of eminent members of the bar of this State, but any other construction than the one here placed upon the Act would defeat in a large measure the purpose for which it was enacted, and we, therefore, advise you that only those buildings erected by municipal, county or State authority, where no sleeping apartments are provided or where public assemblies are not permitted, are exempt from the operation of the Act, and that all other buildings enumerated in the Act are subject thereto, irrespective of whether sleeping apartments are provided or public assemblies are permitted. This, of course, includes elevators and mills, they being either warehouses or industrial plants.

We would suggest that in the case of an elevator or mill wherein a very limited number of employees are engaged at any one time that you exercise some discretion as to the enforcement of this Act. We do not at all mean to suggest that you exempt such buildings from the operation of the Act. What we intend to say is that these mills may be so constructed that the technical enforcement of the law to its very letter might not be required and would work a hardship upon the owner without any corresponding beneficial result to the employees of the company. This, however, is merely a suggestion and not intended as a rule for your guidance.

I return herewith the complete file transmitted by you with your communication.

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

LEVEE IMPROVEMENT DISTRICTS—RAILROADS—COUNTIES—CITIES AND TOWNS—TAXATION

(1) Expenses to which railroads may be put in conforming to the plan of reclamation must be borne by them and the levee district shall deduct the amount of such expense from the benefits assessed against the railroad.

(2) Levee Improvement Districts, under the Lancy Act, do not have the power to levy taxes or assessments against the property of any city, county or other public corporation.

(3) The provisions of the Lancy Act must be construed to apply only to all legal subjects of taxation and must be limited by the provisions of the Constitution exempting certain property from taxation.

August 5, 1920.

Hon. Arthur A. Stiles, State Reclamation Engineer, Capitol.

DEAR SIR: In your letter of the 2d inst. you state that the Engineer of the City of Dallas and Dallas County Levee Improvement District No. 10—the district at the City of Dallas—has submitted to you the following questions:

(1) The district does not allow the railroads therein any damages for the expense to which they are put in meeting the levee project. Does the district assess the railroads for the benefits to their property or are they allowed these benefits as an offset to the expense to which the roads are placed?

(2) Has a levee improvement district authority to levy "assessments" against city and county property, such as highways, parks, etc?

Replying, I beg to say:

(1) By Section 24, of Chapter 44, Acts Fourth Called Session, 1918 (Laney Act), it is provided that

"All taxes shall be apportioned and levied on each tract of land, railroad and other real property in the district in proportion to net benefits to the property named. * * *"

We think that since the property within the district is liable only for the amount of net benefits, that is, benefits actually received by reason of the reclamation of lands within the district, any and all expenses to which the railroads may be put in conforming to the plan of reclamation must be borne by them and the Levee District should deduct the amount of such expense from the benefits assessed against the railroads.

(2) A levee improvement district does not have the power to levy taxes or "assessments" against the property of any city, county or other public corporation.

By Section 9, of Article 11, of the Constitution, it is provided

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

In Galveston Wharf Company vs. Galveston, 63 Texas, 14, 23, the Supreme Court held:

"There may be property owned by municipal corporations which would be subject to taxation, but the enumeration of certain things in the section of the constitution quoted, as exempt from taxation, was not intended to operate as a declaration that things not enumerated were subject; but simply to indicate the character of things, and the uses to which they must be appropriated, in order to be entitled to the exemption.

"In the absence of any law expressly providing otherwise, such property as a municipal corporation owns and uses for a public purpose is held not to be affected by general laws regulating taxation.

"Many cases exist in which examples are given of the character of property and uses to which it must be put, owned by municipal corporations, to

make it, within the meaning of the law, property 'held only for public purposes, or devoted exclusively to the use and benefit of the public,' which, in this case, it is not deemed necessary to review, among which are the following: Klein vs. New Orleans, 99 U. S., 150; Water Commissioners vs. Gaffney, 34 N. J., 131; Gibson vs. Howe, 37 Iowa, 170; Fall vs. Mayor of Marysville, 19 Cal., 392; Piper vs. Singer, 4 S. & R., 354; Directors of the Poor vs. School Directors, 42 Pa. St. 24; Louisville vs. Commonwealth, 1 Duval, 295; Trustees vs. Champaign Co., 76 Ill., 185.

"The words 'held only' and 'devoted exclusively,' used in the section of the constitution quoted, would seem to convey the idea that a municipal corporation may own property which will not be exempt from taxation; if so, the property involved in this case is not of that character; and it will be time enough to consider what kinds of property, if any, belonging to a municipal corporation, is subject to taxation when a case requiring its decision is presented."

The tax authorized by the Laney Act is a "tax" within the meaning of that term as used in the Constitution and is not a "special assessment" for local improvements.

The Laney Act came into being by virtue of the 1917 amendment to the Constitution authorizing the creation of conservation and reclamation districts. (Constitution, Article 16, Section 59.) This amendment authorizes "the levy and collection within such districts of all such taxes, equitably distributed, as may be necessary for the payment of the interest and the creation of a sinking fund for the payment of bonds to be issued by such districts.

In Dallas County Levee District No. 2 vs. Looney, 207 S. W. 310, the Supreme Court held:

"The declaration of the amendment that the taxes shall be 'equally distributed' simply means that they must be fairly proportioned according to benefit to the property taxed.

"It is clear that the Conservation Amendment does not undertake to prescribe any given rule for making the apportionment. It provides no express method by which the benefit to the particular property—the subject of the tax—shall be ascertained, and accordingly refrains from the adoption of any express basis for the apportionment of the tax. The effect of the declaration simply is that it shall be justly laid in fair proportion to the benefit. If it is so apportioned, there can be no question but that an 'equal distribution' of the taxes will be accomplished within the full meaning of the term."

The basis of apportionment, therefore, was by the amendment left to the Legislature. In the passage of the Laney Act the Legislature prescribed a method whereby taxes might be "equally distributed" or "equitably distributed" in such districts. In order to intelligently understand this method, it is necessary to briefly notice the provisions of the Act in reference thereto.

First: The Board of Supervisors are required to appoint three disinterested commissioners, to be known as the Commissioners of Appraisement. (Sec. 19.)

Second: The Commissioners of Appraisement are required to view the lands within the district or that will be affected by the plan of reclamation therefor and all public roads, railroads, rights of way, and other property or improvements located upon such lands, and all lands without the district as may be acquired under the Act for any purpose connected with or incident to the carrying out of the plan of reclamation and they "shall assess the amounts of benefits and all damages, if any, that will accrue to any tract of land within

such district or to *any public highway*, railroad and other rights of way, *roadways or other property*, from carrying out and putting into effect the plan of reclamation for such district." (Sec. 21.)

Third: The Commissioners of Appraisement are required to prepare a report of their findings, which report shall show:

a. The owner of each piece of property examined and on or concerning which any assessment is made.

b. Description of said property with the amount of damages and all benefits assessed for and on account of or against the same.

c. The value of all property to be taken or acquired for rights of way, etc., and,

d. Designate a time and place to hear objections to such report. (Section 21.)

Fourth: The final judgment and decree of the Commissioners of Appraisement shall form the "basis of taxation within and for the levee improvement district for which they shall have acted for all purposes for which taxes may be levied and all taxes shall be apportioned and levied on each tract of land, railroad and other real property in the district in proportion to net benefits to the property named in such final judgment or decree." (Sec. 24.)

Where a levee improvement district desires to issue bonds the petition for election shall state the rate of interest, etc., and whether "taxes shall be levied within and for said district in payment thereof." (Sec. 26.)

And Section 27 provides in part as follows:

"At such election those desiring to vote in favor of the issuance of bonds and levy of *taxes* in payment thereof shall have written or printed on their ballots 'For the issuance of bonds and *levy of taxes in payment thereof*'; and those desiring to vote against the proposition submitted shall have printed or written on their ballots 'Against the issuance of bonds and *levy of taxes in payment thereof*.'"

When the bonds are issued, the Commissioners Court (which is the "taxing authority") is required to levy *taxes* upon all the real property and railroads within the district "based upon and proportioned as to each piece of property to the net benefits which it shall have been found will accrue to such property from the completion of the plan of reclamation or other duly authorized work." (Sec. 38.)

The Secretary of the Board of Supervisors of the District is ex officio tax assessor thereof and it is his duty when any tax is levied to prepare a tax roll in form substantially as the assessment roll made by all county tax assessors "except that instead of ad valorem valuation it shall state net benefits assessed against property and he shall compute against each piece of property the amount of taxes assessed against it and enter on such roll the amount of such taxes." (Sec. 40.)

Section 42 of the Act provides that the tax collectors "shall perform all duties and exercise all powers in respect to delinquent taxes due levee improvement districts as may be provided by law for the collection of delinquent State and county taxes, and the collection of such delinquent levee improvement district taxes and sales of prop-

erty therefor shall be governed by the laws applying to the collection of delinquent State and county taxes. Taxes levied under this Act shall be a lien upon the property against which they are assessed, and shall be payable and shall mature and become delinquent as may be provided by law for State and county taxes, and upon failure to pay such taxes when due the same penalty shall accrue and be collected as may be provided by law in case of non-payment of State and county taxes." How then is a levee improvement district to enforce a tax lien against a city or a county?

While the Laney Act provides that the commissioners of appraisement "shall assess the amounts of benefits and all damages, if any, that will accrue to any tract of land within such district, or to *any public highway*, railroad and other rights of way, *roadways* or *other property*, from carrying out and putting into effect the plan of reclamation for such district," yet the Conservation Amendment to the Constitution (Art. 16, Sec. 59) did not confer any authority upon the Legislature to invade or interfere with the functions of any city or county government or to impose burdens upon any city or county government. The provisions of the Laney Act must be construed to apply only to all legal subjects of taxation, and, in our opinion, must be limited by the provisions of the Constitution exempting certain property from taxation.

Very truly yours,
W. P. DUMAS,
Assistant Attorney General.

Op. No. 2225, Bk. 53, P. —.

I LEVEE DISTRICTS—CONSERVATION AND RECLAMATION DISTRICTS:

(a) The Levee District Act of 1915 was not affected by the passage of the Canales Law, or the Laney Act.

(b) A levee district organized under the Canales Law is governed and controlled by the Act of 1915, except as may be otherwise provided in the Canales Law.

II LEVEE DISTRICTS—TAXATION:

(a) Taxation in levee districts created under the Laney Act must be according to benefits assessed.

(b) Taxation in levee districts created under the Canales Law is on the ad valorem plan.

III LEVEE DISTRICTS—STATUTES:

The Act of 1915, the Canales Law, and the Laney Act are three distinct and separate laws upon the subject of levee construction in this State.

July 14, 1919.

Messrs. Wilkinson & Davidson, Attorneys for Franklin County Levee Improvement District No. 1, Mt. Vernon, Texas.

GENTLEMEN: In your letter of the 27th ultimo, addressed to the Attorney General, you state:

(a) Franklin County Levee Improvement District No. 1 was originally created under the Act of 1915, and, upon petition to the commissioners court, it was created into a Conservation and Reclamation District "by virtue of the Acts of the Fourth Called Session of the Thirty-fifth Legislature."

(b) The district now desires to issue additional bonds under the provisions of Chapter 44, Acts of the Fourth Called Session of the Thirty-fifth Legislature, but that in making application for the new bond issue you have discovered a material difference between the provisions of the two Acts, and that you find it difficult to separate the two Acts, and you request this Department to outline "the proceedings with reference to additional bonds."

We are not advised whether this district was organized as a Conservation and Reclamation District under Chapter 25, Acts Fourth Called Session, Thirty-fifth Legislature, and generally known as the Canales Act, or under Chapter 44, Acts of the same session, and known as the Laney Act. Since it desires to issue the additional bonds under Chapter 44, we presume that it became a Conservation and Reclamation District under the procedure prescribed by Section 62 of that chapter.

The Thirty-fifth Legislature, at its Regular Session, submitted to a vote of the people an amendment to the Constitution, and which was adopted in August, 1917, and has become generally known as the Conservation Amendment, and at the next session of the Legislature after its adoption (the Fourth Called Session of the Thirty-fifth Legislature) the two laws in question were passed.

The Laney Act (Chapter 44, Acts Fourth Called Session, Thirty-fifth Legislature) provides for the creation of Conservation and Reclamation Districts under and by virtue of Section 59, Article 16—The Conservation Amendment—and to be known as levee improvement districts, for the purpose of reclaiming lands from overflow from rivers, creeks and streams by constructing and maintaining levees and the proper drainage and other improvements of such lands.

The Laney Act is the same in principle and substantially the same in procedure as the Levee District Act of 1915 (Chapter 146, Acts 1915) except that under it—

(1) Levee districts may embrace territory located in two or more counties;

(2) There are some slight, but not material, differences in the procedure for the formation of the district;

(3) Taxation is based on net benefits as to each tract of land;

(4) A method for the ascertainment and adjustment of such benefits is provided for;

(5) Personal property is not taxed at all for levee purposes;

(6) The supervisors of such districts have more extensive powers than are conferred under the Acts of 1915, or under the Canales Act;

(7) Bonds may be voted by a majority vote and the amount is limited to cost of improvement as shown by the plan of reclamation, plus ten per cent for emergencies;

(8) The provisions of the Act govern and control such districts

whether wholly within one county or where composed of land situated in two or more counties.

The Laney Act does not affect either the Act of 1915 or the Canales Act. By Section 60 thereof it is declared that *in all matters not provided for therein,* levee improvement districts created under it or that may become entitled to its benefits "shall be governed by the provisions of Chapter 146, of the General Laws of the Regular Session of the Thirty-fourth Legislature. The Laney Act, however, appears complete in every respect and in its passage the Legislature designed a complete scheme for the reclamation of overflowed lands.

Levee improvement districts organized under other laws may avail themselves of the provisions of the Laney Act by following the procedure outlined in Section 62 thereof.

Section 61 of the Act provides:

"Levee improvement districts heretofore organized under any law of this State, and districts organized under any law of this State having for their objects the reclamation of lands through a system of levees and drainage, whether denominated levee improvement districts or not, may become entitled to and hereafter exercise all the rights, powers and privileges conferred by this Act upon districts created under it, and to all of the enlarged powers which may be conferred under Section 59, Article 16, of the Constitution of this State, by proceeding as follows:

"Section 62. Whenever the owners of a majority of the acreage of any district mentioned in the preceding section shall present to the commissioners court of the county in which such district is located their petition praying that a hearing be ordered to determine whether such district may avail itself of the provisions of this Act, it shall be the duty of the court to fix a time and place for such hearing, and cause notice thereof to be given, *substantially in all respects as notice of the hearing upon the matters of the formation of a district under this Act,* and at the time and place of such hearing the court shall proceed to hear and determine the issue presented by the petition, and evidence for and against the same, and if it finds that the interests of the district in question would be promoted by granting the prayer of the petition it shall so decree and enter its judgment of record, declaring it to be to the interest of such district that it avail itself of all the rights, powers and privileges conferred by this Act upon districts created under it, and that the district on behalf of which the petition is filed shall thereafter be entitled to and may exercise all rights, powers and privileges conferred by this Act upon districts created by it, and thereafter such district shall have and may exercise all such rights, powers and privileges as if created under this Act, *and thereafter it shall proceed in all things as it would if created hereunder,* but such decree shall not in any respect injuriously affect any financial liability of such districts."

In our opinion, if the levee district in question was created a Conservation and Reclamation District in line with the procedure prescribed by the above quoted section of the Act, then in the issuance of bonds it must proceed as it would if originally created under the Laney Act. Section 55 of the Act deals with the issuance of "additional bonds" where bonds have already been issued under Section 26 et seq., of the Act, and not with bonds to be issued in addition to bonds authorized by the district when operating under the Levee District Act of 1915. In the issuance of "additional bonds" by such districts, as authorized by Section 55, the proper authorities "may proceed in all respects to provide additional funds for such additional works in accordance with the provisions of this Act in respect to the original plan of reclamation, and may * * * issue ad-

ditional bonds, but always subject to every limitation in respect to such original proceedings."

As stated above, in districts operating under the Laney Act, taxation is based on net benefits as to each tract of land. In other words, the taxes shall be levied according to benefits received: the land actually reclaimed shall bear the principal burdens of taxation, and other lands only incidentally or generally benefited shall be taxed only according to their incidental or general benefit.

In the passage of the Laney Act the Legislature prescribed a method whereby the taxes shall be levied according to benefits received, and, in order to intelligently understand this method, it is necessary to briefly notice the provisions of the Act in reference thereto.

(1) The Board of Supervisors are required to appoint three disinterested commissioners to be known as the "Commissioners of Appraisement." (See Section 19.)

(2) The Commissioners of Appraisement are required to view the lands within the district or that will be affected by the plan of reclamation therefor and all public roads, railroads, rights of way, and other property or improvements located upon such lands, and all lands without the district as may be acquired under the Act for any purpose connected with or incident to the carrying out of the plan of reclamation and they "shall assess the amounts of benefits and all damages, if any, that will accrue to any tract of land within such district or to any public highway, railroad and other rights of way, roadways or other property, from carrying out and putting into effect the plan of reclamation for such district." (Section 21.)

(3) The Commissioners of Appraisement are required to prepare a report of their findings, which report shall show:

(a) The owner of each piece of property examined and on or concerning which any assessment is made;

(b) Description of said property with the amount of damages and all benefits assessed for and on account of or against the same;

(c) The value of all property to be taken or acquired for rights of way, etc., and,

(d) Designate a time and place to hear objections to such report. (See Section 21).

(4) The final judgment and decree of the Commissioners of Appraisement shall form the "basis of taxation within and for the levee improvement district for which they shall have acted for all purposes for which taxes may be levied * * * and all taxes shall be apportioned and levied on each tract of land, railroad and other real property in the district in proportion to net benefits to the property named in such final judgment or decree." (Section 24.)

Where a levee improvement district, under the Laney Act, desires to issue bonds, the petition for election shall state the rate of interest, etc., and whether "taxes shall be levied within and for said district in payment thereof"; when the bonds are issued, the commissioners court (which is the "taxing authority") is required to levy taxes upon all the real property and railroads within the district "based upon and proportioned as to each piece of property to the net benefits which it shall have been found will accrue to such property from

the completion of the plan of reclamation or other duly authorized work." (Section 38.)

The Secretary of the Board of Supervisors of the District is ex officio tax collector thereof, and it is his duty when any tax is levied to prepare a tax roll in form substantially as the assessment roll made by all county tax assessors "except that instead of ad valorem valuation it shall state net benefits assessed against property and he shall compute against each piece of property the amount of taxes assessed against it and enter on such roll the amount of such taxes." (Section 40.)

If, therefore, the district in question has been created a Conservation and Reclamation District under the Laney Act (Chapter 44, Acts Fourth Called Session, Thirty-fifth Legislature), and now desires to issue bonds, then it should proceed as if it had been originally created under said Act and such bonds must be issued strictly in line with the requirements therein prescribed. (See Sections 26 to 31, inclusive, of said Chapter 44.) After the issuance of such bonds, if it should appear that an additional issue is necessary, then such "additional bonds" should be issued in line with Section 55 of the Act.

And now with reference to the Canales Act, the same being Chapter 25, Acts Fourth Called Session, Thirty-fifth Legislature—

This Act, as shown by its caption, was intended to make effective the provisions of the newly adopted constitutional amendment and undertook to do so by providing, among other things, that any existing levee improvement district organized under the laws of the State and Section 52 of Article 3, of the Constitution, might avail itself of the benefits of the new amendment and become a Conservation and Reclamation District by proceeding substantially as required for the formation of a district by the Levee Act of 1915—that is, by petition to the commissioners court and a hearing before such court, after notice to all concerned, with opportunity for them to contend for, or contest, the prayer of the petition and upon the judgment of the court on such hearing in favor of the petitioners.

It is further provided in this Act that any levee improvement district, or other named district, becoming a Conservation and Reclamation District under it may incur indebtedness and levy taxes to fully carry out each and all of the purposes of its organization, and that all limitations of indebtedness authorized to be incurred, and taxes to be levied, imposed on such districts so becoming Conservation and Reclamation Districts by Section 52 of Article 3, of the Constitution, and any and all laws under which any such district may have been organized, are removed. (See Sections 2, 3 and 4 of the Act; General Laws Fourth Called Session, Thirty-fifth Legislature, page 41.)

The Canales Act further provides that levee improvement districts organized under Levee District Act of 1915 on becoming Conservation and Reclamation Districts under it *shall continue to be governed and controlled by the provisions of the said Act of 1915*, and amendments thereto, except as otherwise in said later Act provided.

It will thus be seen that where a levee improvement district has been organized under the Levee District Act of 1915 and has already

issued bonds under said Act, and thereafter comes under the provisions of the Canales Law, as a Conservation and Reclamation District, the provisions of the Act of 1915 with reference to the issuance of "additional bonds" will govern the issuance of the additional bonds by such district.

From all of the above, it will be seen that—

(a) The Levee District Act of 1915 was not affected by the passage of the Canales Law or the Laney Act, and under it levee improvement districts may be organized and contract debts as heretofore.

(b) The Canales Act provides that a levee district that has been previously organized or that may thereafter be organized may, "by following certain procedure as prescribed by the Act of 1915 and upon the order of the commissioners court entered of record, become a Conservation and Reclamation District without change of name or impairments of its obligations." (See Dallas County Levee District No. 2 vs. Looney, 207 S. W., 310.) Where a levee district becomes a Conservation and Reclamation District under the Canales Act it is governed and controlled by the Levee Act of 1915, except as otherwise provided by the *Canales Act.*

(c) The principal purpose of the Laney Act was to make provision for the creation of original districts, and also to permit levee districts organized under any other laws to accept the benefit of its provisions, but taxation in such districts must be according to benefits assessed and not ad valorem.

(d) The Levee Act of 1915, the Canales Law, and the Laney Act are three distinct and separate laws upon the subject of levee construction in this State, and should be considered separate and apart in the organization of levee districts and in the issuance of bonds by such districts, yet each Act is a part of the conservation and reclamation system of the State—each having its proper place in such system.

Very truly yours,

W. P. DUMAS,
Assistant Attorney General.

LEVEE IMPROVEMENT DISTRICTS—COUNTIES—PUBLIC ROADS—DAMAGES.

Op. No. 2032, Bk. 52, P. 331.

The expenses of changing a roadway made necessary by the construction of a levee may be paid by the county, if its Commissioners' Court so desires, but in case the Commissioners' Court refuses to pay same, then such damages as accrue to the county should be paid by the Supervisors of the Improvement District, out of funds available therefor.

Articles 5567 and 5575, Vernon's Texas Civil and Criminal Statutes, 1918 Supplement.

AUSTIN, TEXAS, April 10, 1919.

Hon. H. M. Wade, County Attorney, Rockwall, Texas.

DEAR SIR: We have yours of April 5th, addressed to the Attorney General of Texas, which reads as follows:

"We have a concrete road across East Ford of Trinity along the way designated for the Bankhead Highway. There is a Levee District in East

Ford bottom. The levee will cross the good road about 220 yards from the river channel. The road bed is so low that when the levee is put up the levee will be several feet higher than the road bed, thereby permitting overflow water to pass over and along said road bed out into and over the land sought to be leveed. The road now is sufficient for travel at all times regardless of overflow. When the Levee District fixes the road at junction of Levee with said road to prevent the escape of water along said road, then the water will during heavy rise of river be so deep on the road bed inside of the levee that travel over said road will be impossible. Whose business is it to fix the road inside of the levee to meet the demand for a higher road, the levee district or the county? The road bed inside of the levee will have to be built some four feet higher."

Replying thereto we call your attention to Articles 5567 and 5575, Vernon's Texas Civil and Criminal Statutes, 1918 Supplement, which are amendments to the original Levee Improvement District Act. These articles read as follows:

Art. 5567.—"The right of eminent domain is hereby expressly conferred upon all levee improvement districts established under the provisions of this Act, for the purpose of enabling such districts to acquire the fee simple title, easement or right of way to, over and through any and all lands, waters, or lands under waters, private or public (except land and property used for cemetery purposes), within, bordering upon, adjacent to or opposite such districts necessary for making, constructing and maintaining all levees and other improvements for the improvement of a river or rivers, creek or creeks, or streams, within or bordering upon such districts, to prevent overflow thereof. In the event of the condemnation, or the taking, damaging or destroying of any property for such purposes, the improvement district shall pay to the owner thereof adequate compensation for the property taken, damaged or destroyed. All condemnation proceedings or suits in the exercise of eminent domain under this Act shall be instituted under the direction of the district supervisors, and in the name of the levee improvement district, and all suits or other proceedings fo such purposes and for the assessing of damages, and all procedure with reference to condemnation, the assessment of and estimating of damages, payment, appeal, the entering upon the property pending the appeal, etc., shall be in conformity with the statutes of this State for the condemning and acquiring of right of way by railroad companies, and all such compensation and damages adjudicated in such condemnation proceedings, and all damages which may be done to the property of any person or corporation in the construction and maintenance of levees or other improvements under the provisions of this Act shall be paid out of any funds or properties of said levee improvement district, except taxes necessarily applied to the payment of the sinking fund and the interest on the district bonds.

Art. 5575.—"The said district supervisors are hereby authorized and empowered to make all the necessary levees, bridges and other improvements across or under any railroad embankments, tracks or rights of way, or public or private roads or the rights of way thereof, or levees or other improvements of other districts, or other such improvements and the rights of way thereof, or to join such improvements thereto, for the purpose of enabling the said district supervisors to construct and maintain any or all of the improvements necessary for the said district; provided, however, that notice shall first be given by said district supervisors to the proper railroad authorities or other authorities or persons, relative to the additions or changes to result from the improvements contemplated by said supervisors, and the said railroad authorities or other authorities, or persons, shall be given thirty days in which to agree to the said work, or to refuse to agree thereto, or in which they, if they so desire, may at their own expense construct the said improvements in their own manner; provided, such design or manner of construction shall be satisfactory to the said district supervisors and approved by the State Reclamation Engineer or his deputy. But if the said authorities or persons shall refuse to permit the said improvements to be made by

said district, or shall refuse to make them at their own expense, then the said district supervisors shall proceed by due process of law, as provided in this Act."

You will observe that Article 5567 confers the right of eminent domain upon levee improvement districts over all property, "private or public," and the last clause of said article provides that any damages accruing by reason of such condemnation proceedings shall be paid out of any funds or properties of said levee improvement district.

Article 5575, however, provides that in crossing any public or private roads, notice shall be given to the proper authorities of the intent of the district to do so; that they shall have thirty days in which to agree or disagree to said work; that in case they agree thereto, they shall have the privilege of making such changes as are required at their own expense, and the last clause reads as follows:

" * * * but if the said authorities or persons shall refuse to permit the said improvements to be made by said district or shall refuse to make them at their own expense, then the said district supervisors shall proceed by due process of law, as provided in this act."

These two articles, taken together, clearly mean that in case it becomes necessary in the construction of a levee district to cross, obstruct or use a public roadway, that the cost and expense incident thereto may first be paid by the county, and that in case the county should refuse to either make such changes and improvements itself or to allow same to be done, that in that case it would be the duty of the levee and improvement district supervisors to condemn said property and to pay the expenses and costs thereof out of the funds available therefor belonging to such levee improvement district.

In the case of Fort Worth Improvement District No. 1 vs. City of Fort Worth, 158 S. W., 164, the City of Fort Worth brought injunction proceedings against the improvement district to restrain said improvement district from endangering the water plant of the city. The city alleged that by the building of the levee the pumping plant of said water system would be subject to overflow at certain seasons of the year by reason thereof.

Under the law as it was then written, there was no provision by which such damages could be paid out of the funds of the improvement district, and, therefore, the Supreme Court of the State held that an injunction would lie. Since the case was decided, however the Act has been amended as above quoted and by such amendment provision is made that such damages may be paid by the improvement district.

I therefore advise you that the expense of changing a roadway made necessary by the construction of a levee may be paid by the county, if its commissioners court so desires, but that in case the commissioners' court refuses to pay same, then such damages as accrue to the county should be paid by the supervisors of the improvement district out of the funds available therefor.

Yours very truly,
JOHN MAXWELL,
Assistant Attorney General.

LIBEL LAW.

Op. No. 1975, Bk. 52, P. 500.

PROCEEDINGS JOINT INVESTIGATING COMMITTEE.

1. An investigation of the character of that provided for in the resolution creating the "Joint Ranger Investigation Committee" is a "legislative proceedings" within the meaning of Section 2 of Article 5597, if such proceedings "are made a matter of record" by the Legislature.
2. Matters disclosed in such an investigation may be matters of "public concern" within the meaning of Section 4 of said article.
3. The kind of "account" which would be privileged under the terms of Sections 1, 2 and 3 of Article 5597.
4. The kind of "comment or criticism" privileged under the terms of Section 4 of said article.
5. The words "account," "comment" and "criticism," as used in said article defined.

AUSTIN, TEXAS, February 4, 1919.

Hon. W H. Bledsoe, Chairman, Joint Ranger Investigation Committee, House of Representatives.

DEAR SIR: We have your letter of recent date, which is as follows:

"I respectfully request that your department issue an opinion as to whether or not a fair and impartial presentation without malice of matters brought out under oath before the joint ranger investigation committee of the Thirty-sixth Legislature of Texas is privileged matter under Texas libel laws.

"The committee has decided to advise, through the press of the State, that they are sitting for the purpose of hearing of charges filed against rangers and request any person having specific charges of this nature to appear before them.

"The question as to whether or not the press of the State is allowed to freely and fairly discuss developments before the committee vitally concerns the work and purpose of said committee."

Mr. J. T. Canales has, also, made the following request:

"I further ask whether charges made by a State Representative against the misconduct of State officers can be published without violation of the libel law, and whether State rangers are State officers."

Your committee was created by the adoption of House Concurrent Resolution No. 20, which is as follows:

"Resolved by this House of Representatives, the Senate concurring, That a committee of seven be appointed, four by the Speaker of the House and three by the President of the Senate, to fully investigate the activities of the Ranger Force, and the conduct of its individual members, and the causes of complaints that are made against it; the source from which such complaints come, and the motives that actuate those who make them, and to make a full investigation of the treatment by the Ranger Force of citizens and other persons intrusted to their charge; that said committee be empowered to summon witnesses to appear before it and to provide for their pay out of the contingent expense fund of the Legislature for this Thirty-sixth Legislature."

The privilege statute of the Texas Libel Law is Article 5597 R. S., which is as follows:

"What matters deemed privileged.—The publication of the following mat-

ters by any newspaper or periodical, as defined in Article 5595, shall be deemed privileged, and shall not be made the basis of any action for libel without proof of actual malice:

"1. A fair, true and impartial account of the proceedings in a court of justice, unless the court prohibits the publication of the same, when in the judgment of the court the ends of justice demand that the same should not be published, and the court so orders; or any other official proceedings authorized by law in the administration of the law.

"2. A fair, true and impartial account of all executive and legislative proceedings that are made a matter of record, including reports of legislative committees, and of any debate in the Legislature and in its committees.

"3. A fair, true and impartial account of public meetings, organized and conducted for public purposes only.

"4. A reasonable and fair comment or criticism of the official acts of public officials and of other matters of public concern published for general information."

Article numbered 5598, in the second volume of Vernon's Texas Civil and Criminal Statutes, 1918 Supplement, which is Section 2, Chapter 206 of the General Laws of the Regular Session of the Thirty-fifth Legislature, is as follows:

"Nothing in this Title shall be construed to amend or repeal any penal law on the subject of libel, nor to take away any now, or at any time heretofore, existing defense to a civil action for libel, either at common law, or otherwise, but all such defenses are hereby expressly preserved."

Our opinion is that Texas Rangers are officers of the State of Texas, that they are "public officials" and that their acts done, within the scope of authority given them in Title 116, R. S. 1911, are "the official acts of public officials," within the meaning of Section 4, Article 5597, R. S.

Our opinion is that an investigation within the scope of that outlined in the above quoted resolution, made during the sitting of this Regular Session of the Thirty-sixth Legislature, is a "legislative proceedings" within the meaning of Section 2, Article 5597, R. S., if such proceedings "are made a matter of record" by the Legislature. It is, also, our opinion that matters disclosed in such investigation, as above limited, are "matters of public concern" within the meaning of that term as used in Section 4, Article 5597, R. S.

Attention is now called to the particular wording of your inquiry which may be stated, in substance, as follows:

"Whether * * * a *fair* and *impartial presentation* without malice, of matters brought out under oath before the * * * committee is prevented under the Texas Libel Laws."

Then your letter contains the following explanatory sentence:

"The question as to whether or not the press of the State is allowed to *freely* and *fairly discuss developments* before the committee vitally concerns the work and purpose of said committee."

Attention is now called to the fact that the word "presentation" nowhere occurs in the statute. The word "account" is used in Sections 1 and 2 and 3, Article 5597, and the words "comment or criticism" are used in Section 4 thereof. Considering the connection in

which the word "presentation" is used in your letter, together with the explanatory matter contained therein, we think you wish to be advised as to what "account," "comment or criticism" of the proceedings before the committee can be published by a newspaper without violating the provisions of the Libel Law.

Your particular question would have to be answered in the negative, whether you wish the word "presentation" to be considered as synonymous with either the word "account" or the term "comment or criticism," as used in the Act, because you ask whether a newspaper may make a merely "fair and impartial presentation." This leads us to here call your attention to a distinctive feature of the Act, and that is, that an "account," as the word is used throughout the Act—whether of "proceedings in a court of justice" or of "official proceedings authorized by law in the administration of law," as provided in Section 1 of the Article, or "of an executive or legislative proceedings * * * including reports of legislative committees," as provided in Section 2 of the Act, or "of public meetings, organized and conducted for public purposes only," as provided in Section 3 of the Act—must be not merely "fair and impartial," but must be "fair, *true* and impartial."

A "comment or criticism," as used in Section 4 of the Act, is required to be "reasonable and fair" and not merely "fair and impartial."

We will not give an opinion as to whether the proceedings before this committee is an "official proceedings authorized by law *in the administration of the law*" as those terms are used in Section 1 of the Act, nor on whether the investigation before this committee is a "public meeting, organized and conducted for public purposes only," within the meaning of those terms as used in Section 3 of the Act, because we think that Sections 2 and 4 of the Article are broad enough to permit an account of the proceedings, if the same is made within the limits of the provisions of Section 2, of matters included within the scope of the joint resolution, and to permit "comment or criticism" of matters within the provisions of Section 4 of the Article and within the scope of the joint resolution.

We will now call particular attention to the terms of Section 2, Article 5597. The account contained in a newspaper under the terms of this article to be privileged must be—

1. An account which is "fair, true and impartial," and which is
2. "An account of * * * legislative proceedings," which legislative proceedings
3. "Are made a matter of record."

It may also include a fair, true and impartial account of any debate in the Legislature or in the committee on the matters just above described, and, also, a true, fair and impartial account of the reports of the committee, provided such debates or reports are germane to matters within the scope of the resolution.

We think that it was not the intention of the Legislature to limit the meaning of the word "account" to a fair, true and impartial *copy* of the proceedings, matters and things referred to in Section 2, but that they intended the word there used to have its usual and ordinary meaning. In other words, while a fair, true and impartial copy

of proceedings, matters,debates and reports, as these terms are limited in Section 2, would be "an account," within the meaning of that word as it appears in Section 2, still, we think that it was intended that the word might have a broader meaning—as an instance, an account of a battle.

We will now call particular attention to the terms of Section 4 of the article. The "comment or criticism" there contemplated is

1. A comment or criticism which is "reasonable and fair," and which is a comment on, or a criticism of—

2. "The official acts of public officials," or a reasonable and fair comment on, or criticism of—

3. "Other matters of public concern" published *for general information.*

It will be noted that the "comment or criticism" contemplated by the use of these words in this section of the article is a comment which must be "reasonable and fair." By the omission of the word "true" and the word "impartial," the Legislature has indicated that a comment or criticism may be more than a mere account of proceedings, matters, reports and debates, as those terms are limited in Section 2 of the article, and may extend to comments and criticisms by the writer of official acts of public officials, as the same appear of record in the proceedings before the committee, on subjects within the scope of the investigation permitted by the resolution, provided always that such comments on, or criticism of, the official acts of public officials shall be reasonable and fair.

The comment on, or criticism of, other matters must be of matters within the scope of the inquiry as disclosed by the resolution and must be matters of public concern, and must be published for general information. The words "comment and criticism," as used herein, must be given their ordinary and commonly accepted meaning.

This section of the Article has been construed in San Antonio Light vs. Lewy, 113 S. W. 574, in which writ of error was denied, in 103 Texas, 671; in Galveston Tribune vs. Johnson, 141 S. W. 304-6, and A. H. Belo & Company vs. Lacy, 111 S. W. 217.

Of course, no publication is privileged where actual malice is shown.

In answer to Mr. Canales' question as to whether "charges made by a State Representative against the misconduct of State officers can be published without violation of the libel laws," we call attention to the decision of the Court of Civil Appeals in the case of the Houston Chronicle Publishing Company vs. McDavid, 173 S. W. 471 and 472. The court there, in construing Section 1 of this article, in reference to court proceedings, seems to hold that a publication in a newspaper of a libelous pleading, properly filed, but before any action upon the same had been taken by the court, judge or other officer, is not justified; that the privilege is limited to proceedings while the court is in session and may have an opportunity to prohibit publication.

We do not, in this opinion, construe Section 1 of the article, because we think it does not have application to the present situation. However, if charges made by a State Representative, before the committee, against the misconduct of State officers are a part of the proceedings, within the scope of the resolution, and required by the com-

mittee, and are made a matter of record, and have been acted upon by said committee, they, as left by the committee after their action, would clearly not be within the limitations announced in the decision referred to.

There are sharp distinctions to be drawn between the proceedings of this committee and the proceedings in the committee in the Wren Case, 63 Texas, 720. This committee, both by the terms of the resolution creating it and by the statutes of the State at the present time (Chapter 3, Title 82), partakes more clearly of the nature of a quasi judicial tribunal and, undoubtedly, its acts are legislative proceedings. Unlike the work of the committee in the Wren Case, the work of this committee is in aid of legislation. Unlike the facts in that case, the labors of this committee must necessarily come to the knowledge of the Legislature. Unlike the committee in the Wren Case, this one was formed for purposes in connection with duties of the Legislature. The object of that committee "was to obtain evidence by which the State's counsel might be guided in instituting criminal prosecutions." The object of this committee is to obtain information in order that the Legislature "may better and more wisely legislate with reference" to the Ranger force.

We have not been advised of any rules adopted by the committee in reference either to the filing of charges, the consideration of same, or the hearing of the evidence. This opinion is based merely upon the abstract qustion as to the privileged character of the matters inquired about, in view of the scope, the character and purposes of the investigation, as disclosed by the contents of the resolution creating the committee.

You are advised that, in the opinion of this Department, the matters inquired about are privileged under the statute to the extent and within the limitation hereinbefore stated.

Yours very truly,
JOHN C. WALL,
Assistant Attorney General.

Op. No. 2204, Bk. 53, P. —.

POOL HALL LAW—BONA FIDE CLUBS.

It is not a violation of the law for a bona fide club to maintain and operate pool and billiard tables as an incident to the principal purpose for which the club is organized or maintained.

A so-called club which charges a membership fee or annual or monthly dues, and its principal business is to afford an opportunity to its members to play pool and billiards, is a public pool hall within the meaning of Section 1 of Chapter 14, Acts of the Thirty-sixth Legislature, and, therefore, unlawful.

March 31, 1920.

Hon. A. T. Pribble, County Attorney, Goldthwaite, Texas.

DEAR SIR: I have your letter of March 29th addressed to the Attorney General wherein you request an opinion from this Department with reference to clubs maintaining and operating pool and billiard tables.

In reply, you are respectfully advised, that it is a violation of the law for anyone to maintain and operate pool and billiard tables for hire, that is, to charge a fee for the use of the facilities afforded for playing the game of pool or billiards, or to maintain and operate pool and billiard tables in connection with any place of business where goods, wares or merchandise or other things of value are sold or given away, or to maintain and operate pool and billiard tables for advertising purposes.

A bona fide social or business club may maintain and operate pool and billiard tables for the use of its members provided no fee is charged for playing the game and the tables are not operated in connection with the sale or the giving away of anything of value, or for advertising purposes.

By bona fide club, as above used, we mean a social or business organization which maintains and operates pool and billiard tables merely as an incident of its organization and not as the principal purpose of the organization. It would be unlawful for a club to maintain and operate pool and billiard tables which was organized for the purpose or whose principal purpose in organizing would be to afford its members an opportunity to play pool and billiards and which charged a fee for membership or that charged monthly or annual dues. Such an organization would be conducting a pool hall for hire just as much so as if a fee was charged for the privilege of playing each game.

In determining whether a club is a "bona fide" club or merely an attempt to avoid the law prohibiting pool halls, a good test is: Would the club be organized and maintained if the game of pool and billiards were omitted from the amusements offered the members? If the pool and billiard tables are merely incidental to the main purpose of the club, their removal would not seriously affect the purpose for which the club is organized. On the other hand, if the purpose of the club is merely to afford an opportunity for its members to play pool and billiards, the removal of the pool and billiard tables from the club rooms would destroy the purpose for which the club was organized.

By applying this test, we are of the opinion that the prosecuting officers of the State will have no difficulty in determining for themselves or of convincing the courts and juries of the State as to whether or not a club is maintaining pool and billiard tables in violation of Chapter 14, Acts of the Regular Session of the Thirty-sixth Legislature, known as the "Pool Hall Law."

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

Op. No. 1971, Bk. 51, P. 483.

POOL HALLS—POLICE POWER.

(1) It is within the police power of the State to prohibit the maintenance and operation of pool halls for profit.

(2) A State law prohibiting the keeping of pool halls is not unconstitutional under the Fourteenth Amendment of the Constitution of the United States, either as depriving the owner of the hall of his property without due process of law or as denying him the equal protection of the law.

U. S. Reports, 225, page 627.

AUSTIN, TEXAS, January 27, 1919.

Hon. W. D. Suitor, Chairman Committee of Criminal Jurisprudence, Senate Chamber.

DEAR SIR: The Attorney General is in receipt of your letter of the 27th instant, desiring to have his opinion as to the constitutionality of Senate Bill No. 14, a copy of which you attach to your letter, and which bill is described in the caption thereof as "an Act to prohibit the maintenance and operation of pool halls within the State of Texas for profit."

Replying to your letter, we beg to advise that, in our opinion, the State, through its Legislature, has the legal right under its police power to prohibit the maintenance and operation of pool halls for profit in the State; and that such an act, as disclosed by the provision of this bill, if incorporated into a bill, would be constitutional.

The police power of a State has been defined to be "the power vested in the Legislature to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same."

The term "police power" of the State may be further defined as being "those laws of a State, or ordinances of a municipality, which have for their object the preservation and protection of the public peace and good order and of the health, morals and security of the people." Black's Law Dictionary.

As applied to the powers of the States of the American Union, the term "police power" is also used to denote those inherent governmental powers which, under the Federal system established by the Constitution of the United States, are reserved to the several States. Heretofore, it has been the policy of the State to attempt to regulate the pool halls in Texas rather than to prohibit their maintenance and operation. From every pool table used for profit, the State now levies a State tax of Twenty Dollars per annum. Section 8, Article 7355, Revised Civil Statutes.

It is a penal offense in this State for a minor to enter and remain in a pool hall, or to play pool therein, without the consent of the parents of such minor; Article 1053, Penal Code.

The higher courts of our State have not heretofore passed directly upon the question as to whether or not the State has the right to prohibit the maintenance and operation of pool halls in this State. In view of the fact that the question, so far as we are advised, has never been before our courts, as it has been the policy of the State, as heretofore stated, to attempt to regulate rather than prohibit the operation of pool halls in Texas.

The several decisions of our courts construing the local option features of the pool hall law, enacted by the Thirty-third Legislature, providing that the qualified voters of any county, or political sub-

division thereof, may vote upon the abolishment of pool halls, deal only with the question as to whether or not the State may delegate its own powers, imposed upon it by the Constitution, which it alone may exercise, to the voters of any county. It is now the holding of our Supreme Court, and of the Court of Criminal Appeals, that such authority cannot be delegated.

Lyle vs. State, 193 S. W., 684;
Ex Parte Mitchell, 177 S. W., 953.

These and other decisions of our courts, which are not necessary to mention, do not pass upon the issues involved in the inquiry before us and for that reason we must look to the decisions of the courts of other States to determine the law of the case.

The Supreme Court of Mississippi in the case of the City of Corinth vs. Crittenden (94 Miss. 41; 47 Southern 525) holds that pool and billiard rooms are within the police powers of the State and may be regulated or prohibited at legislative will.

In discussing the matter, the court says:

"While the general law provides for the licensing of pool rooms, such a business comes well within the police power of a State board to regulate or prohibit. The evil tendency of such places is known to all mankind. In them no good is promoted, but they too often prove nurseries of idleness and such evils as naturally result therefrom. The keeping of a pool room, or billiard room, can be considered a lawful business only so long as the Legislature makes it so and only in such places as the law allows. Such places may be prohibited at any time the Legislature deems it proper to do so, and the influence of such places is not much less corrupting than is that of a dramshop."

Under the Constitution of Nebraska, as decided in the case of Cole vs. the Village of Culberson, 86 Nebraska 160, the Legislature has the full power, so says the opinion of the court, to grant authority to villages to license, regulate or prohibit billiard halls, pool halls or bowling alleys within the limits of such village, the court holding in the case that "the constitutional power of the Legislature to grant such authority * * * is too clear to require discussion or citation of authorities."

The Supreme Court of the United States, in the case of Murphy vs. the people of the State of California, 225 U. S. 623, passed upon the right of a State to prohibit the operation of pool halls in the State, and the opinion states the reasons why such an Act is constitutional with such force and clearness that we copy the opinion of said court and adopt the same as our reasons for believing such Act to be constitutional. The opinion was rendered by Mr. Justice Lamar and is as follows:

"In 1908 the city of South Pasadena, California, in pursuance of police power conferred by general law, passed an ordinance which prohibited any person from keeping or maintaining any hall or room in which billiard or pool tables were kept for hire or public use, provided it should not be construed to prevent the proprietor of a hotel using a general register for guests, and having twenty-five bedrooms and upwards, from maintaining billiard tables for the use of regular guests only of such hotel, in a room provided for that purpose.

"The plaintiff in error was arrested on the charge of violating this or-

dinance. His application for a writ of habeas corpus was denied by the Court of Appeals and Supreme Court of the State. In re Murphy, 8 Cal. App. 440; 155 California, 322. Thereafter the case came on for trial in the recorder's court, where the defendant testified that, at a time when there was no ordinance on the subject, he had leased a room in the business part of the city, and at large expense fitted it up with the necessary tables and equipments; that the place was conducted in a peaceable and orderly manner; that no betting or gambling or unlawful acts of any kind were permitted, and that there was nothing in the conduct of the business which had any tendency to immorality or could in the least affect the health, comfort, safety or morality of the community or those who frequented said place of business.' This evidence was, on motion, excluded and testimony of other witnesses to the same effect was rejected.

"The defendant was found guilty and sentenced to pay a fine, or in default thereof to be imprisoned in the county jail. The conviction was affirmed by the Supreme Court of the county, the highest court to which he could appeal. The case was then brought here by writ of error, the plaintiff contending that the ordinance violated the provisions of the Fourteenth Amendment, claiming, in the first place, that in preventing him from maintaining a billiard hall it deprived him of the right to follow an occupation that is not a nuisance per se, and which, therefore, could not be absolutely prohibited.

"The Fourteenth Amendment protects the citizens in their right to engage in lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations, which may or may not be harmful to the public, according to local conditions, or the manner in which they are conducted.

"Playing at billiards is a lawful amusement; and keeping a billiard hall is not, as held by the Supreme Court of California on plaintiff's application for habeas corpus, a nuisance per se. But it may become such; and the regulation or prohibition need not be postponed until the evil has become flagrant.

"That the keeping of a billiard hall has a harmful tendency is a fact requiring no proof and incapable of being controverted by the testimony of the plaintiff that his business was lawfully conducted, free from gaming or anything which could affect the morality of the community or of his patrons. The fact that there has been no disorder or open violation of the law does not prevent the municipal authorities from taking legislative notice of the idleness and other evils which result from the maintenance of a resort where it is the business of one to stimulate others to play beyond what is proper for legitimate recreation. The ordinance is not aimed at the game but at the place; and where, in the exercise of the police power, the municipal authorities determine that the keeping of such resorts should be prohibited, the courts cannot go behind their findings and inquire into local conditions; or whether the defendant's hall was an orderly establishment, or had been conducted in such manner as to produce the evils sought to be prevented by the ordinance. As said in Booth vs. Illinois, 184 U. S., 425, 429: 'A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all at the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interefer, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to the object, but is a clear, unmistakable infringement of rights secured by the fundamental law.'

"Under this principle ordinances prohibiting the keeping of billiard halls have many times been sustained by the courts. Tanner vs. Albion, 5

Hill, 121; City of Tarkio vs. Cook, 120, Missouri, 1; City of Clearwater vs. Bowman, 72 Kansas, 92; City of Corinth vs. Crittenden, 94 Mississippi, 41; Cole vs. Village of Culbertson, 86 Nebraska, 160; Ex Parte Jones, 97 Pac. Rep. 570.

"Indeed, such regulations furnish early instances of the exercise of the police power by cities. For Lord Hale in 1672 (2 Keble, 846), upheld a municipal by-law against keeping bowling alleys because of the known and demoralizing tendency of such places.

"Under the laws of this State, South Pasadena was authorized to pass this ordinance. After its adoption, the keeping of billiard or pool tables for hire was unlawful, and the plaintiff in error cannot be heard to complain of the money loss resulting from having invested his property in an occupation which was neither protected by the State nor the Federal Constitution, and which he was bound to know could lawfully be regulated out of existence.

"There is no merit in the contention that he was denied the equal protection of the law because, while he was prevented from so doing, the owners of a certain class of hotels were permitted to keep a room in which guests might play at the game. If, as argued, there is no reasonable basis for making a distinction between hotels with 25 rooms and those with 24 rooms or less, the plaintiff in error is not in position to complain, because not being he owner of one of the smaller sort, he does not suffer from the alleged discrimination.

"There is no contention that these provisions permitting hotels to maintain a room in which their regular and registered guests might play were evastively inserted, as a means of permitting the proprietors to keep tables for hire. Neither is it claimed that the ordinance is being unequally enforced. On the contrary, the city tustees are bound to revoke the permit granted to hotels in case it should be made to appear that the proprietor suffered his rooms to be used for playing billiards by other than regular guests. If he allowed the tables to be used for hire he would be guilty of a violation of the ordinance and, of course, be subject to prosecution and punishment in the same way, and to the same extent, as the defendant."

In conformity with the opinion of the Supreme Court of the United States in the above case, and in following such decision as the law of the land, we are of the opinion that the State Legislature may forbid the maintenance and operation of pool halls in Texas, and, in doing so, is clearly acting within the police power of the State.

Yours very truly,
W. J. TOWNSEND,
Assistant Attorney General.

Op. No. 2184, Bk. 53, P. —.

SUNDAY LAW—WORKS OF CHARITY.

A person playing a pipe organ or other musical instrument for pay on Sunday and in connection with religious worship does not violate Article 299 Penal Code of Texas.

AUSTIN, TEXAS, March 2, 1920.

Hon. Jesse M. Brown, District Attorney, Fort Worth, Texas.

DEAR SIR: We are in receipt of your inquiry of the 26th ultimo, reading as follows:

"At the request of the sheriff of this county, who is making arrests for violation of Article 299 of the Penal Code, said article being the one

which prohibits working on Sunday, and Article 300 which contains the exceptions, I am asking for an opinion. There are certain professional musicians here in Fort Worth who are paid to play the pipe organ and other musical instruments at the church services. As an instance, there is one man who, at different hours of the day on Sunday, plays the church organ at three different churches; at the Jewish Church, the Catholic Church and one of the Protestant churches. He receives pay for such services. Is he guilty of a misdemeanor under Articles 299 and 300, Branch's Penal Code? If not, what distinguishes his work from that of a carpenter or contractor who works at his job? The only reason that he would not be guilty, it seems, would be that such work must be a work of necessity or a work of charity. Is it, in your opinion, either one?"

In the first place, I respectfully direct your attention to the fact that our Bill of Rights declares that all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship, and that it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship. Article 1, Section 6, Constitution of Texas.

At the time of the adoption of this section of the Bill of Rights, and from time immemorial prior thereto, music was and had been a component part of religious worship in a great number of religious institutions on the Sabbath day. This is a matter of common knowledge and will scarcely be disputed. We are not to be understood as holding the view that the Legislature would be without authority to interfere with modes of religious worship that would disturb the public peace or morals or that would unduly interfere with the rights of others or acts, not a part of religious worship, committed in connection therewith; but it is not to be supposed that the Legislature intended to interfere with as innocent, harmless and universal a mode of religious worship as the one inquired about by you, unless such an intention is unmistakable and clear. See Cooley's Constitutional Limitations, Sixth Edition, pages 576-7.

Article 299 of the Penal Code of Texas is as follows:

"Working on Sunday.—Any person who shall hereafter labor, or compel, force or oblige his employes, workmen or apprentices to labor on Sunday, or any person who shall hereafter hunt game of any kind whatsoever on Sunday, within one-half mile of any church, school house or private residence, shall be fined not less than ten nor more than fifty dollars."

Article 300 of the same Code contains the exceptions to Article 299 and among other things declares that said Article 299 shall not apply to "works of necessity or charity."

Construing these articles of the statute in the light of the constitutional provision before mentioned, it is the opinion of this Department that it was not the intention of the Legislature to prohibit the playing of music in connection with religious services on Sunday. Music being a necessary incident to religious worship according to the beliefs of many denominations, the fact that the musician received

compensation for his services would be immaterial; the minister, priest or rabbi himself receives pay in some form or other.

The Legislature made an exception of "works of charity," and there is no doubt in our minds that under the broad definition properly applicable to the term "charity," this character of employment is to be included therein, and that it was the intention of the Legislature to except such employment from the provisions of Article 299.

The great object of the church and religious services and worship being charitable in its nature, music necessarily incident thereto would likewise be charitable. This doctrine was recognized in the G. C. & S. F. Ry. Co. vs. Levy, 59 Texas 546. In that case the Supreme Court of Texas held that a contract to send a telegram on Sunday, conveying a message relative to the burial of the wife of appellee, was not unlawful under our Sunday law, it being excepted as a work of necessity or charity. Now, of course, the business of sending telegrams might not under all circumstances be a work of necessity or charity, but when the sending of a telegram is incident to and connected with the burial of a human being, it clearly becomes such.

In the case of Allen vs. Duffie, 43 Mich. 1, 38 Am. Rep. 159, the validity of a subscription for the erection of a house of religious worship was attacked on the ground that it was contracted and agreed to on Sunday. The statutes of Michigan, like our statute, prohibited working on Sunday and made an exception of works of charity. The Supreme Court of Michigan held that this transaction was, within the meaning of the Michigan Statute, a work of charity, as it was connected with religious worship. Judge Cooley, writing the opinion of the court, said:

"Charity is active goodness. It is doing good to our fellow man. It is fostering those institutions that are established to relieve pain, to prevent suffering, and to do good to mankind in general or to any class or portion of mankind. As the term 'charity' is made use of in our law, it no doubt takes on shades of meaning from the Christian religion, which has largely affected the great body of our laws, and to which we must trace the laws which punish what the Christian regards as a desecration of the first day of the week. It was never doubted, so far as we know, that all the necessary or usual work connected with religious worship was work of charity. If it were not so, the minister who preaches, the organist, the precentor who furnishes the music, and the sexton who cares for the building on Sunday, would be violating the law every day they performed service for their religious society, and not only would be precluded from recovering compensation, but might be punished for services which are proper in themselves, and for which the day is specially set apart. But their work is not illegal, because it is in a true sense, and indeed in the very highest sense, charitable. Religious societies are formed to do good to mankind."

It is not necessary to discuss at length or quote from numerous cases upon this subject, but it might be said that the following cases are to the same general effect as the Michigan case quoted from above:

73 Conn. 718.
127 Ind. 42.
110 Iowa 5.
98 Pa. St. 389, 42 Am. Rep. 624.
113 Wis. 567.
109 Mass. 398, 12 Am. Rep. 720.

As indicative of the probable legislative intent we call attention to the fact that instead of prohibiting innocent and harmless modes of religious worship on Sunday, the Legislature, in obedience to the command of the Constitution, has sought to protect the same from disturbance. You will note that Article 296, Penal Code, makes it unlawful to wilfully disturb a congregation assembled for religious worship or Sunday School, and Article 299 itself prohibits hunting within half a mile of a church on Sunday.

If the mere fact that the musicians who furnish the music, which is a part of religious worship, receive compensation would constitute working on Sunday, it could with equal force be said that the ministers, priests and rabbis who receive compensation for their services, a part of which is to expound the gospel on Sunday, would likewise be working on Sunday, and a strict enforcement of the Sunday law thus interpreted would prohibit directly religious worship on Sunday.

We answer your inquiry, therefore, that in the opinion of this Department the playing of a pipe organ or other musical instrument on Sunday as a part of religious worship by persons receiving compensation therefor not only does not constitute a violation of law, but that such a mode of religious worship is protected by law from any character of interference from any source.

This same question came up for decision in the days of Christ when the Pharisees learned that Christ's disciples had plucked heads of wheat (corn) and shelled this wheat, or corn, in the palms of their hands. This transaction having occurred on Sunday complaint was made against His disciples charging them with having worked on Sunday.

(Mark II— 23 to 28 inclusive.)

A like charge was preferred against Christ Himself by the Pharisees for having healed a man with a withered hand on the Sabbath day as He made his entrance into the Synagogue.

(Mark III—1 to 6 inclusive.)

Christ's interpretation of the Sunday law was to the effect that "The Sabbath was made for man and not man for the Sabbath, therefore, the Son of Man is Lord also of the Sabbath," and that it was lawful to do good on the Sabbath.

We think the Constitution and laws of this State unmistakably guarantee and protect the right of every person to worship God according to the dictates of his own conscience and all religious worship is protected by law from any character of interference from any source, and inasmuch as it is known of all men that music is a customary and usual part in religious worship, it is wholly immaterial whether those who furnish that music receive compensation or not. The music being a part of religious worship it is protected by the Constitution and laws of this State and it does not constitute such transaction a violation of any law of this State.

Yours very truly,
W. A. KEELING,
Assistant Attorney General.

Op. No. 2031, Bk. 52, P. 327.

PUBLIC SECURITIES—ROADS AND ROAD DISTRICTS—COUNTIES—BONDS—WORDS AND PHRASES.

(1) Where a county or road district issues bonds under Chapter 2, Title 18, R. S., 1911, and amendments thereto, money derived from their sale must be expended in the construction, maintenance and operation of roads and "in aid thereof"—the words "in aid thereof" held to mean all necessary work in the proper construction and maintenance of roads.

(2) By Article 637-a, Chapter 203, Acts of 1917, counties are authorized to assume or take over the bonded debts of road districts therein; held that this Act authorizes the issuance of bonds to pay for district roads already constructed and such additional amount of bonds that might be considered necessary to "further construct" roads to the end that the district roads purchased might be connected up and merged into and become a part of a general county system of public roads.

(3) Ditches can be properly constructed for draining roads, if necessary in the proper maintenance thereof.

(4) Where a county or road district issues bonds under Chapter 2, Title 18, and amendments thereto, the roads constructed by the issuance of such bonds must be adequate, durable and permanent, and the Court would have no authority to construct "dirt roads," as such roads would not come within the requirement of the law providing for the construction of "macadamized, graveled or paved roads."

(5) Commissioners court held authorized to construct "dirt roads" first and then surface them within a reasonable time, but there cannot be one bond issue for building "dirt roads" and another bond issue for surfacing such roads.

ATTORNEY GENERAL'S DEPARTMENT, April 8, 1919.

Hon. B. S. Wright, County Attorney, Wharton, Texas.

DEAR SIR: In your communication of the 28th ult., addressed to the Attorney General, you request a construction of the phrase "in aid thereof" appearing in the purpose prescribed for the issuance of road bonds by counties and road districts.

By Section 52 of Article 3 of the Constitution it is provided:

> "Under legislative provision any county, any political subdivision of a county * * * now or hereafter to be described and defined * * * in addition to all other debts, may issue bonds * * * in any amount not to exceed one-fourth of the assessed valuation of the real property of such district or territory * * * for the following purposes * * * the construction, maintenance and operation of macadamized, graveled or paved roads and turnpikes, or in aid thereof."

In our opinion, funds derived from the sale of bonds issued by a county or road district must be expended in the construction, the maintenance, and the operation of roads and also "in aid thereof." The words "in aid thereof" mean any necessary work or improvements with respect to the proper construction and maintenance of adequate and durable roadways, namely, ditches, culverts and bridges.

In the case of Aransas County vs. Coleman-Fulton Pasture Company, 191 S. W. 553, the Supreme Court, speaking through Chief Justice Phillips, used the following language:

> "The amendment of 1903 to Section 52 of Article 3 * * * marked a radical departure from the previous policy of the State. It was the response to a public demand that provision be made whereby the State and

every section of the State might be supplied through voluntary taxation with adequate, durable and permanent roadways. * * *

"Furthermore, it was to prove of use to every section of the State, no less to those parts where the building of roads might be attended by the crossing of swamp lands and marsh land, or other natural obstacles, than to those whose topography is more favorable; no less to the coast counties with their shallow channels and indented inlets and bays to be reckoned with in the procurement of convenient and enduring highways of travel, than to those of the prairie region and black land belt whose elevation and surface afford no such difficulties and present no such problems."

Your letter also contains the following:

"Under Article 637-a, Section 2, above mentioned, the bonds are to be issued for 'further constructing, maintaining and operating macadamified, graveled or paved roads and turnpikes throughout such county.' I will appreciate your opinion as to whether the proceeds from the sale of these bonds may be used for any other purpose than the language would seem to indicate. Could they be used for the purpose of building ditches to drain such roads? Could dirt roads be constructed to be surfaced at a later date? Was it the intention of the Legislature to restrict the use of these bonds to taking over roads of existing districts in county and to *simply* the constructing, etc., of macadamized, graveled or paved roads and turnpikes?"

The above article, namely, Article 637-a, is embraced in Chapter 203, Acts of 1917, which was an Act to authorize a county to assume or take over the bonded debts of the road districts therein and the purpose prescribed therefor is as follows:

"Purchasing or taking over the improved roads already constructed in said road district or districts and of further constructing, maintaining and operating macadamized, graveled or paved roads and turnpikes throughout such county."

This purpose authorizes the issuance of bonds to pay for district roads already constructed and such additional amount of bonds that might be considered necessary to "further construct" roads to the end that the district roads purchased might be connected up and merged into and become a part of a general county system of public roads. Ditches can be properly constructed for the purpose of draining the roads, if it is found necessary in the proper maintenance thereof. The purpose provides that "macadamized, graveled or paved roads and turnpikes" shall be constructed. This, we think, would prevent the construction of "dirt roads." As the political subdivisions named were given authority upon the requisite vote to issue bonds "in addition to all other debts" and as the only maximum prescribed was the liberal amount of 25% of the real property values, we think that the purpose, in so far as it applies to the kind of roads to be constructed, should be strictly construed. We have held that the court could not issue bonds and use the money derived from their sale for simply grading roads.

In Aransas County vs. Coleman-Fulton Pasture Co., 191 S. W. 556, the Supreme Court (opinion by Chief Justice Phillips) held that roads paved with "shell" would be "paved roads" within the constitutional provision. This case affirmed in part a judgment of the Court of Civil Appeals at San Antonio in the case of Coleman-Fulton

Pasture Co. vs. Aransas County, reported in 180 S. W. 316, and the ruling of the Civil Appellate Court approved by the Supreme Court is set out in the following language:

"We are of the opinion that appellees have full authority to use the funds arising from the sale of the bonds to construct, maintain, and operate roads, whether they be macadamized, graveled or paved, and as there was sufficient testimony to show that the shell roads to be erected were paved roads, within the contemplation of the Constitution, the court properly refused to restrain appellees from using the money to construct such roads. 'To pave' is defined by Webster's Unabridged Dictionary:

"'To lay or cover with stone, brick, or other material, so as to make a firm, level, or convenient surface for horses, carriages, or persons on foot to travel on.'

"The testimony shows that shell or mud shell will make a hard, smooth road, that is durable and lasting. The words 'paved road' we think, are broad enough to include roads made of shell or mud shell. It cannot be supposed that the Constitution meant to confine the words to roads with solid toppings, as asphalt or concrete, because it is well known that such materials are never used in Texas in building public roads, but are used only in towns and cities. Macadamized and graveled roads are mentioned, and then, as comprehending all other roads, the word 'paved' was used. We think appellees have the right and authority to expend the money arising from the bond issue in the construction and maintenance of roads built, as indicated in the testimony, of shell or mud shell. The evidence was positive that shell roads are 'paved roads.'"

From all of the above, it is our opinion that the roads must be so constructed as to be adequate, durable and permanent, and the court would have no authority, therefore, to construct "dirt roads" for it is a mater of common knowledge that "dirt roads" are not permanent.

We will state, however, that the court could, of course, construct "dirt roads" first and then surface them within a reasonable time after their construction; that is, as soon as circumstances will permit. By "reasonable time" we mean so much time as is necessary under the circumstances conveniently to do that which the statute requires should be done, namely, the construction of macadamized, graveled or paved roads and turnpikes. However, the construction of the "dirt roads" and surfacing such roads must be paid for out of the funds derived from the sale of the bonds to be issued. In other words, there cannot be one bond issue for building the "dirt roads" and another bond issue for surfacing such roads.

Yours very truly,
W. P. DUMAS,
Assistant Attorney General.

BONDS—PUBLIC SECURITIES—ROAD DISTRICTS—TAXATION.

(1) Road District Bond Taxes can be used for the purpose of paying bonds outstanding against the district and for no other purpose.

(2) Commissioners' Court is authorized to cancel and destroy any bonds, and the interest coupons annexed thereto, on or after the maturity dates therein designated, although such bonds have not been sold.

August 7, 1920.

Hon. T. H. Miller, County Judge, George West, Texas.

DEAR SIR: In your letter of the 5th instant, addressed to the Attorney General, you state that since Live Oak County has no county attorney you request the opinion of this Department on the following:

"Where a road district has voted bonds for the improvement of roads and the bonds have been issued and approved by your department and the taxes have been levied and collected for one year or more, and the money is with the depository for the taking up of those bonds, but the bonds have not been sold to any one, has the commissioners' court the right to take the money on hand in the interest and sinking fund and redeem the bonds that are due and apply that money to road building * * *?"

(1) Taxes levied by the Commissioners Court to provide interest on and sinking funds for road improvement district bonds can be used for the purpose of paying such bonds outstanding against the district and for no other purpose whatever.

(2) Where a road district has voted bonds and taxes have been levied and collected for one year or more and the tax money is in the depository to the credit of the interest and sinking fund account of the district, it is not within the power of the Commissioners Court to transfer the money to the construction fund and expend the same for the purpose of improving the roads within the district.

(3) Where a road district has voted bonds and the bonds have been issued and approved by the Attorney General, but have not been sold, it is within the power of the Commissioners' Court to cancel and destroy any bonds, and the interest coupons annexed thereto, on or after the maturity dates therein designated; but as such bonds are not sold, they do not represent a debt against the district and consequently there are no bonds to be paid.

Yours very truly,
W. P. DUMAS,
Assistant Attorney General.

Op. No. 2066, Bk. 52, p. 426.

PUBLIC SECURITIES—COUNTIES—ROAD DISTRICTS—LEVEE DISTRICTS.

(1) A county or a road district or any part of a county or a road district cannot be taxed under Section 52 of Article 2, Constitution, in support of bonds for all purposes permitted by said Section in excess of an amount equal to one-fourth of the assessed real property values thereof.

(2) Where a levee improvement district is organized under Section 52 of Article 3 of the Constitution and embraces territory included within a road district, the aggregate amount of indebtedness incurred for levee and road building purposes in the territory common to the levee district and the road district cannot exceed 25% of the total assessed valuation of the real property situated in such common territory.

ATTORNEY GENERAL'S DEPARTMENT, April 25, 1919.

Hon. F. L. Wilson, County Judge, Waxahachie, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of the 18th inst., and in reply thereto I beg to say:

(1) Where a levee improvement district is organized under Section 52 of Article 3 of the Constitution and embraces territory included within a road district, the aggregate amount of indebtedness incurred for levee and road building purposes in the territory common to the levee district and the road district cannot exceed 25% of the total assessed valuation of the real property situated in such common territory.

In Simmons vs. Lightfoot, 146 S. W., 871, the Supreme Court of this State (opinion by Justice Dibrell) held that the several acts of the Legislature passed in pursuance of Section 52 of Article 3 of the Constitution—

"* * * when construed together, as they must be, do not give each district, when one embraces a part of the whole area of another district formed for a different purpose, authority to create a debt for each purpose equal to one-fourth the assessed value of the real property in such district, but rather gives the privilege to the *first district formed* to create a debt and levy and collect the necessary taxes for its discharge in a lesser or greater amount, not to exceed the maximum sum fixed by the Constitution. Those acts simply imply that *subsequently* formed districts for different purposes embracing territory of previously formed districts *must accept conditions as they exist;* and that disricts first formed may first appropriate.

"We are of opinion that a road district formed after a drainage district, may embrace such district, and may create a debt not to exceed one-fourth of the assessed value of the real property in such subsequently formed district, less the debt created by the *previously* formed district; but, in levying and collecting the taxes to pay the interest on and provide a sinking fund for the payment of *such debt*, the property in the *previously formed district* cannot be taxed *more than sufficent* than to pay the amount in excess of the debt the drainage district was authorized to incur."

The opinion further declares:

"We are, therefore, of the opinion that the Constitution authorizes the creation of an indebtedness of one-fourth of the assessed valuation of the real property of any district or territory for all purposes enumerated in the Constitution."

In Munson vs. Looney, 172 S. W., 1102 (opinion by Chief Justice Brown), it was held by the Supreme Court that the aggregate amount of indebtedness incurred for drainage and road building purposes in the common territory must not exceed 25% of the total assessed valuation of the real property situated in such common territory.

The opinion contains the following language:

"* * * drainage districts Nos. 5 and 8 in Brazoria County were created. District No. 5 issued bonds to the amount of 22% of the assessed value of the real estate within its limits. District No. 8 was creted in said county, and adjoining No. 5, which issued bonds to the amount of 21 1/10% of the assessed value of all real estate within said district. If the bonds now sought by this procedure were issued by either the 5th or the 8th district, it would result in charging upon such district a sum greater than one-fourth of the assessed value of the real estate therein, in violation of the Constitution."

(2) A county or a road district, or any part of a county or a road district, cannot be taxed under Section 52 of Article 3 of the Constitution in support of bonds for all purposes permitted by this section

in excess of an amount equal to one-fourth of the assessed real property values thereof. In other words, it is provided by Section 52 of Article 3 that territory common to road, drainage, navigation, levee and irrigation districts cannot be bonded in excess of 25% of the real property values thereof for all five purposes. Take for example a road district that embraces a levee district. Each district has issued bonds and the territory common to both is bonded to 20% of the assessed values. Therefore, the bonding power of each district as long as the outstanding bonds are unpaid is 5% of the real property values.

As an illustrative test of the above, let us apply the facts of an assumed case by the following plat:

E A D

Levee District.

Valuation	$300,000
Normal bond capacity	75,000
Levee bonds issued	30,000
Reserved capacity	45,000

B C

Road District.

Valuation	$1,000,000
Normal bond capacity	250,000
Road bonds issued	100,000

F G

A, B, C and D represent a levee district.

E, F, G and D represent a road district and which, as shown above, includes the levee district.

The real property assessed valuations in the levee district being $300,000, and the real property valuations in *both districts* being $1,000,000—therefore, the pro rata part of the $100,000 *road bonds* on the territory in the *levee district* is $30,000 or 10% of the real property values of the levee district, and the levee district having issued levee bonds amounting to $30,000, the territory common to both districts is for levee and road purposes bonded in the sum of 20% of the realty values thereof. Consequently, the road district, in the issuance of *additional road bonds,* cannot legally issue an amount in excess of $50,000 and which would increase the debt on the said common territory $15,000 or 5%, thereby making the 25% limit prescribed by Section 52 of Article 3 of the Constitution.

(3) You state that you find no statutory authority for excluding from a road district territory also embraced in a levee district and that Article 637D of Chapter 203, Acts of 1917, "expressly prohibits the inclusion of any part of a road district with outstanding bonds in any other district created under Section 52, Article 3."

In the creation or establishment of a road district under the general law (Chapter 2, Title 18, R. S., 1911), the commissioners court may exclude, if practicable, the territory embraced within a levee district

that has been formerly created. The term "defined district" means any part of the county less than the whole created by the commissioners court for the purpose of constructing roads. If, for example, a portion of a commissioner's precinct is embraced in a levee district, the commissioner's court can create a road district out of the remaining portion of such commissioner's precinct. Therefore, the commissioner's court in the establishment of a road district may exclude or leave out a levee district, if practicable. Article 637D referred to by you only prohibits one road district overlapping the territory of *another road district*. This Article was amended by Chapter 18, Acts Fourth Called Session Thirty-fifth Legislature, and, as amended, authorizes the commissioner's court to pass necessary orders so as to make the boundaries of the district last created conform to the boundaries of the contiguous road district first created.

(4) Where a county undertakes to issue bonds under Chapter 2, Title 18, R. S., 1911, or under any special road law therefor passed in pursuance of Section 52 of Article 3 and there are levee improvement districts in such county that have issued bonds under said Section 52 of Article 3, then, in the issuance of the road bonds by the county, it should be definitely determined whether any territory common to the county and any levee district therein will not be bonded in excess of 25% of the real property values of such common territory for levee and for road purposes.

In certain counties levee districts have become conservation and reclamation districts under Section 59 of Article 16, generally known as the Conservation Amendment, and as such, have issued additional levee bonds under what is termed as the Canales Law (Chapter 25, Acts Fourth Called Session, Thirty-fifth Legislature), yet the debts incurred by such districts under the Levee District Acts prior to the passage of the Canales Law must be controlled by the laws of their creation and must therefore be taken into consideration in determining the bonding power of the county for the construction of roads under Section 52 of Article 3 of the Constitution. * * *

Very respectfully,

W. P. DUMAS,
Assistant Attorney General.

Op. No. 2016, Bk. 52, P. 269.

CONSTITUTIONAL LAW—SEARCHES AND SEIZURES—DUE PROCESS OF LAW.

The orders or instructions of the Live Stock Sanitary Commission, its agents or inspectors, given for the purpose of enforcing certain provisions of the Tick Eradication Law would be insufficient to authorize a sheriff or constable to enter the premises of any person, and against the owner's wishes, seize and take by force cattle or other live stock.

Fourth Amendment, U. S. Constitution; Section 1, 14th Amendment of U. S. Constitution; Section 9 and 19, Article 1, Texas Constitution; Section 19, Chapter 60, Acts Thirty-fifth Legislature, passed at its Regular Session.

AUSTIN, TEXAS, April 2, 1919.

Hon. Dack Walker, County Judge, Gilmer, Texas.

DEAR SIR: I have your letter of March 28th, addressed to the Attorney General, reading as follows:

"We are having trouble over the dipping law in this County due to the ruling of the higher court in the Dallas case and while the facts in that case do not exactly apply in the Upshur County matter I want an opinion from you on the direct point in controversy between the Court and certain parties in this County who refuse to dip, to-wit: When a man positively refuses to dip his cattle do you hold that under the law the Sheriff's department is authorized to take charge of said cattle and dip them as provided in the law?

"The opinion is held by some of our attorneys that a quarantine of the man's premises who refuses to dip would be as far as the law could be enforced. Is this true?

"We are having trouble and I will appreciate an early reply, in fact I will ask you to wire me collect an answer to these questions."

That part of Section 19, Chapter 60, Acts of the Thirty-fifth Legislature passed at its Regular Session, which attempts to authorize the sheriff to seize and dip cattle, reads as follows:

"If any person, firm or corporation owning, controlling or caring for any domestic animal or animals located in any territory quarantined by the provisions of this Act, or by order of the Live Stock Sanitary Commission of Texas, shall fail or refuse to dip or treat such domestic animal or animals in such manner, and at such time as directed by the Live Stock Sanitary Commission, then the Live Stock Sanitary Commission of Texas, or the chairman thereof, or any inspector acting under the authority of said commission or chairman thereof, shall have the power to call upon the sheriff, deputy sheriff, or any constable of the county in which such live stock are found and it shall be the duty of said sheriff, deputy sheriff. or constable, together with the said inspector, to seize and dip or otherwise treat such domestic animal or animals in a manner and at such times as the Sanitary Commission shall direct. The sheriff, deputy sheriff or constable performing such service as above set out shall receive such compensation as is provided in Article 7320, Revised Civil Statutes, and similar compensation shall be paid for any person who may have to assist him in performing such services, and the said fees, with all costs of dipping and treating the said live stock, shall constitute a lien against such animal or animals and shall be collectible by civil suit."

It would be contrary to the provisions of Section 9, Article 1, of the Texas Constitution, for a sheriff or constable with no other authority than the orders or instructions of the Live Stock Sanitary Commission, its agents or inspectors, who, for the purpose of eradicating fever-carrying ticks, enters the premises of any person and, against the owner's wishes, seizes and takes by force cattle or other live stock.

Fourth Amendment, U. S. Constitution; Section 9, Article 1, Texas Constitution; Boyd vs. United States, 116 U. S., 624; Dupree vs. State, 119 S. W., 301; City of Bessemer vs. Eidge, 50 So., 270; Cooley's Constitutional Limitations, 432.

Long before our Federal or State Constitutions were written, it had become a maxim of the common-law that all citizens should be secure in their persons and property against even the process of law, except in a few specified cases, and in those cases searches and seizures could only be made by due process of law.

The eloquent and quaint passage in Lord Chatham's famous speech on General Warrants is familiar:

"The poorest man may, in his cottage, bid defiance to all forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement."

It has been held that a search warrant authorizing the search of premises would authorize the search of the dwellings situated thereon, the word "premises" meaning the land and the buildings and structures thereon. McSherry vs. Heimer, 156 N. W., 130. Therefore, under the common law of England, which is the common law of this country, a citizen is protected not only from unreasonable search and seizures in his dwelling, but in any of his premises. No man may enter the premises of another and take away property, except by due process of law.

The maxim that "every man's house is his castle" is made a part of our constitutional law; not only in the Federal Constitution, but in the Constitutions of every state in the Union in the clauses prohibiting unreasonable searches and seizures. These constitutional provisions have always been looked upon as of high value to the citizens. The English-speaking peoples have always demanded this protection even before the signing of the Magna Charta.

Section 9, Article 1, of the Constitution of Texas, reads:

> "The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches, and no warrant to search any place or to seize any person or thing, shall issue without describing them as near as may be, not without probable cause, supported by oath or affirmation."

It is elementary that the directions or instructions of the Live Stock Sanitary Commission of Texas, its agents or inspectors, to the sheriff or constable would be insufficient to authorize him to enter the premises of any person or to seize and dip the cattle or other live stock against the wishes of the owner. Before the sheriff would be authorized to enter the premises of any person and seize by force his cattle or other live stock and dip them for the purpose of tick eradication, he must be authorized to do so by proper warrant or writ issued by a court of competent jurisdiction.

Laws which authorize a search of a person's premises and the seizure of his property have always been strictly construed. A description of the premises that are to be searched must be given, and a description of the property that is to be seized, and a search warrant will only issue upon the oath or affirmation of one or more persons.

In the case of Dupree vs. State, 119 S. W., 301, supra, the court held invalid a law which provided that upon affidavit being made by any credible person of the county where the proceeding is begun before the county judge or a justice of the peace of said county, describing the place, room or building where it is believed by the affiant that intoxicating liquor is being sold in violation of law or is being kept or possessed for the purpose of being sold in violation of law, or shall name, or describe if the name is unknown, any person who has, keeps, or possesses any intoxicating liquor for the purpose of sale in violation of law, then, and in either event, it shall be the duty of such county judge or justice of the peace, as the case may be, to issue a warrant commanding the sheriff or constable of the county to immediately search such place and, if refused admission into any such place where the affiant has good reason to believe any such person has placed or secreted any liquor, then, and in such event, the officer, executing such warrant, is authorized to force an entrance to any such place or build-

ing and he shall search for and seize any intoxicating liquor found in such place or building or in the possession or under the control of such person, named or described in said warrant; and shall also seize all signs, screens, bars, bottles, glasses, furniture, tools, appliances, or other articles or things used in keeping or maintaining such place or used in any manner as an aid to the unlawful sale of intoxicating liquor. And after seizure, he shall make an accurate inventory of everything seized, stating therein the estimated value of each item and shall securely keep same until replevied or otherwise disposed of under the provisions of said law. The statute also provided for service of the prescribed notice on the defendant as citations are served in civil causes for proceedings in the cause as in other civil cases, except that several provisions are made for the purpose of securing the speedy trial and final disposition of the cause.

The court, in holding the above law unconstitutional, said in part:

> "The most that the act can be held to require, as a basis for the issuance of the search warrant, is that it described a place where the affiant believes 'intoxicating liquor' is being sold or is being kept or possessed for the purpose of being sold in violation of law. We speak only of those provisions intended to allow searches of places. * * * Neither the giving of the name or the description of any person nor of any further description of the thing or things to be seized is required. Upon this and no more the act requires the magistrate to issue the warrant. The writ is made to confer authority upon the sheriff or constable to enter and search not only 'such place' etc.,—that is, the place which has been described in the affidavit—but 'any place' etc., where the 'affiant' has good reason to believe any such person has placed or secreted any such liquor. This is so apparent a contradiction of the bill of rights that the point of conflict scarcely needs to be pointed out. The bill of rights forbids the issuance of any warrant to search 'any place' without describing it upon a complaint, and a warrant describing a place or places. The statute attempts to authorize the search of other places not described. * * * It follows that all the provisions authorizing the search of places and the *seizure* incident to such search and all others dependent upon them must be treated as not having the form of law. * * * We noted the fact that the statute requires neither the giving of the name nor description of the owner, keeper, or possessers, of the liquor intended for sale in violation of law. We have also seen that the Constitution requires that a thing to be seized shall be described 'as nearly as may be.' The purpose of this is to define and limit 'as near as may be' the power of officers to invade the premises of the citizen by specification of that which he may search for and seize. * * *"

The Supreme Court of Texas in the above case declared a law unconstitutional which attempted to permit an officer to search a man's premises and to seize his property for the reason that the place which was to be entered and searched was not, under the provisions of the law, sufficiently described in the affidavit.

The law which we now have under consideration attempts to authorize the sheriff or constable to enter premises and seize live stock without any affidavit being made at all; without the premises, to be searched, being described at all; without the property, that is to be seized, being described at all. It is evident that such a law must fail and be without force.

In the case of the City of Bessemer vs. Ridge, supra, the City of Bessemer, State of Alabama, passed an ordinance which attempted to prohibit the keeping of any spirituous, vincus, malt, or intoxicating

liquors in any house, building or place where people resorted for lawful or unlawful purposes; and provided for the seizure and confiscation of such liquors, drinks or beverages. There was an attempt to comply with Section 5 of the Bill of Rights of Alabama, which provides:

"That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches; and that no warrants shall issue to search any place or to seize any person or thing without probable cause supported by oath or affirmation."

The ordinance provided that the search warrant might issue upon affidavit being made that the affiant had "good reason to believe."

The Supreme Court of Alabama in passing upon this question held that:

"'Good reason to believe' is not the equivalent of 'proper cause for believing' as required by the Constitution."

The above case is cited for the purpose of showing how strictly the courts construe any law which attempts to permit an officer to enter the premises of a citizen for the purpose of seizing his property against his wishes.

The Fourth Amendment to the United States Constitution reads as follows:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

The courts have held that the above provision of the Federal Constitution applies only to Federal laws and is no restriction upon the various states of the Union; however, as we have heretofore stated, every state in the Union has a provision in its constitution similar to that in the Federal Constitution. Therefore, a construction placed upon the above provisions of the United States Constitution by the United States Supreme Court would be in point upon the question which we have under consideration.

In the case of Boyd vs. United States, supra, was a case wherein the District Attorney of the United States in the district court for the Southern District of New York filed an information in a cause of seizure and forfeiture of property against thirty-five cases of plate glass seized by the collector as forfeited to the United States under Section 12 of the Act to amend the custom and revenue laws and to repeal an Act passed June 22, 1874. 18 Statutes, 186.

Section 5 of this Act is, in substance, as follows: In all suits and proceedings, other than criminal, arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any business, book, invoice, or paper belonging to defendant that will tend to prove any allegation made by the United States, may make a written motion describing such book or paper. Thereupon the court may issue a notice to the defendant to produce

such book or paper in court, and if the defendant fails to produce such book or paper, the allegation stated in the motion, made by the attorney for the government, shall be taken as confessed. The Supreme Court held that this was tantamount to compelling the production of the papers, for the reason that the attorney for the government would always be sure to state the evidence expected to be derived from the book or paper as strongly as the case would admit of. The court then said:

"It is true that certain aggravating incidents of actual search and seizure such as forcible entrance into a man's house and searching among his papers are wanting and to this extent the proceeding under the Act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial purpose of those acts. * * * It is our opinion, therefore, that a compulsory production of a man's private papers is within the scope of the Fourth Amendment of the Constitution in all cases in which a search and seizure would be. * * * Is such a proceeding for such purpose an 'unreasonable search and seizure' within the meaning of the Fourth Amendment of the Constitution, or is it legitimate proceeding? * * * In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution, under the term 'unreasonable searches and seizures' it is only necessary to recall the contemporary, or then recent history, of the controversy on the subject both in this country and in England.

"The practice had obtained in the Colonies of issuing writs of assistance to the revenue officers, empowering them in their discretion to search suspected places for smuggled goods which James Otis pronounced: 'The worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in an English law book,' since hey placed 'the liberty of every man in the hands of every petty officer.'

"This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event in inaugurating the resistance of the Colonies to the oppression of the Mother Country.

" 'Then and there,' said John Adams, 'then and there,' was the first scene of the first act of opposition to the arbitrary claims of Great Britain, then and there, the child, independence, was born.'

"These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government. * * * We think that the notice to produce the invoice, in this case he order by virtue of which it was issued, and the law which authorized the order were unconstitutional and void * * *."

The Act which we have under consideration does not attempt to place "the liberty of every man in the hands of every petty officer," but it does attempt to give the Live Stock Sanitary Commission of Texas, its agents and inspectors, the right to order the peace officers of this State to enter a man's premises and to seize his property without due process of law.

For a sheriff or constable to seize and dip cattle or other live stock, against the wishes of the owner, for the purpose of eradicating fever-carrying ticks with no other authority than the orders or instructions of the Live Stock Sanitary Commission, its agents or inspectors, would be a taking of property without due process of law.

Sec. 1, 14th Amendment, U. S. Constitution;
Sec. 19, Art. 1, Texas Constitution;
Chicago, Milwaukee & St. Paul Ry. Co. vs. Minn., 134 U. S. 418;
Norwood vs. Baker, 172 U. S., 269;

Dupree vs. State, 119 S. W., 301;
Hutchison vs. Storrie, 92 Texas, 685;
Armstrong vs. Traylor, 87 Texas, 598;
Gulf, Colorado & Santa Fe Ry. Co. vs. State, 120 S. W., 1028;
Bennett vs. Gulf, Colorado & Santa Fe Ry. Co., 146 S. W., 355;
Wichita Electric Co. vs. Hinckley, et al., 131 S. W., 1192;
M. K. & T. Ry. Co. vs. Braddy, 135 S W., 1059;
Middleton vs. Texas Power & Light Co., 178 S. W., 956;
St. Louis & San Francisco Ry. Co. vs. Griffin, 171 S. W., 703;
Cooley's Constitutional Limitations, 502 et seq.;
Railing Case Law, page 430, et seq.

The definition of due process of law, or the law of the land, the terms being synonymous, as given by Daniel Webster in the famous Dartmouth College case, is, perhaps, quoted more often than any other. He said:

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an actment is not, therefore, to be considered the law of the land."

Cooley, in his admirable work on Constitutional Limitations, page 502, et seq., after quoting the above definition, said:

"The definition here given is apt and suitable as applied to judicial proceedings which cannot be valid unless they 'proceed upon inquiry' and 'render judgment only after trial'; it is entirely correct, also, in assuming that a legislative enactment is not necessarily the law of the land."

Under the law, which we have under consideration, there is to be no inquiry and no trial and the owner of the cattle given no opportunity to be heard in his own defense, but his premises are to be entered and his property seized upon the arbitrary command of the Live Stock Sanitary Commission, its agents or inspectors. Clearly then, here is a taking of property without due process of law. While it is true that the owner of the live stock is not to be deprived of his ownership, yet, it is equally true that he is to be deprived of property without the due process of law; for the reason that when his property is arbitrarily taken by the sheriff or constable at the command of the Live Stock Sanitary Commission, its agents, or inspectors, the law provides that:

"The sheriff, deputy sheriff, or constable, performing such service as above set out, shall receive such compensation as is provided in Article 7320, Revised Civil Statutes, and similar compensation shall be paid for any person who may have to assist him in performing such service and the said fees, with all costs of dipping and treating said live stock, shall constitute a lien against such animal or animals and shall be collectible by a civil suit."

We find, then, that a man's property, under the provisions of this law, is to be taken from him upon the arbitrary command of the Live Stock Sanitary Commission, its agents, or inspectors, and while the owner is not divested of actual ownership, yet, his property is to be returned to him with a lien against it for all the costs of the officers

and other persons who may assist the officers, together with all costs of dipping and treating the said live stock. No provision is made as to how many men the sheriff may call upon to assist him, but any person who assists him, under the law, shall receive similar compensation as the sheriff, his deputy or the constable. We find then that there is no apparent limit to the costs that may be chargeable against the live stock so seized and dipped. Such proceedings clearly constitute a taking of property; and property can only be so taken by due process of law. That is, the owner must have notice, must have an opportunity to be heard and then his premises can only be entered and his property seized upon a proper warrant or writ issued by a court of competent jurisdiction.

Section 1 of the Fourteenth Amendment of the United States Constitution reads, in part, as follows:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

This article differs from the Fourth Amendment in that the Fourth Amendment is limited to the Federal government; but the Fourteenth Amendment absolutely prohibits any state from depriving any person of life, liberty or property without due process of law.

We have already discussed what it takes to constitute due process of law. Our own State Constitution is not silent on this question. Section 19, Article 1, of the Constitution of Texas, reads:

"No citizen of this State shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land."

The Federal Constitution uses the term "without due process of law." The State Constitution uses the term "due course of the law of the land." As we have already seen, those terms are synonymous and mean that a person can not be deprived of life, liberty or property, except by the due process of the law of the land.

And, as so ably stated by Daniel Webster, it is not every enactment that is "the law of the land."

The United States Supreme Court in the case of Chicago, Milwaukee and St. Paul Railway Company vs. Minnesota, supra, held that an enactment of the Legislature of Minnesota, which attempted to create a railroad and warehouse commission of three persons, and provided:

"That all charges made by any common carrier subject to the provisions of this Act for any service rendered, or to be rendered, in the transportation of passengers or property, as aforesaid, or in connection therewith, or for the receiving, delivery, storage, or handling of such property shall be equal and reasonable, and every unequal and unreasonable charge for such service is prohibited and declared to be unlawful."

It was provided that every common carrier subject to the provisions of the Act should print and keep for public inspection schedules of the charges which it had established for the transportation of property; that the common carrier should make no change therein, except

after ten days' notice, plainly stating changes proposed to be made and the time when they would go into effect; that it should be unlawful for a common carrier to charge or receive any greater or less compensation, so established, and published, for transporting property; and that in case the commission should find at any time that any part of the tariffs of charges so filed and published were in any respect unequal or unreasonable, it should have the power, was authorized and directed to compel any common carrier to change the same and adopt such charge as the commission "shall declare to be equal and reasonable."

If any common carrier, subject to the provisions of the Act, should neglect to publish or file its schedules of charges or to carry out such recommendation made and published by the commission, it would be subject to a writ of mandamus on application of the commission to compel compliance with the requirements of the commission; also, that the commission could apply for an injunction against the carrier from receiving or transporting property or passengers within the State. Such injunction to continue until the common carrier has complied with the requirements of the commission. And for any wilful violation or failure to comply with such requirements, it was provided that a court might award such costs, including counsel fees, by way of penalty, as may be just.

The Chicago, Milwaukee and St. Paul Railway Company was charging three cents per gallon for transporting milk from certain places on its line into the City of St. Paul. Upon complaint being made, the Railroad and Warehouse Commission notified the railroad company that they must charge only two and one-half cents for transporting milk instead of the three cents. The railroad company refused to comply with this requirement and the Attorney General of Minnesota made an application to the Supreme Court of the State for writ of mandamus to compel the company to comply with the requirements of the commission. The court granted the alternative writ and upon its return the case came on for hearing upon the alternative writ and the return and the company applied for a reference to take testimony on the issue raised by the allegations in the application for the writ and return thereto, as to whether the rate fixed by the commission was reasonable, fair and just. The court denied the application for reference and rendered judgment in favor of the relator, and that a peremptory writ of mandamus issue. The terms of the peremptory writ were directed to be that the company comply with the requirements of the commission. Costs were also adjudged against the company. To review this judgment the company brought a writ of error.

The Supreme Court of the United States, in holding the Minnesota law unconstitutional, said in part:

"The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive and not to be re-examined here as to its propriety or accuracy. The Supreme Court authoritatively declares that it is the expressed intention of the Legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the Act, are not simply advisory, nor merely prima facie and equal and reasonable, but final and conclusive

as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are lawful, and, therefore, in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the statute, there is no fact to traverse except the violation of law in not complying with the recommendation of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable.

"This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

"* * * No hearing is provided for, no summons or notices to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at.

"By the second section of the statute in question, it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision, the carrier has a right to make equal and reasonable charges for such transportation. In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportaton by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such depreciation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

It will be seen that the above case is directly in point with the question which we are now considering. And the court took occasion to say, in the above case, that the law was unconstitutional for the reason, among other reasons, that no hearing was provided for; no notice to the company was to be given; no opportunity to present the facts before the commission.

The same is true of Section 19 of the Tick Eradication Law. The owner of live stock is to have no opportunity of being heard; is to receive no notice, but the Live Stock Sanitary Commission, its agents or inspectors, may arbitrarily order the sheriff or constable to enter a

man's premises and, against his wishes, seize and take his property and, under the provision of the law, proceed to dip the same and create a lien against the live stock.

We have cited a great many other cases that hold that a person cannot be deprived of property without notice and without an opportunity of being heard. In fact, the books are teeming with cases holding that a man's premises cannot be invaded and searched nor his property seized except upon due process of the law of the land. The essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly process adapted to the nature of the case.

It was a maxim of the common law that no man should be punished without an opportunity of being heard. To assert that courts have an inherent power to deny all right to defend an action and to render decrees without any hearing whatever is in the very nature of things to convert the court exercising such an authority into an instrument of wrong and oppression, and to, hence, strip it of that attribute of justice upon which the exercise of judicial power necessarily depends. Hence, as a general rule, no one may be legally divested of his property unless he is allowed a hearing before an impartial tribunal where he may contest the claim set up against him and be allowed to meet it upon the law and facts and show, if he can, that the pretext for doing it is unfounded.

Judgment without notice and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression and can never be upheld where justice is fairly administered. Ruling Case Law, supra. If the above is true, and it is, then it is equally true that a commission, nor the agent or inspector of such a commission, could not render judgment and deprive a man of his property without notice and opportunity to be heard in defense of his property.

We are fully aware of the inherent power of the State to enact laws for the purpose of protecting the citizens and their property. The very purpose of the Tick Eradication Law is to safeguard the live stock of the citizens of this State from fever-carrying ticks, infectious and contagious diseases. And the Legislature has the power to enact such a law.

Armstrong vs. Taylor, 87 Texas, 598;
Ex Parte Tompkins, 47 Tex. Crim. Rep., 359;
Munsey vs. State, 194 S. W., 953;
Brazeale vs. Strength, County Judge, et al., 196 S. W., 247;
A. T. Castleman, et al. vs. Harmon Raney, et al. (not yet reported).

In the case of Brazeale vs. Strength, supra, the court passed on the law which we have under consideration, and without going into the facts, we quote from the opinion of the court:

"It is further insisted, however, that both the Act of 1913 and the Act of 1917 are violative of Section 19 of Article 1 of the State Constitution and Section 1 of Article 14 of the Federal Constitution in that they were 'an unwarranted invasion of private property rights,' because they required all cattle to be dipped whether infected with ticks or not, and whether kept on the owner's premises or not. We think the Acts were not violative of the provisions in the State Constitution specified. Section 23, Article 16, of that Constitution authorized the Legislature to 'pass laws

for the regulation of live stock and the protection of stock raisers' * * * We think it was within the power of the Legislature to require all cattle to be dipped without respect to whether they were infected with ticks or not, whether they were kept by the owner on his premises or not. * * *"

The court in the above case does not mention Section 19 of the Tick Eradication Law. The court was merely passing upon the constitutionality of the entire law with reference to whether the commissioners' court, after the people had voted for tick eradication, had the authority to spend the county funds for tick eradication purposes. And, as has been seen above, it held the law constitutional; and, also, that the Legislature had power to require all cattle to be dipped without respect as to whether they were infected with ticks or not. Just in this connection, I call attention here to the Castleman vs. Raney case, supra, which was decided some two weeks ago by the Court of Civil Appeals at Dallas.

The court used the following language:

"* * * We do believe that before said commission or its agents or inspectors are authorized to require cattle to be dipped or to dip them themselves for the purpose of eradicating fever-carrying ticks, it is prerequisite that an inspection and proper investigation be made; and that such inspection or investigation shall disclose the existence of such disease or the presence of such tick or that the animals are infected with the agency of transmission of said diseases or have been exposed thereto, and hence the necessity for such dipping. * * *"

The last quotation is the last expression of an appellate court upon this question and must govern; and, therefore, before the owner of cattle is forced to dip them, the Live Stock Sanitary Commission, its agents or inspectors, must comply with the ruling of the court, as given above.

We will again consider the Brazeale vs. Strength case, wherein it was held that the Legislature had the power to require all cattle to be dipped, whether they are kept by the owner of cattle on his premises or not. This is unquestionably the law, but the owner of the cattle can only be forced to dip them by due process of the law of the land. And the provision of that part of Section 19 of the Tick Eradication Law, which we have hereinabove quoted, attempts to force the dipping of cattle without due process of the law of the land.

However, the Legislature has made ample provision for the proposed enforcement of the Tick Eradication Law. Section 15 of said law reads as follows:

"Any person, company or corporation owning, controlling or caring for any domestic animal or animals, which are located in any territory quaratined through the provisions of this Act, or by the order of the Live Stock Sanitary Commission of Texas, who shall refuse or fail to dip or otherwise treat such live stock at such time and in such manner as directed in writing by the Live Stock Sanitary Commission, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each day of such failure or refusal shall be a separate offense."

By the provisions of the above section of the Tick Eradication Law, the Live Stock Sanitary Commission, its agents or inspectors, may file

complaint against the owner of live stock who refuses and fails to dip or otherwise treat such live stock, as directed in writing by the Live Stock Sanitary Commission, and upon conviction, the owner of the live stock shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each day of such failure or refusal is made a separate offense. This section provides a means of enforcing the provisions of the Tick Eradication Law by due process of the law of the land. For it gives the owner of live stock notice in writing and if he refuses to obey such notice, he is given a hearing and a trial before a proper tribunal where his guilt or innocence may be determined.

You are, therefore, advised that the Tick Eradication Law is constitutional and that it can be enforced in the manner provided for by Section 15, but you are also advised that it can not be enforced under the provisions of that part of Section 19 which authorize the sheriff upon the direction of the Live Stock Sanitary Commission, its agents or inspectors, to seize the cattle and dip them.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

Op. No. 2012, Bk. 52, P. 217.

TICK ERADICATION—DUTY OF LIVE STOCK OWNERS.

Before the Live Stock Sanitary Commission, or its agents or inspectors have authority to require cattle to be dipped or to dip them themselves for the purpose of eradicating the fever carrying tick, it is a prerequisite that an inspection or proper investigation be made and that such inspection or investigation shall disclose the existence of such disease or the presence of such tick, or that the animals are infected with the agency or transmission of said disease or have been exposed thereto, thereby creating a necessity for such dipping.

Any person, company or corporation owning, controlling or caring for any domestic animals in this State who shall refuse or fail to dip or otherwise treat such live stock when lawfully directed to do so by the Live Stock Sanitary Commission shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than Twenty-five Dollars nor more than One Hundred Dollars, and each day of such failure or refusal shall be a separate offense.

Chapter 60, Acts Thirty-fifth Legislature, passed at its Regular Session.

AUSTIN, TEXAS, March 28, 1919.

Hon. J. P. Word, County Attorney, Meridian, Texas.

DEAR SIR: I have your letter of March 24, addressed to the Attorney General, wherein you propound to this Department the two following questions:

"I wish your opinion on this phase of the case: Suppose the commissioners' court is not instructed by the Live Stock Sanitary Commission to furnish the dip and the owners of cattle are directed by the inspector of Bosque County to dip and the owner refuses to comply with the inspector's direction. Would the owner be subject to a criminal prosecution?

"Again if the Live Stock Sanitary Commission does not direct the commissioners' court to furnish dip to dip cattle in Bosque County does it

then become the duty of the owners of the cattle to buy the necessary dip to dip their cattle?"

Section 15 of Chapter 60, Acts Thirty-fifth Legislature, passed at its Regular Session, provides that:

"Any person, company or corporation owning, controlling or caring for any domestic animal or animals, which are located in any territory quarantined through the provisions of this Act, or by the order of the Live Stock Sanitary Commission of Texas, who shall refuse or fail to dip or otherwise treat such live stock at such time and in such manner as directed in writing by the Live Stock Sanitary Commission, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each day of such failure or refusal shall be a separate offense."

In the case of A. T. Castleman vs. Harmon Rainey et al., which was decided by the Court of Civil Appeals at Dallas some two weeks ago and which has not yet appeared in the advance sheets, was a suit brought by Harmon Rainey and forty-nine others against A. T. Castleman and fourteen others, all citizens of Dallas County, Texas, the purpose of the suit being to restrain defendants, who were inspectors in and for said county and acting under the Live Stock Sanitary Commission of this State, from requiring plaintiff's cattle to be dipped for the eradication of fever-carrying ticks. The opinion in the case is very lengthy and we shall only quote portions therefrom:

"* * * Was the trial court authorized by the pleadings and the evidence introduced to grant plaintiffs and intervenors any of the relief asked? We think so. They allege and the evidence was sufficient to warrant the conclusion that defendants by their commands and threats forced them against their will and wishes to dip their cattle in liquid, chemicals and poison not conforming to that prescribed for treatment of splenetic fever or the eradication of fever-carrying ticks. * * * It was not necessary, perhaps, for the Live Stock Sanitary Commission, or the defendants, as inspectors operating under the statute enacted for the protection of the live stock industry of this State against malignant, contagious and infectious or communicable diseases to have inspected each head of cattle to determine whether or not it was affected with some such disease, or the fever-carrying tick, before they would be authorized to dip for the eradication of such tick, but we do believe that before said commission or its agents or inspectors are authorized to require cattle to be dipped or to dip them themselves for the purpose of eradicating the fever-carrying tick it is a prerequisite that an inspection or proper investigation be made, and that such inspection or investigation shall disclose the existence of such disease or the presence of such tick or that the animals are 'infected with the agency of transmission of said disease, or have been exposed thereto, and hence the necessity for such dipping.' Trimble vs. Hawkins, 197 S. W., 224. * * * The judgment is also to the effect that * * * defendants and their successors be enjoined from dipping or causing to be dipped plaintiffs' and intervenors' cattle unless they first make a personal inspection of the animals and find the fever-carrying ticks on them or find the animals affected with splenetic fever, etc. If it is meant by this that each animal must be inspected and some one of the conditions found to exist which authorizes the work of tick eradication before such animal may be dipped or the work of tick eradication proceeded with, we do not agree with the court. Our views, with respect to the extent of the inspection required to authorize the work of tick eradication, is briefly stated in a former part of this opinion. * * * In accordance, therefore, with the views expressed in this opinion the judgment of the district court,

in so far as its effect is to enjoin defendants from dipping plaintiff's cattle or causing them to be dipped again in the fluids, liquids and poisons in which they were dipped causing the injuries complained of in this action, and in which they threatened to dip them in the future, will be affirmed; and in so far as it enjoins defendants and their successors from threatening to report plaintiffs and intervenors to the officers for the purpose of having them arrested for their failure to have their stock dipped until and unless the conditions or diseases mentioned in the statute are first found to exist by a personal inspection of each animal * * * and from dipping said cattle or causing them to be dipped under the Act of the Legislature of 1917 until said Act is submitted to and approved and adopted by the voters of Dallas County at an election for that purpose; and from dipping plaintiff's cattle or causing them to be dipped after March 1, 1919, unless they first make a personal inspection of each animal and find fever-carrying ticks on them * * * is reversed and the injunction granted upon those grounds and to that extent dissolved."

You have heretofore advised me that Bosque County voted "FOR TICK ERADICATION." You are, therefore, advised that it is now the duty of the commissioners' court to assist the Live Stock Sanitary Commission in carrying on the tick eradication work, build dipping vats and to purchase the necessary dipping material to be used in dipping the live stock. The commissioners' court at all times will work according to the rules and regulations and under the direction of the Live Stock Sanitary Commission.

And you are further advised that any person, company or corporation owning, controlling or caring for any domestic animals in this State who refuses to dip said animals in the way and manner provided for by the provisions of said Chapter 60 when directed to do so by the Live Stock Sanitary Commission, its agents or inspectors, will be guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each day of such failure or refusal is a separate offense.

Yours very truly,
E. F. SMITH,
Assistant Attorney General.

Op. No. 1947, Bk. 51, P. 372.

GAME, FISH AND OYSTER DEPARTMENT—GAME LAWS—CLOSED SEASON ON DOVES.

The closed season on doves is as is prescribed by Act of the Fourth Called Session of the Thirty-fifth Legislature, Chapter 72.

AUSTIN, TEXAS, September 4, 1918.

Mr. A. T. McKinner, Jr., County Attorney, Huntsville, Texas.

DEAR SIR: The Attorney General has your letter of September 2nd, desiring an opinion from this department as to the validity of Chapter 72, General Laws of the Fourth Called Session of the Thirty-fifth Legislature amending the law fixing the closed season for killing doves. You suggest the invalidity of this Act for the reason that it amends Article 889A of the Penal Code enacted by the Regular Session of the

Thirty-fourth Legislature, which article was subsequently amended by Chapter 22 Acts First Called Session of the Thirty-fourth Legislature. The amendatory Act of the Fourth Called Session of the Thirty-fifth Legislature disregarded the amendment by the Thirty-fourth and amended the original Act.

We will quote the original Act and the two amendments. The original Act is found as Chapter 123 Acts Regular Session of the Thirty-fourth Legislature, which Act added to Chapter 6, Title 13, of the Penal Code, two articles, being numbered 889A and 889B, the first of which only is under discussion in this opinion, and is as follows:

"From and after the passage of this Act it shall be lawful to kill doves in this State at any time except between the first of March and the first of September of each year."

By Chapter 22 Acts First Called Session of the Thirty-fourth Legislature, the above article was amended to read as follows:

"From and after the passage of this Act it shall be unlawful for any person within this State to kill, ensnare, entrap or in any way destroy any wild doves between the first day of March and the first day of September of any year."

Chapter 72 Acts Fourth Called Session of the Thirty-fifth Legislature amended the original Article 889A without reference to the amendment thereto made by the First Called Session of the Thirty-fourth Legislature, the amendment of the Thirty-fifth Legislature being as follows:

"From and after the passage it shall be unlawful for any person to kill any dove during the period of time embraced between the first day of February and the first day of December of any year; provided, however, that in those counties in this State lying north of a line marking the northern boundaries of the counties of Shelby, Nacogdoches, Angelina, Houston, Leon, Roberson, Falls, Bell, Lampasas, San Saba, McCullough, Concho, Tom Green, Irion, Reagan, Upton, Ward, Loving, Culberson, Hudspeth and El Paso, it shall be unlawful for any person to kill any dove during the period of time embraced between the first day of November and the thirty-first day of August of any year."

Upon a careful reading of the original Act and the first amendment thereto by the Thirty-fourth Legislature it will be observed that while the language is different the idea expressed is the same and the substance of the Act was not changed. The original Act made it lawful to kill doves at any time except between the first of March and the first of September, while the amendment by the First Called Session made it unlawful to kill, ensnare, entrap, or in any way destroy doves between the first day of March and the first day of September of any year. It will be seen that in each of these Acts the closed season is the same, that is, from the first of March until the first of September.

Therefore, the amendment was but a re-enactment of the original Act with the verbiage changed, but with the substance remaining the same, so that it is immaterial whether the Legislature in the Fourth Called Session of the Thirty-fourth Legislature amended the original Act or the amendment thereto.

Even though the original Act had been substantially changed by an amendment, such original Act may be amended by subsequent amendments according to the weight of authority in this country.

Mr. Sutherland, in his work on Statutory Construction, Section 233, discusses the subject as follows:

"There is a conflict of authority as to whether a section which has been repealed can be amended. The question usually arises where a section of an act is amended 'to read as follows' and is then again amended in the same manner and by the same description, ignoring the first amendment. Most of the older and some of the more recent cases held that such an amendatory act, or the amendment of a repealed section, is a nullity. A repeal by implication is said to stand upon the same footing in this respect as a direct or express repeal. 'While there is some conflict of opinion on the subject,' says the United States Court of Appeals, 'the decided weight of authority and the better opinion is that an amendatory statute is not invalid, though it purports to amend a statute which had previously been amended or for any reason been held invalid.' This view, we believe, is sustained by the decisions."

To like effect is Section 234 of the same work discussing the effect of a second amendment to a section which ignores a prior amendment. The rule is laid down that where a section was amended by adding or inserting certain words or provisions the said section is again amended in another particular not inconsistent with the first omitting the words inserted by the first and entirely ignoring that amendment. The courts hold that the first amendment was not repealed and that the words inserted remained in force as part of the section. So in the case presented by you. The amendatory act of the First Called Session of the Thirty-fourth Legislature inserted certain provisions with reference to the number of birds that might be killed or taken on any one day and also inserted a penalty for a violation of the two new articles. These provisions were not carried forward into the amendatory Act of the Thirty-fifth Legislature, but under the above rule they remain a part of the statute laws of the State.

We therefore advise you that the Act of the Fourth Called Session of the Thirty-fifth Legislature is a valid act and fixes the closed season on doves in the north and south portions of the State, as is therein indicated, and that you should follow it in the enforcement of the game laws in your county.

Yours truly,

C. W. TAYLOR,

Assistant Attorney General.

Op. No. 2081, Bk. 53, P. 95.

GAME LAWS—POSTING—TRESPASSERS.

(1) The owner, proprietor or manager of enclosed lands in excess of two thousand acres may post same against hunting therein without regard to the number of acres enclosed. There is no law providing for posting enclosed lands in excess of two thousand acres against fishing.

(2 A person who owns enclosed lands on both sides of a public stream of less than two thousand acres may prevent the public from fishing from the banks of said stream within said enclosure, but there is no law preventing

the public from fishing in enclosed lands in excess of two thousand acres.

(3) A person may fish in any stream in Texas thirty feet wide or more without permission of the riparian owners of the enclosed lands adjacent thereto, provided he does not enter upon said enclosed lands of two thousand acres or less nor remain therein while engaged in such enterprise.

(4) There is no Statute in Texas authorizing a landlord to eject a trespasser by force from the posted enclosure.

AUSTIN, TEXAS, June 5, 1919.

Game, Fish and Oyster Commission,
Attention: J. Jefferson, Chief Deputy, Capitol.

Gentlemen: We have yours of the 21st instant, which reads as follows:

"Please give me your opinion on the following questions:

"1—How large a pasture or enclosure can a man legally post against hunting and fishing?

"2—Can a man who owns land on both sides of a public stream, such as the Colorado River, prevent the public from fishing in said stream within the confines of his holdings?

"3—Is there any law giving the right to the landlord of forcibly ejecting a trespasser from a posted enclosure?"

By reason of other pressing matters on my desk I have been unable to answer till now.

In reply to inquiry number one, I will refer you to Articles 1255 to 1256, inclusive, Vernon's Criminal Statutes. These articles are too long to quote in this opinion.

Article 1255A forbids any person either to hunt or fish on the enclosed property of another without permission of the owner, fixing a penalty for doing so at not less than ten dollars nor more than one hundred. This article, however, applies only to enclosures of less than two thousand acres.

Article 1245A to 1256, inclusive, prohibits hunting with firearms or dogs on enclosed or posted lands in excess of two thousand acres; defines posting and fixes a penalty.

There is nothing in these articles, nor elsewhere in the statute that I can find, that prohibits fishing in enclosed land in excess of two thousand acres.

I would therefore advise you in reply to your first inquiry that it is unlawful to hunt or fish upon the enclosed lands of another without permission, whether same is posted or not, when the lands enclosed are less than two thousand acres; also, that the owner, proprietor or agent in charge of lands in excess of two thousand acres may post an enclosure of any size whatever and thereby prohibit hunting on same, but such posting does not prohibit the fishing on enclosures in excess of two thousand acres.

In answer to your second inquiry I will refer you to Article 3980, Vernon's Sayles Civil Statutes, which vests title to the beds of all public rivers and all the products thereof in the State of Texas, and which provides that with reference to the fish and oyster industries the State Game, Fish and Oyster Commissioner shall have jurisdiction and control thereof. I further refer you to Article 5338, Vernon's Sayles Civil Statutes, relating to public lands, which says in part: "All streams, so far as they retain an average width of thirty feet, shall be considered

navigable streams within the meaning hereof and shall not be crossed by the lines of any survey."

The definition of a navigable stream is used in connection with the public land law of the State and its evident intention is to retain title in the State to the waters and bed of any stream of thirty feet wide or more. I further refer you to Section 1, Chapter 88, of the General Laws of the Thirty-fifth Legislature, relating to the irrigation laws of the State, which provide that "unowned and unappropriated waters of the ordinary flow and underflow and tides of every flowing river or natural stream . . . within the State of Texas, are hereby declared to be the property of the State."

By reading these several articles together it is easy to determine that the intention of the Legislature is to retain title to and jurisdiction of all streams and waters in the State and title to the beds of streams of thirty feet wide or more. The owner of the lands adjacent to and abutting on the stream of thirty feet wide or more, even though he owns the lands on each side of said stream, does not own the bed of said stream or the waters thereof.

After he has taken the steps provided by statute appropriating the use of the waters in any stream, in that event the riparian owner would be authorized to withdraw the amount of water appropriated by him for his own use, but such appropriation and use of the waters would not give such riparian owner title to the waters nor to the bed of the stream, but would only give him the right to withdraw the water from the stream and appropriate same to his own use and benefit.

I would, therefore, advise you, in reply to your second inquiry, that the owner of an enclosed tract of land of less than two thousand acres may prohibit the entry into his property and the fishing therein from the banks of said stream when the land enclosed is abutting on said stream, either on one or both sides thereof. But if the stream is thirty feet wide or more the owner of the abutting property could not prohibit a person from fishing in said stream, provided such person should move up and down said stream in a boat, raft or otherwise, and in doing so did not enter upon or fish from the lands of the riparian owner. However, as said in my answer to your first inquiry this rule does not apply where the lands are in excess of two thousand acres for the reason that there are no laws prohibiting fishing in lands in excess of two thousand acres.

In reply to your third inquiry I will advise you that after a diligent search I find no statute authorizing a landlord forcibly to eject a trespasser from a posted enclosure. The landlord's remedy would be by filing complaint in a court of proper criminal jurisdiction, and if the trespasser should do any civil damages, by a suit to recover therefor.

Yours very truly,
JOHN MAXWELL,
Assistant Attorney General.

Op. No. 2003, Bk. 52, P. 148.

RECEIVERS—BOARD OF WATER ENGINEERS—VESTED RIGHTS—WATER RIGHTS.

1. Board of Water Engineers has jurisdiction over water projects in hands of Receivers, but its findings must be enforced in the Court appointing such Receivers.

Section 65-66, Chapter 4, Federal Judicial Code. Article 2146—Vernon's Sayles' R. S.

2. An appropriator under the Act of 1895 has a right to divert water from one watershed to another, notwithstanding the provisions of the Acts of the Thirty-fifth Legislature relating thereto.

Revised Statutes, 1911, Article 4997. Acts Thirty-fifth Legislature, Chapter 88, Section 137.

3. The Board of Water Engineers does not have the power to grant a preferential use to one appropriator as against another, there being no adjudication of priorities.

AUSTIN, TEXAS, March, 19, 1919.

Board of Water Engineers, Capitol.

GENTLEMEN: In reply to your recent communication addressed to the Attorney General's Department in which you ask us to give our opinion upon several separate matters, I will state that after serious and continuous investigation we have reached the following conclusion, respectively:

Your first inquiry is:

"Has the Board of Water Engineers any jurisdiction over any project taking or using the waters of the State from any source of supply for any stated statutory purpose while the affairs of such project are being administered by a receiver under the orders of the State or Federal court or courts?"

In answering this inquiry we will first examine your rights with reference to Federal receivers. Sections 65 and 66, Chapter 4, Federal Judicial Code, as found in Fifth Federal Statutes Annotated, 2nd ed. p. 540, reads as follows:

"Sec. 65. Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both."

"Sec. 66. Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

Section 64 clearly requires Federal receivers to operate their properties according to the valid laws of the States in which such properties are located, and Section 65 authorizes such receivers to

sue or be sued in a court of competent jurisdiction without first obtaining permission of the court appointing the receiver, retaining, however, the equity jurisdiction over the receiver and the property in his hands. It is universally held that neither of these statutes permits courts or tribunals other than the courts appointing the receiver in any way to interfere with the corpus of the property or with its operation. The receiver is an officer of the court and the property is in the custody of the court. However, the authorities further show that subject to these equity powers which relate to the conservation and preservation of the property that such receivers are compelled to operate same in accordance with the valid laws of the State. It would seem, however, that in enforcing the remedies of the Water Board, for instance, it would be necessary after the findings of the board had been announced to secure an order from the court by which the receiver had been appointed, and if in the opinion of such court said order was valid and reasonable then it would be the duty of the court to enforce same. In the case of Cutting vs. Florida Railway and Navigation Co., 43 Federal, 747, the Circuit Court, Western District of Florida, held that a railroad could be compelled to obey the law of the State of Florida prohibiting discrimination in freight rates. The Kansas statute abrogating the common law rule as to the liability of manager for an injury to an employe caused by the negligence of a fellow servant has been held in Federal and State courts to be applicable to receivers. In fact, the Federal courts generally follow this theory and uphold State laws regulating the operation of utilities when same are in the hands of a receiver. However, while the receiver himself is bound to operate his property in accordance with State laws the court appointing the receiver will construe these laws as to validity and reasonableness and also in enforcing them will see to it that no rights of creditors are destroyed and that the property is preserved and conserved for the benefit of those upon whose application the receiver was appointed.

Authorities:

High on Receivers, Sec. 374;
5th Thompson on Corps., 2nd ed., 432;
26 Cyc. 381-k;
Railway Co. vs. State, 106 Texas, 249;
Andrews vs. Rice, 198 S. W., 666;
In Re Tyler, 149 U. S., 164;
In Re Swann, 150 U. S., 637;
Railway Co. vs. Weaver, 191 S. W., 591;
Alderson on Receivers, Sec. 309;
Turner vs. Cross, 83 Texas, 218;
U. S. vs. Harris, 177 U. S., 305.

I would, therefore, advise you with reference to Federal receivers that they must operate their properties in accordance with all valid and reasonable regulations of the Board of Water Engineers, but that in order to enforce such rules and regulations proceedings must be had in the Federal Court appointing such receiver.

As to State receivers the rule is very much similar to that of Federal receivers. It might be well here to say that actions of any character against receivers were at common law forbidden except by and

with permission of the court appointing such receiver and the right to sue a receiver either in the Federal Court or in the State court is obtained only by consent of the court appointing same, unless there is a statutory provision of the respective governments authorizing the bringing of such suit. We have seen from the above that within limitations such action is authorized by the Federal courts.

Article 2146, Vernon's Sayles' Statutes, provides:

"When any property of any kind within the limits of this State has been placed, by order of court, in the hands of a receiver, who has taken charge of such property, such receiver may, in his official capacity, sue or be sued in any court of this State having jurisdiction of the cause of action, without first having obtained leave of the court appointing such receiver to bring said suit; and, if a judgment is recovered against said receiver, it shall be the duty of the court to order said judgment paid out of any funds in the hands of said receiver as such receiver."

Article 2147 fixes the venue of such suits—thus it appears that in State courts the suits may be brought against receivers appointed by State courts practically as in other causes against the corporation. While a receiver appointed by the State court is an officer of the court and the property is in the custody of the court and cannot be disturbed in its possession and management without consent of the court, yet the court itself is a part of the same government as is the Board of Water Engineers and is thereby operating under the same laws and government and to this extent they are more amenable to the rulings and orders of the Board of Water Engineers than are those receivers appointed by Federal courts.

I would say, therefore, in reply to your first inquiry that your board has jurisdiction over projects in the hands of receivers whether Federal or State, that in exercising such jurisdiction you cannot disturb the corpus or the control of the property, that your actions are subject to the equity powers of the Federal Court when related to Federal receivers and that your findings in all cases must be enforced in the court appointing such receivers.

Your second inquiry reads as follows:

"Assuming that a corporation was duly organized and began the construction of either impounding or diversion works, or both, for the purpose of impounding or diverting water from any source of supply, and that it began construction work prior to the enactment of the General Irrigation Statute of 1913, and may or may not have completed same prior to said time; and further assuming that the pre-existing statute did not by express terms inveigh against the diversion of water from one watershed to another, would such company have the right at this time in view of the instant statute (see Section 81, General Laws, Regular Session, 1917) to divert water either directly from the flow of a stream or from an impounding reservoir created in the bed of the stream from the watershed of such stream into the watershed of another and different stream without having first obtained a permit from this Board so to do, as provided in said section to which direct reference is above made."

In answering same I shall quote from a preliminary opinion on this question prepared by Mr. Smedley, formerly attached to this office:

"A riparian owner has no right to divert water from a stream for the purpose of irrigating that portion of his riparian land which is outside of the

watershed of the stream. This is the common law rule which is stated in Kinney on Irrigation and Water Rights in Section 514 as follows:

" 'The question now arises, as to how far back from the stream the lands may lie, so that they may be irrigated as a riparian right, under the Western American construction of the common law. Upon this subject the States in question have adopted practically the same rule. For the present we will disregard the question of title, and discuss the question from the standpoint of the watershed. The great weight of authority in these States holds that land in order to be riparian, and hence entitled to be irrigated as a riparian right, should lie within the drainage basin or watershed of the stream to which the rigarian rights are claimed. This is so far the reason that, as soon as the land passes over the ridge or 'divide' separating its drainage basin from another, it becomes tributary to another stream; and, therefore, if it touches this stream, it is riparian to it; if it touches no stream, it is not riparian land. So, if a divide cuts in two a tract of land held under one ownership, that portion only which lies within the drainage basin of the stream may rightfully be irrigated.'

"This common law rule is recognized in Texas as shown by the opinion in the case of Watkins Land Company vs. Clements, 98 Texas, 578; 86 S. W., 733.

"It appears that the rule is different with reference to *appropriators* of the water from streams. It is thus stated by Kinney in Section 866 of his Work on Irrigation:

" 'There is no question now as to the right of an appropriator to divert the water from a stream flowing in one watershed and by any means conduct it for the irrigation of lands in another watershed. * * * The general rule is that under the law of appropriation, as contrary to the law of irrigation as a riparian right, the water may be used in any locality, however remote from the stream from which it is taken. Therefore, it may be used on the lands of the valley of the stream from which it is taken, or it may be carried over or through the intervening ridge to land lying in another watershed, and there used, provided that the vested rights of others are not injured thereby. Where, however, water has been used in one watershed for irrigation and domestic purposes by an appropriator, and other parties were receiving the benefit of the seepage and percolations, it was held that it could not be conducted to another watershed by a pipe line, whereby all seepage is lost, and in such a case it is held that an action for an injunction will lie without proof of damages.'

"In support of this rule Kinney cites a case from Colorado and a case from Washington. The same rule is announced by Farnham in Section 671a of his Text Book on Water and Water Rights. In support of the text Farnham cites a Montana case. There is no case in Texas which discusses this question. The new Irrigation law passed by the Thirty-third Legislature undertakes to prohibit the diversion of water from the watershed and this apparently applies as well to the diversion by an appropriator as to the diversion by a riparian owner. It is Section 81 of the Irrigation Act and appears on page 376 of the General Laws of the Regular Session and reads as follows:

" 'Sec. 81. Diversion of Water from Watershed Prohibited When.—It shall be unlawful for any person, association of persons, corporation, or irrigation district to take or divert any of the water of the ordinary flow, underflow, or storm flow of any stream, water course, or watershed in this State into any other natural stream, water course, or watershed to the prejudice of any person or property situated within the watershed from which such water is proposed to be taken or diverted.'

"The Irrigation Law of 1895, which was in force until the Irrigation Act of the Thirty-third Legislature, contained no specific provision prohibiting the diversion of water from the watershed of the stream. Article 5005 of the Revised Civil Statutes of 1911, being a part of the Irrigation Law of 1895, and relating to the appropriation of water, provides in substance that all surplus water not used or disposed of shall be conducted back to the stream from which it was taken."

The Act of 1895 referred to in the above quotation provides that

the rights of appropriators shall date from the time of beginning work upon any dam, reservoir, canal, ditches, etc., set out in their application under said statute. Both the Acts of the Thirty-third and Thirty-fifth Legislature provide that no vested rights either of riparian owners or appropriators shall be altered, decreased, increased or abolished by these two respective Acts, which, in fact, is the law even though not provided in said statutes.

See Acts Thirty-third Legislature, Chapter 171, Section 98; Acts Thirty-fifth Legislature, Chapter 88, Section 137.

It is a fundamental rule of law that rights that have become vested cannot be disturbed by legislative action and in many States it is held that even the Constitution itself cannot interfere with vested rights that had accrued prior to the adoption of such constitutional provision.

6 L. R. A. (N. S.), 257; Farnham Waters and Water Rights, p. 2024, et seq.

It appears, therefore, that under the authorities of the other States an appropriator under the Act of 1895 might divert and use the water from a stream on land not within the watershed of the stream, but it further appears that such appropriator would not be allowed to waste the water and that if there was any surplus of the water which he diverted to land outside of the watershed and it was wasted any person who suffered damage, whether a riparian owner or another appropriator, might maintain an action against the person so wasting the surplus water. It seems that the mere fact that an appropriator under the Act of 1895 diverts water to lands outside of the watershed would not constitute the basis for an injunction or for a damage suit.

Your third inquiry reads as follows:

"The Board assumes that it is clothed with full legal authority to at all times limit the taking of water from any stream or any source of supply so that there will be a supply adequate for domestic use. The Board has heretofore construed the use of water for the inhabitants for a city or town situated within the watershed of any principal stream a domestic use. In many instances the diversion plants supplying such water are owned by individuals or private corporations, in which case the owner diverts such water and sells same to the users thereof. Supposing, therefore, that a privately owned plant is diverting water and selling same to the inhabitants of a city or town for domestic use, while at the same time the owner of a pumping plant situated above the first named plant on the stream is diverting water therefrom for the purpose of irrigation, the supply becomes insufficient for both. Has this Board, in the absence of any general adjudication of the water rights on this particular stream, any legal authority to discriminate between appropriators and order the one higher up on the stream to close his plant in order that the appropriator first named, and below him, may have a water supply sufficient for the purpose stated?"

This inquiry brings up the question as to whether or not the board has the right to grant preferential use of water in case of scarcity. The only provision in the statute with reference thereto is the provision which says that irrigation shall be given preference over power rights in case of scarcity whenever it is practicable.

The general rule with reference to the use of water is that there is no preference to be granted to one user over another, except upon the grounds of priority either as riparian owner or as an appropriator. "The first in time is the first in right" is not only a provision of our own statute on the subject, but is the general rule governing the use of water. In discussing this subject Kenney on Irrigation and Water Rights, Second Edition, Section 791, says:

"Outside of the preference right for certain uses granted by constitution or statutory provisions in some of the states in times of scarcity, the general law of appropriation gives no preference right to any particular use to which the water may be applied over other uses,—hence it follows that the right of priority is based upon the date of the particular appropriation regardless of the use for which the appropriation is made. In other words, as far as the acquisition of a priority of right is concerned, with the exception above mentioned, all uses stand upon equal ground."

See also Long on Irrigation, 2d ed., Section 128; Union Mill & Mining Co. vs. Doughberg, 81 Fed. 73.

Therefore, I would advise you that your board does not have the power to grant a preference to one user over another except upon the basis of a priority in time in appropriating the waters and that a difference of uses does not create a preference in priorities except as above stated that where practicable irrigation shall be given preference over power rights.

Yours very truly,
JOHN MAXWELL,
Assistant Attorney General.

Op. No. 2027, Bk. 52, P. 315.

WATER RIGHTS—BOARD OF WATER ENGINEERS—STREAMS—TORTS.

The Board of Water Engineers has no authority to adjudicate private torts even though they grow out of the use of public waters.

If the silt from a city drainage system fills a stream and interferes with a private irrigation system, it is in the nature of a tort and not within the jurisdiction of the Board of Water Engineers.

Chapter 88 Acts Thirty-fifth Legislature.

AUSTIN, TEXAS, April 8, 1919.

Board of Water Engineers, Capitol.

GENTLEMEN: We have yours of April 3d with the following statement of facts and inquiry:

"About twenty years ago 'A' installed a pumping plant on an intermittent stream for the purpose of diverting certain flood waters, as well as the flow of certain small springs, which waters were rendered more or less static, both by reason of a depression in the bed of the stream, and the elevation of the bed of the stream lower down due to natural causes, tree growth, etc., in the bed of said stream. The water thus held and static has been diverted and used by 'A' in carrying into effect a limited irrigation project. In the opinion of the Board 'A' has complied with the requirements of the General Irrigation Statute, relating to appropriations. Some two years ago a municipal corporation constructed an artificial drain ditch, which ditch carries

more or less surface water from an undefined area and empties same into said stream some three hundred or four hundred yards above the point where 'A's' pumping plant is situated.

"'A' complains to the Board of Water Engineers that, as a direct result of the construction and use of said drain ditch, the hole of water in which the intake pipe of his pumping plant is located has been, or is being, filled with deposits of silt carried into the channel of the stream during times of heavy rains; and that by reason thereof his intake pipe has been covered with mud and silt and the capacity of the natural reservoir materially reduced; in consequence of which he has been and is being materially damaged.

"Does the General Irrigation Act passed by the Thirty-fifth Legislature, the same being Chapter 88, Acts of the Regular Session, confer upon the Board of Water Engineers any jurisdiction over the matters of complaint hereinbefore indicated? If so, how should the Board proceed to exercise this jurisdiction and apply a remedy, if any?"

In reply thereto will state that the facts submitted by you as above are in the nature of a private tort, and are, therefore, not within the jurisdiction of your board. Chapter 88 of the Acts of the Thirty-fifth Legislature does not and could not vest in your board any judicial powers. Its powers are purely administrative and can pass on facts only as same is necessary in order to administer the law. The conservation of the public waters, the enforcement of statutory regulations as to their use, the fixing of reasonable rates and similar duties and powers are vested in your board. In the exercise of these it sometimes becomes necessary to pass on a certain statement of facts which you can do only within the limits of the statutes. Private controversies touching upon the invasion of property rights are not within your jurisdiction. They can be adjudicated only in the courts of the State. In fact, the statute above referred to does not invest power in the board to prevent the emptying of silt into a stream, even though the doing so did not infringe upon the rights of another party, nor does the statute penalize such action on the part of any person or corporation. I would, therefore, advise you that the matters submitted in the above communication are not within the jurisdiction of your board to cure.

Yours very truly,
JOHN MAXWELL,
Assistant Attorney General.

Op. No. 2236, Bk. 53, P.—

STATE BOUNDARIES—RANGERS.

History of the boundary controversy between the State of Texas and Oklahoma on Red River, and power of the Governor to exercise sovereign right over disputed territory by placing the Ranger force thereon.

AUSTIN, TEXAS, March 14, 1920.

Hon. W. P. Hobby, Governor State of Texas, Capitol.

SIR: Since our last conference concerning the Red River Boundary litigation and the injunction recently issued by the Federal Court at Enid, Oklahoma, against certain Texas Rangers acting under the orders of your excellency we have been able to obtain a copy of the order isued by the Oklahoma Federal Court. This order reads as follows:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE WESTERN DISTRICT OF OKLAHOMA.

JUDSONIA DEVELOPING ASSOCIATION, Composed of Walter, C. Daugherty, James L. Taylor, Evander Kiser, Floyd N. Thompson, Robert L. Hart, A. C. Goodlin, Thomas R. Foster, Jam B. Crossland, Complainants,
vs.
Sam Sparks,
General Oil Company, a Corporation,
Lone Star Oil & Refining Company, a joint stock association,
J. L. Hunter,
G. H. Kerr,
Albert Lovern,
G. S. Fry,
Tom R. Hickman,
John Doe,
Richard Roe,
Bill Doe,
James Roe,
Walter Doe,
Frank Roe,
Black,
Osgood,
Glasscott,
Robertson,
Frank Brown
Defendants.

Case No. 395
Equity

ORDER.

Now on this 10th day of March, 1920, the above entitled matter came on for decision upon complainants' application for temporary injunction. Present the complainants in person and by counsel and the court having examined the pleadings and files in the case and considered the affidavits and evidence introduced in support of complainants' bill and application for injunctional order, and having heard the arguments and contentions of counsel, and being duly advised in the premises, finds that heretofore and on the 26th day of February, 1920, in the above entitled matter by the consideration of this court, on bill and application and showing duly made, this court duly isued its certain order warning and restraining said defendants as prayed for in complainants' bill and directing service thereof on defendants, and appearance on the 3d day of March, 1920, at said court at Enid, Oklahoma, to show cause, if any, why injunction prayed for should not be granted, and that thereafter, before March 3, 1920, due and legal service of said order was made on certain of said defendants, and thereafter and on the 3d day of March, 1920, and after the court had heard the evidence the court continued in force said restraining order theretofore issued and took this aid matter under consideration; and now at this time after being fully advised the court finds that the allegations of complainants' bill are true and that complainants are entitled to injunction as hereinafter set out.

Wherefore, it is by the court considered, ordered, decreed and adjudged that the said defendants and each of them and their principals, agents, servants, employes, substitutes or assigns and all persons or corporations acting by, for, through or under them or in their behalf, and all persons holding or claiming to hold for, by, through or under

them or in their behalf, and all persons to whom these presents or notice thereof may come, be and are enjoined from entering or remaining upon the tract of land in Tillman County, State of Oklahoma, immediately hereinafter described, to-wit:

Beginning at a stake at the South bank of the Red River, at a point where the East line of Section Numbered Five (5) of Township Numbered Five (5) South of Range Numbered Fourteen (14) West of the Indian Meridian, if projected would strike the South bank of the Red River.

Thence from said stake South 56 degrees West a distance of 400 feet.
Thence South 35 degrees West 444 feet.
Thence South 45 degrees West 263 feet.
Thence 57 degrees West 365 feet to a cottonwood tree.
Thence South 57 degrees West 190 feet to a second cottonwood tree.
Thence South 34 degrees West 300 feet.
Thence South 65 degrees West 161 feet.
Thence South 65 degrees West 618 feet to the Southwest corner of said Judsonia Developing Association's location and claim.
Thence North 2640 feet to a stake in the bed of the Red River.
Thence North 47 degrees East 2640 feet to the Northeast corner.
Thence South 2640 feet to the southeast corner, the place of beginning, containing one hundred sixty (160) acres, known as the Judsonia Developing Association's Placer Mining Claim.

And each and all of said persons be and are hereby enjoined from interfering with the complainant, the Judsonia Developing Association, or any member thereof or any of its agents, servants or employes in the free exercise of peaceful and undisturbed possession of the said above described tract of land and from the free exercise of ingress and egress of the said described tract of land and from their free and undisturbed possession of the oil and gas taken from said tract of land and from the free and undisturbed drilling and exploration of said tract of land and the production and care of the oil therefrom discovered and recovered by them and all said defendants and described persons are enjoined from removing any fixtures, appliances, machinery or property from the said above described tract of land, and each and all of said defendants and said persons and corporations herein described are hereby directed and ordered to forthwith deliver to complainants the full possession of the said described premises and all property and equipment of whatsoever kind and character located on said lands described until the further order of this court or the judge thereof.

And it is further ordered that the clerk of this court issue certified copies of this order for service upon the defendants and the defendants residents of Texas, directed to the marshal of the respective districts where such defendants may be found, and that the United States Marshal of any district to whom these presents may come is directed to forthwith serve this order upon defendants, corporations and described persons in the respective districts where such defendants, corporations and described persons may be found and make due return hereof with his doings hereunder endorsed hereon.

FRANK A. YOUMANS,
Judge United States District Court, Western District of Oklahoma.

Endorsed: Filed March 10, 1920.

UNITED STATES OF AMERICA, }
} SS.
WESTERN DISTRICT OF OKLAHOMA. }

I, Arnold C. Dolde, clerk of the District Court of the United States for the Western District of Oklahoma, do hereby certify the within and foregoing to be a full, true, correct and complete copy of original Injunctional Order of said date, in said cause, as the same appears of record and on file in my office.

WITNESS my hand and the seal of said court at my office in the City of Enid, in said district, this 10th day of March, A. D. 1920.

ARNOLD C. DOLDE, *Clerk*,
By FRANK T. McCOY, *Deputy*.

SEAL U. S. District Court.

You will note that the defendants named are certain parties to whom the State has granted a permit to prospect for oil or their vendees; also Mr. J. L. Hunter, who was appointed receiver of one of the oil wells located on the property in controversy by Judge Calhoun, judge of the Fifty-third District Court of Travis County, Texas; also certain parties named who are Texas Rangers acting under the orders of your excellency.

The lands described in the order are south of the middle of the main channel of Red River and, therefore, within the boundaries of Texas.

Parsons vs. Hunt, 98 Texas, 425;
Spears vs. State, 8 Texas Cr. App., 467.

In the case of Parsons vs. Hunt just cited the Supreme Court of the State of Texas said:

"The State of Texas has jurisdiction over the waters of Red River to the center of the stream. Spears vs. State, 8 Texas Crim. App., 476; Tugwell vs. Eagle Pass Ferry Co., 74 Texas, 480. In the first case cited above this question was directly presented to the Court of Criminal Appeals by the brief of the appellant, in which the provisions of the different treaties were stated, and the claim was made that a proper construction of the treaty provisions would confine the jurisdiction of this State to the south bank of the river. In a very clear and able opinion by Judge George Clark, then a member of that Court, it was held that the jurisdiction of the State extended to the middle of the stream."

The lands are not only within the jurisdiction of the State of Texas as a sovereign, but are owned by it in its proprietary capacity. The State has granted a permit to certain parties to prospect for oil on these properties and a number of wells are being drilled thereon by the State's permittees or assigns. Our information is that three oil wells are in on the property thereof, but as to this we cannot speak accurately.

Under the laws of the State the State obtains one-eighth of all the oil that is produced on this territory. And this from the wells that are now producing oil, we are informed, will amount to many thousands of dollars per month. It is said that the tract of land involved is, as a whole, a rich portion of the oil field. You will observe, therefore, that the interest of the State as a sovereign is not only involved, but that its material wealth involved in the controversy is a matter of great moment.

We cannot undertake to give a complete history of the controversy, suits and conflicts growing out of the boundary controversy between Oklahoma and Texas, but will make reference to such matters as appear absolutely essential to a clear understanding of the position stated in this opinion.

About the 8th day of December, A. D. 1919, under leave of the court, the State of Oklahoma filed an original suit in the Supreme Court of the United States against the State of Texas which is No. 27 Original, the State of Oklahoma, complainant, vs. The State of Texas, defendant. The purpose of this suit is, briefly, to determine the boundary between the States of Oklahoma and Texas along Red River. The State of Oklahoma contends that the south bank of Red River is the boundary between the two States. The State of Oklahoma in her bill filed in the Supreme Court of the United States alleges among other things, in substance:

"Your orator further states that the boundary line between the State of Oklahoma east of the 100th degree of longitude west from Greenwich and the State of Texas is the south bank of said Red River, and that said south bank of said stream forms said boundary line between the States of Oklahoma and Texas at all points east of said 100th degree of longitude west from Greenwich; that although said boundary has been thus fixed and determined as the south bank of the Red River, the State of Texas, in its capacity as a sovereign State, is now and has for a long time past disregarded said boundary and is now and has for a long time past asserted civil, criminal, and political jurisdiction over all that portion of the State of Oklahoma north of the south bank of Red River, up to and in many instances beyond the center of said stream; that said State has by its regularly constituted executive officers made grants of lands beyond and north of the south bank of said river and in some cases beyond and almost to the north bank of said stream; that it has, by its regularly constituted executive officers, granted numerous oil and gas permits to leases to divers and various persons covering lands beyond and north of the south bank of said stream and beyond the boundary limits of said State as fixed by said treaty of 1819 and subsequent treaties and laws; that it has by its Attorney General instituted various suits in the courts of the State of Texas claiming that the lands so granted and the oil and gas permits and leases so made are valid grants of the State of Texas. and has invoked the jurisdiction of the said courts to protect same; that the courts of the State of Texas have assumed jurisdiction of said actions and the subject matter thereof and have asserted and exercised civil and criminal jurisdiction of Red River beyond and north of the south bank; that the State of Texas, through its regularly constituted executive, State and county officials, aided and assisted by the courts of said State, are claiming, asserting, and exercising political, civil, and criminal jurisdiction beyond and north of the south bank of Red River and within the limits of the State of Oklahoma; that said officers are using force and threats of force to enforce the claims of the State of Texas; that they are excluding the regularly constituted officers of the State of Oklahoma from exercising the duties and functions of government within said disputed territory and are excluding citizens of the State of Oklahoma from all the south portion of the bed of Red River, and in legal effect, taking and confiscating their property therein.

"The State of Oklahoma claims that the southern boundary of said State is the southern bank of the Prairie Dog Town fork of Red River as the same existed in 1819, and that her sovereignty and jurisdiction extends to said southern bank of said stream throughout its course between said states, and that said State of Oklahoma has at all times since its admission into the Union claimed and asserted jurisdiction over the same.

"The State of Texas. however, claims that the true boundary between said states is the center or tread of the watercourse of said stream as it

now exists, said center or tread of said stream being far north of the south bank of said stream as it existed in 1819, and said State of Texas is attempting to exercise sovereignty and jurisdiction, both civil, criminal and political, not only to the center of the present water course, but north of said line.

"There is, therefore, a confusion of boundaries between the said States and a controversy between the States of Oklahoma and Texas with regard to same and with regard to their sovereignty and jurisdiction.

"Riparian owners in the State of Texas bordering on the south bank of said stream, as the same existed in 1819, are claiming ownership under grants and leases from the State of Texas to the center or tread of the present watercourse of said stream far north of said original south bank of said stream, and riparian owners, including the State of Oklahoma, in the State of Oklahoma are claiming ownership to the south bank of said stream as the same existed in 1819.

"Wherefore, being without remedy on the law side of this court, the State of Oklahoma prays that the State of Texas be made a party defendant to this bill, and that subpoena be issued and served upon the proper officers of said State, and that it be required to answer the allegations hereof, but not upon oath.

"And it is prayed that your honors, by proper orders and decrees, establish the true boundary line between the State of Oklahoma and the State of Texas as the south bank of said Rio Roxo or Red River as the same existed on February 22, 1819, from the point where said Red River is intersected by the 100th degree of longitude west from Greenwich thence southeasterly along said south bank throughout the course of said river between the State of Oklahoma and the State of Texas; that the rights, jurisdiction, and sovereignty of the State of Oklahoma to all the land and territory lying north of said line and within the State of Oklahoma so established be confirmed and established by decree of this court.

"And to the end that the said line may be definitely located and fixed by the only court having jurisdiction so to do, it is prayed that a boundary commission be appointed to ascertain and designate said boundary line between the States of Oklahoma and Texas, and that such boundary commission be required to make the proper examination and to delineate on maps prepared for that purpose the true boundary as determined by this court."

Upon the filing of the aforesaid suit in the Supreme Court of the United States, that honorable court in the exercise of its proper authority on the 8th day of December, A. D. 1919, issued a subpœna citing the State of Texas to appear and answer the bill of complaint of the State of Oklahoma. Service of this subpœna was accepted on the 15th day of September, A. D. 1919, by the Governor and the Attorney General of Texas.

By the terms of said subpœna the State of Texas was commanded to appear before the Supreme Court of the United States on Monday, March 1, 1920, and answer in the cause. On Monday, March 1, A. D. 1920, the State of Texas, acting by its Attorney General, did in response to said subpœna appear before the Supreme Court of the United States and under leave of the court filed the original answer and counterclaim of the State of Texas.

Pleading directly with reference to certain allegations in the bill of complaint of the State of Oklahoma the State of Texas answered in part as follows, to-wit:

3. Defendant denies that the boundary line between the States of Oklahoma and Texas east of the one hundredth degree of longitude west from Greenwich is the south bank of Red River and that this bank forms the boundary line between the two states at all points, or at any point,

east of said one hundredth degree of longitude as stated in lines 3 to 9 inclusive, on page 14 of the bill.

4. Defendant denies that the State of Texas, in her capacity as a sovereign State, is now disregarding, or has for a long time disregarded the true boundary between said States, and is now asserting, or has for a long time past asserted, civil, criminal or political jurisdiction over all that portion of the State of Oklahoma north of the south bank of Red River, up to and in many instances beyond the center of said stream, as alleged in lines 11 to 17 inclusive, on page 14 of the bill. Defendant says, however, that now for a long time past, as hereinafter more fully set out, she has asserted civil, criminal and political jurisdiction over that portion of the bed of Red River lying south of the center of its main channel but never beyond center of this channel, and she denies that any part of the stream south of the center of its main channel is or has been at any time a portion of the State of Oklahoma.

5. As to the allegations appearing in lines 17 to 21 inclusive, on page 14 of the bill, to the effect that the State of Texas has by her regularly constituted executive officers made grants of lands north of the south bank of said river and in some cases beyond and almost to the north bank of the stream, defendant admits that she has by her regularly constituted executive officers issued permits to develop for oil and gas on lands, and made contracts for the leasing of lands, situated beyond and north of the south bank of said river and up to the middle of the main channel thereof, but denies that she had done so on lands situated beyond and north of the middle of the main channel, or has otherwise than as admitted made grants of lands north of the south bank of said river.

6. As to the allegations contained in lines 21 to 26 inclusive, on page 14 of the bill, to the effect that the State of Texas has by her regularly constituted executive officers granted numerous oil and gas permits and leases to divers and various persons covering lands beyond and north of the south bank of said stream and beyond the boundary limits of said State as fixed by said treaty of 1819 and subsequent treaties and laws, defendant admits that she has by her regularly constituted executive officers granted numerous oil and gas permits to divers and various persons covering lands situated beyond and north of the south bank of said stream, and made contracts to lease lands so situated, but says that all of said lands were south of the center of the main channel of Red River and within the boundaries of the State of Texas, as fixed by the treaty of 1819 and subsequent treaties and laws; she denies that she has granted any oil or gas permits covering, or made contracts to lease, land situated beyond and north of the middle of the main channel of Red River and beyond her boundary limits as fixed by said treaty of 1819 and subsequent treaties and laws.

7. As to the allegations contained in lines 26 to 31 inclusive, on page 14 of the bill, to the effect that the State of Texas has by her Attorney General instituted various suits in the courts of defendant claiming that the lands granted by her and the oil and gas permits and leases made by her were valid grants of defendant, and has invoked the jurisdiction of her courts to protect same, defendant admits that she has instituted various suits in her courts claiming that the lands granted by her, and the oil and gas permits and contracts to lease made by her, were valid grants of defendant and has invoked the jurisdiction of her courts to protect same, but she denies that the land involved in any of these suits was situated north of the center of the main channel of the Red River, or within the territorial jurisdiction of the State of Oklahoma.

8. As to the allegations contained in lines 31 to 35 inclusive, on page 14 of the bill, to the effect that the courts of the State of Texas have assumed jurisdiction over said actions and the subject matter thereof and have asserted and exercised civil and criminal jurisdiction of Red River beyond and north of its south bank defendant admits that her courts have assumed jurisdiction over actions and the subject matter thereof in cases where the land involved is situated beyond and north of the south bank of Red River, but not beyond and north of the center of the main channel of the river, and that these courts have asserted and exercised civil and criminal jurisdiction of Red River beyond and

north of its south bank, but not beyond and north of the center of the main channel thereof; defendant denies that her courts have asserted and exercised said jurisdiction in cases where the lands involved are situated beyond and north of the center of the main channel of Red River, or of Red River beyond and north of the center of its main channel.

9. As to the allegations contained in the last three lines of page 14 and the first 3 lines of page 15 of the bill, to the effect that the State of Texas through her regularly constituted executive, State and county officers, aided and assisted by the courts of said State, is claiming, asserting and exercising civil, political and criminal jurisdiction beyond and north of the south bank of Red River and within the State of Oklahoma, defendant admits that her said regularly constituted officers, aided and assisted by her courts, are claiming, asserting and exercising said jurisdiction beyond and north of the south bank of Red River, but denies that they are so doing north of the center of the main channel of Red River and within the limits of the State of Oklahoma.

10. As to the allegation contained in lines 3 to 5 inclusive, on page 15 of the bill, to the effect that the last mentioned officers are using force and threats of force to enforce the claims of the State of Texas, defendant admits that through her officers she is using force and threats of force where necessary to enforce her sovereign rights in and over that portion of Red River lying south of the center of the main channel thereof, same being within the limits of the State of Texas, but denies that she is so doing as to any portion of Red River north of the center of the main channel thereof and within the limits of the State of Oklahoma.

11. Defendant says that as to the allegations contained in lines 5 to 10 inclusive, on page 15 of the bill, to the effect that said officers of the State of Texas are excluding the regularly constituted officers of the State of Oklahoma from exercising the duties and functions of government within said disputed territory and are excluding citizens of the State of Oklahoma from all the south portion of the bed of Red River, and, in legal effect, taking and confiscating their property therein, defendant admits that her officers are endeavoring to exclude and are excluding all persons from exercising the duties and functions of government within the territory south of the middle of the main channel of Red River, where said river forms the boundary line between the States of Oklahoma and Texas, except where such persons are acting by and under the authority of the State of Texas, but denies that she is so doing as to any territory beyond and north of the center of the main channel of Red River; that she is without information as to whether or not the persons so excluded are the regularly constituted officers of the State of Oklahoma, or citizens of that State. Defendant denies that she is by her admitted acts in legal effect taking and confiscating any property of the State of Oklahoma or of the citizens of that State.

12. As to the allegations contained in lines 11 to 18 inclusive, on page 15 in the bill, to the effect that the State of Oklahoma claims that the southern boundary of said State is the southern bank of the Prairie Dog Town Fork of Red River as same existed in 1819, and that her sovereignty and jurisdiction extended to the southern bank of said stream throughout its course between the two States, and that the State of Oklahoma has, at all times since her admission into the Union, claimed and asserted jurisdiction over the same, defendant says that she is without information sufficient to enable her to answer as to the present claims of Oklahoma except the information contained in the bill itself; but defendant denies that the State of Oklahoma has at all times, since her admission into the Union, claimed and asserted jurisdiction over the land south of the middle of the main channel of Red River. Defendant says that the first knowledge or information she had of such asserted jurisdiction was about the first day of January, A. D. 1919, when officers of the State of Oklahoma caused surveying to be done south of the middle of the main channel of Red River within Wichita County, in the State of Texas, after discovery of a large oil field adjacent to Red River and south of the middle of the main channel thereof. Defendant says that she is informed and believes that the occasion referred to was the first

instance in which the State of Oklahoma ever asserted jurisdiction over land south of the main channel of Red River.

13. As to the statement contained in lines 19 to 26 inclusive, on page 15 of the bill, to the effect that defendant claims that the true boundary between the two States is the center or tread of the water course of Red River as it now exists, said center or tread being far north of the south bank or said stream as it existed in 1819, and that defendant is attempting to exercise sovereignty and jurisdiction, civil, criminal and political, not only to the center of the present water course, but north of said line. Defendant admits that she claims that the true boundary between the two States is the center of the main channel of Red River as it existed when said Treaty of 1819 became effective with such changes as have since occurred through natural and gradual processes, and that she is attempting to exercise sovereignty and jurisdiction, civil, criminal and political, as far north as the center of said channel, but denies that she is doing so beyond and north of the center of said channel.

14. As to the allegations contained in lines 27 to 30 inclusive, on page 15 of the bill, to the effect that there is a confusion of boundaries between the two States and a controversy between them with regard to the boundaries and their sovereignty and jurisdiction, defendant admits the existence of the controversy and that the boundary line has never been marked on the ground, but denies that there is otherwise a confusion of boundaries, the center of the main channel of Red River being the boundary.

The answer of the State of Texas is too long to be here inserted in its entirety, but I am transmitting a printed copy of the same for the information of your excellency.

Among other things pleaded by the State of Texas in its answer as shown on page 15 thereof is that "from the time of the adoption of the Treaty of 1819 up to about January 1, 1919, there has not been within the knowledge of this defendant any dispute or controversy in which the boundary herein involved is claimed to be other than the middle channel of Red River."

Among other allegations in the answer are those beginning on page 15 and ending on page 17, which read as follows:

"Defendant, on information and belief, says that the government of Spain and that of Mexico, after the Treaty of 1819 became effective, and during the time that the territory now known as the State of Texas was a part of the territory of those governments, claimed and exercised sovereign jurisdiction and authority to the middle of the main channel of Red River and enjoyed the right of navigation and use of the waters thereof. Defendant says that the Republic of Texas achieved her independence in the year 1836 and became a State of the American Union in the year 1845.

"That from the establishment of her independence down to the present time, first as a Republic and afterwards as a State, she has claimed all the land in controversy in her sovereign and proprietary capacity and has exercised political, criminal and civil jurisdiction over it; that beginning in the year 1836 she has embraced it within the land districts and the boundaries of her counties; she has made contracts for the leasing of, and granted numerous gas and oil permits covering portions thereof; that she has policed it, and repeatedly, through her courts, declared and exercised civil and criminal jurisdiction thereover; that she has maintained continuous, quiet, peaceable and uninterrupted possession thereof for more than 80 years and up to January 1, 1919; that all of this has been done with the acquiescence of the Government of the United States, and with that of the State of Oklahoma from the date of its admission as a State of the Union down to January 1, 1919.

"Defendant, on information and belief, says that the Government of the United States did not, after the taking effect of the treaty of 1819, or that

of 1828, or that of 1838, and up to the admission of Texas into the Union in the year 1845, claim, or attempt to exercise any jurisdiction or authority over, the land in controversy; that since Texas was admitted to the Union the United States has not claimed any interest or ownership in this land, and has not disputed, questioned or challenged the sovereign and proprietary rights, claims and jurisdiction asserted by the State of Texas in and over it; that not only has the United States at all said times permitted the State of Texas to remain in quiet, peaceable and uninterrupted possession of said land and made no effort to interfere with same, but that it has not at any time, by its surveys or otherwise, asserted or attempted to exercise any proprietary rights over the land in controversy; that on the contrary, by its treaties with different Indian tribes and various official acts of its executive and administrative officers, it has recognized the center of said main channel as the correct boundary line between what is now the States of Oklahoma and Texas, and has issued no grants to lands south of said center.

Defendant, on information and belief, says that the State of Oklahoma, from its admission into the Union down to January 1, 1919, has not only claimed no interest or ownership in the land in controversy and not disputed, questioned or challenged the sovereign and proprietary rights, claims and jurisdiction asserted and exercised by the State of Texas in and over it and permitted the State of Texas to remain in quiet, peaceable and uninterrupted possession thereof and make no effort to interfere with said possession, but has by her surveys, and otherwise, admitted that the said center of the main channel of Red River constituted the boundary line now in controversy; that Oklahoma first asserted, and attempted to exercise, proprietary rights and jurisdiction over the land in controversy about January 1, 1919, when an oil field was developed in Wichita County, Texas, on said land.

"That by virtue of these facts the center of the main channel of Red River has by prescription become the boundary line between the States of Texas and Oklahoma, and the land in controversy by prescription has become a part of the State of Texas and is owned by that State under the terms of the compact between the United States and the Republic of Texas, entered into in the year 1845, by which the Republic of Texas became a State of the Union."

Pleading with reference to various treaties and Acts of Congress, their purpose and effect, the State of Texas in its said answer among other things says:

"That complainant claims that, where Red River forms the boundary between the States of Texas and Oklahoma, the south bank thereof is the exact boundary line, while defendant contends that the middle of the main channel is the exact line. Leaving out of consideration defendant's counter claim, hereinafter set forth, the territory involved is, therefore, that south of the middle of the main channel of Red River and between it and the south bank; for the sake of brevity defendant will call this territory 'the land in controversy.'

"That Red River has its sources in the plateau known as the Panhandle of Texas, in a general westerly direction from the southwest corner of the State of Oklahoma; that it flows in a southeasterly direction until it empties into the Mississippi River in the State of Louisiana; that it constitutes the boundary line between Oklahoma and Texas from the point where it crosses the degree of longitude 100 west from London and 23 from Washington for about 400 miles; that throughout about 300 miles of said distance, which is the southeastern portion thereof, it is navigable in fact and has been for over 100 years, and has been from time to time improved by the national Government as a navigable stream; that its navigability has continued to the point where it empties into the Mississippi River; that from its source to about the point where it becomes navigable in fact it flows through a semi-arid country where the rainfall for over 100 years has been slight and below normal, making agriculture difficult, a country devoted largely to the raising of cattle; that between its source and the point where navigation

begins it has for more than 100 years drained a wide stretch of country, furnishing practically the only surface water supplied to the inhabitants thereof and being separated by great expanses of semi-arid country from the nearest rivers to the north and south respectively.

"That up to some thirty years ago, when the inhabitants of the region referred to began to successfully develop wells, Red River furnished them with practically the only water supply of any character, and accessibility thereto was of the utmost importance to the people on both sides of the river in order that they might secure water for their cattle, and for domestic and other purposes.

"That as far back as 1778 the waters of this river were used by the Indians in irrigating.

"That in 1819 the use of steam in land transportation had not been developed, and transportation by water was the cheapest, easiest and most valuable method employed.

"That because of these facts, when the Treaty of 1819 between Spain and the United States was negotiated, it was the intention of both the high contracting parties thereto that the citizens of both, living on the respective sides of the boundary in dispute, should have access to the waters of this stream and should be free to use those waters for navigation, irrigation and all other purposes; that in order to carry out this intention, it was provided in 'Article 3' of the Treaty, that the use of the waters and the navigation of Red River (then sometimes called the Rio Roxo), throughout the extent of the boundary herein involved, should be common to the respective inhabitants of the two nations. That for the same reason, it was specifically provided in this Article that the boundary line should follow 'the course of the Rio Roxo westward,' by which was meant that the middle of the main channel of the river should constitute the boundary line, and the legal effect of the Treaty was to establish it as the line.

"That by virtue of the treaties and Acts of Congress described in complainant's bill the boundary line so established between Spain and the United States subsequently became the boundary line between Mexico and the United States, and thereafter between the Republic of Texas and the United States, and thereafter between the State of Texas and the United States, and finally between the State of Texas and the State of Oklahoma.

"That the center of the main channel of Red River, as it existed when the Treaty of 1819 became effective, is today the boundary line between Oklahoma and Texas, with such changes as have since arisen from natural and gradual processes.

"That under the terms of said treaties and Acts of Congress all the rights, privileges, ownership and sovereignty relating to said boundary line which were vested in Spain by virtue of the Treaty of 1819 became vested in, and now belong to the State of Texas, including the right of the State and its citizens to navigate Red River and use its waters throughout that portion of the stream which constitutes the boundary between Texas and Oklahoma and to have free and uninterrupted access thereto.

"That Red River is at the present time the largest stream in the vicinity of the boundary in dispute, that it furnishes a great supply of water, that throughout the said 300 miles of the navigable portion thereof it is a large stream, and over a substantial part of said 300 miles much commerce moves to and from the Mississippi River and points beyond; that the right to use and navigate the waters of Red River, and have free access to same, is a valuable right to the State of Texas and its people, more particularly those who own riparian rights on the south bank thereof.

"That by virtue of the facts recited not only has the center of the main channel of Red River become the boundary line herein involved, but the land in controversy, under the terms of the compact entered into by the United States and the Republic of Texas in the year 1845, by which the Republic of Texas became a State of the Union, became and is the property of the State of Texas."

The State of Texas likewise in its said answer on pages 17 to 22 gave the history of what is known as the Greer County Case and

showed that the same had no application to the present matter of controversy between the States of Oklahoma and Texas and that the same was not res adjudicata and did not establish the boundary line between Texas and Oklahoma where Red River forms the boundary. Summarizing its contentions in reply to the bill of the State of Oklahoma the State of Texas in its answer says:

"The contentions of defendant in reply to the bill herein are summarized as follows:

"First. The boundary line in controversy between Oklahoma and Texas is the center of the main channel of Red River as it existed when the Treaty of 1819 between Spain and the United States became effective with such changes as have since arisen from natural and gradual processes—

"(a) Because so fixed by said Treaty and subsequent treaties and Acts.

"(b) Because so determined by prescription

"Second. If this Honorable Court should hold that Red River, along the boundary in question, is entirely within Oklahoma, then that the exact boundary line is the edge of the water of the river on its south side at the low water stage, as it existed when the Treaty of 1819 became effective, with such chanages as have arisen from natural and gradual processes.

"Third. If the court should hold that the south bank of Red River is the boundary in question, then that the exact boundary line is the edge of the water of the river on its south side at the low water stage, as it existed when the Treaty of 1819 became effective, with such changes as have since arisen from natural and gradual processes."

In its prayer the State of Texas among other things prayed the Supreme Court of the United States to establish the true boundary between the State of Oklahoma and State of Texas as the middle of the main channel of the Rio Roxo, or Red River, as the same existed on February 22, 1819, from the point where the Red River is intersected by the 100 degree of longitude west from London and 23 from Washington, thence southeasterly along the middle of the main channel throughout the course of said river between the State of Oklahoma and State of Texas; that the rights, ownership, jurisdiction and sovereignty of the State of Texas of and to all the land and territory lying south of said line be established and confirmed by a decree of the Supreme Court. The State of Texas also prayed for the appointment of a boundary commission and made an appropriate prayer as to its counterclaim.

Your excellency from the foregoing will observe that the entire subject matter of the boundary between Oklahoma and Texas along Red River and the acts of the State of Texas, its officers and authorities with reference thereto are made justiciable issues before the Supreme Court of the United States, and that the determination of the conduct of the State of Texas with reference to all these matters is now confined to that court where pleadings were filed and the issues made. You will note from excerpts from the pleadings quoted that the State of Oklahoma is claiming that the State of Texas is by her regularly constituted executive State and county officers, aided and assisted by the courts of the State, claiming, asserting and exercising political, criminal and civil jurisdiction north of the south bank of Red River to the middle of the main channel of the stream. You will note that the State of Texas in its answer has admitted that this is true. You will observe that Oklahoma in her bill charges that the officers of the State are using force and threats of force to enforce the claims of the State

of Texas. You will also observe that the State of Texas admits that through her officers she is using force and threats of force where necessary to enforce her sovereign rights in and over that portion of Red River lying south of the main channel thereof, the same being within the limits of the State of Texas.

Likewise the petition of Oklahoma contains the allegations that the officers of the State of Texas are excluding regularly constituted officers of the State of Oklahoma from exercising the duties or functions of government within the disputed territory, and are excluding citizens from the State of Oklahoma from all the south portion of the bed of Red River and in legal effect taking and confiscating their property therein. In response to this charge the State of Texas admitted that her officers are endeavoring to exclude and are excluding all persons from exercising the duties and functions of government within the territory south to the middle of the main channel of Red River where said Red River forms the boundary between the States of Oklahoma and Texas except where such persons are acting by and under the authority of the State of Texas. By a review of the various provisions of the two pleadings it will become quite apparent that the entire issue of the conduct if the State of Texas and its officers and all its contentions and claims is pending in the Supreme Court of the United States upon bill of complaint lawfully filed and answer lawfully made.

About the 3d day of January, A. D. 1920, information came to this Department that two certain joint stock associations or common law trusts, known respectively as Burk-Divide Oil Company No. 1 and Burk-Divide Oil Company No. 2, were drilling wells upon a portion of the land south of the middle of the main channel of Red River in Wichita County and which was claimed by the State of Texas as her property and upon which she had granted permits to prospect for oil.

It appeared that these two companies were common law trusts or partnerships and that certain of the partners or owners of each of them resided in the State of Texas. The State of Texas, therefore, in order to protect its sovereign jurisdiction and its property right and to protect itself from any claims which might be made against it, filed a suit in the District Court of Travis County, Texas, Fifty-third Judicial District, styled "The State of exas vs. Burk-Dividde Oil Company, No. One, et al."

Upon presentation of the matter to the Hon. George Calhoun, judge of said court, an injunction was issued against the defendants, their servants, employees, drillers, assigns or legal representatives from trespassing upon the lands described in the petition and, among other things, from taking any oil or minerals from said lands.

In the State's original petition referred to prayer was made that when necessity arose for a receiver that a receiver be appointed to take possession of the lands in controversy or such portion thereof as might be necessary.

On or about January 21 a receiver was appointed in the aforesaid suit for one of the oil wells located on the land in controversy, known as Burk-Divide No. 1, the Hon. J. L. Hunter being appointed receiver. The receiver duly qualified, entered upon his duties, took possession of the property and has since remained in possession. In the course

of the proceedings, as we understand it, your excellency sent certain of the Texas Rangers to the disputed territory for the purpose of preserving peace and good order and to prevent bloodshed. The orders your excellency gave them and your purpose in sending them are matters known to you and about which the writer is not definitely informed. Long after the filing of the aforesaid suit and the appointment of a receiver by the District Court of Travis County a suit was instituted in the District Court of the United States for the Western District of Oklahoma by the Judsonia Developing Association, composed of various private individuals whose names appear in the copy of the order inserted in this opinion.

The suit was brought against the defendants which we have also heretofore set out, among others against Mr. J. L. Hunter, the receiver heretofore referred to, and several Texas Rangers whose names are not known to the writer, but whose names, as we understand it, appear on the copy of the order inserted herein.

A consideration of the order of the District Court of the United States for the Western District of Oklahoma discloses that its purpose and effect, among other things, is to take from the possession of the receiver and the State of Texas a tract of 160 acres of land which is located south of the middle of the main channel of Red River and, therefore, within the boundaries of Texas, and which tract of land is involved in the suit filed in the District Court of Travis County. Included on the tract, so we are informed, are the well of which Mr. Hunter is receiver and other producing wells or wells near in production. The direct effect of the order is to take from the State of Texas its property; and from its sovereignty its territory and to deliver the sovereignty thereof over to another sovereign and the property thereof over to persons other than the State of Texas and its permittees and their assigns.

We are of the opinion that the effect of the order is to undertake to control the State of Texas in its sovereign authority and in its proprietary capacity and, therefore, the suit becomes one in effect against the State of Texas in violation of the Constitution of the United States.

The Eleventh Amendment to the Constitution of the United States declares that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State. The State is, therefore, immune to suit by citizens of another State and, also, by citizens of its own State, except by its consent; and while it may be sued by another State, and particularly when the question of boundaries is involved, such suit must be brought in the Supreme Court of the United States as has been done by Oklahoma. The doctrine is well settled that whether a State is the actual party defendant in a suit within the meaning of the Eleventh Amendment to the Constitution is to be determined by a consideration of the nature of the case as presented by the whole record, and considering the nature of the case pending in the United States Court for the Western District of Oklahoma as disclosed by the order of the court and considering the effect of this order if obeyed by the receiver and the Texas Rangers we have concluded that it is in effect a suit against

the State of Texas. That whether or not a suit is against the State is to be determined by a consideration of the nature of the case is, as indicated above, well settled by the authorities. In re Ayers, 123 U. S., page 443.

The State of Texas can act only by its agents and agencies. It carries out the laws of its legislative department through its judicial and executive departments. If it may be made to litigate the question of its boundaries and determine them in courts in which it may not be directly sued by bringing actions against the receivers appointed by its courts and peace officers acting under orders of its Governor, then those provisions of its Constitution guaranteeing to it due process of law by the trial of its boundary disputes in the Supreme Court of the United States and by the trial of its sovereign rights in controversy with the other States in that court, as well as the protective clauses of the Eleventh Amendment to the Constitution, are reduced to a nullity and force the State into a humiliating position, destructive of its sovereignty, its property rights and its peace, which was never contemplated by the makers of the Constitution.

We have concluded, therefore, that the order of the District Court of the United States for the Western District of Oklahoma, which we heretofore quoted, in so far as it seeks to dispossess the receiver appointed by the District Court of Travis County and to dispossess the State of Texas of the lands in controversy by enjoining and forbidding action by the peace officers of the State acting under your orders, is void. We do not pass upon the validity of the order in so far as it concerns private individuals, nor do we pass upon the question of the right of a receiver to continue to produce oil. We confine our opinion particularly to the question of the right of possession of the property and the right to exclude plaintiffs in that suit from a possession which trespasses upon the property of the State.

It may be said, also, that the order of the United States District Court, heretofore quoted, is void for additional reasons. Article 1242 (Judicial Court, Sec. 265) of the United States compiled statutes declares:

"The right of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by law relating to proceedings in bankruptcy."

All of the land in controversy, according to our information, in the suit pending in the United States Court for the Western District of Oklahoma is embraced in the lands in controversy in the District Court of Travis County, and the effect of the order issued by said United States Court is to stay the proceedings and make null the orders and decree of the District Court of Travis County. This is absolutely prohibited by the United States statute referred to, which statute has been construed in various cases.

Dillon vs. Kansas City etc. Ry. Co., 43 Fed. 109;
Security Trust Co. vs. Union Trust Co., 134 Fed. 301;
Union Pacific Ry. Co. vs. Flynn, 180 Fed. 565;
Mills vs. Provident Life & Trust Co., 100 Fed. 344;

American Association vs. Hurst, 59 Fed. 1.
Phelps vs. Mutual Reserve etc. Assoc., 112 Fed. 453.

Also it seems to be a rule well supported by authority that a person in possession of property cannot be ousted from his possession and another placed in possession thereof by a temporary injunction. Calvert vs. State, 34 Nebraska 616. In this case the Supreme Court of Nebraska in part said:

"A temporary injunction merely prevents action until a hearing can be had. If it goes further and divests a party of his possession or rights in the property, it is simply void. * * * The question of the street railway's right to appropriate the property in question should have been determined by a trial before the order in question was made, and if it was not so made, the judge acted without authority and the order is void. The plaintiffs in error therefore are not guilty of contempt."

In the case of State vs. Cravens, 66 Nebraska, the Supreme Court of that State, after quoting from the decision above cited, said:

"This statement seems to be fully sustained by the adjudged cases in other jurisdictions, and we have found no decision giving color or countenance to another view."

In the case of T. & P. Company vs. Iosco, 44 Michigan, 479, the Supreme Court of that State among other things said:

"It has been decided repeatedly that any decree or order divesting possession or rights on a preliminary inquiry is illegal and void, so that no one need respect or obey it."

In the case of Lacassagne vs. Chapius, 144 U. S., 119, the Supreme Court of the United States among other things said:

"The plaintiff was out of possession when he instituted this suit, and by the prayer in this bill he attempts to regain possession by means of the injunction asked for. In other words, the effort is to restore the plaintiff by injunction to rights of which he had been deprived. The function of an injunction is to afford preventive relief, not to redress alleged wrongs which had been committed already. An injunction will not be used to take property out of the possession of one party and put it into that of another. * * * The plaintiff has a full, adequate and complete remedy at law and the case is not one for the jurisdiction of a court of equity."

This doctrine is approved in the case of Black vs. Jackson, 177 U. S., page 349.

We have thus far been unable to obtain a copy of the petition or bill filed in the District Court of the United States for the Western District of Oklahoma and our knowledge of its purposes is derived from the copy of the order made by the court which we have.

With the information before us we beg to advise your excellency that we will as soon as it can possibly be done prepare an appropriate pleading for presentation to the Supreme Court of the United States asking for the protection of the rights of the State of Texas over those portions of the territory in dispute between the State of Oklahoma and the State of Texas where the situation is acute and particularly with reference to the territory involved in the suit in the

District Court of the United States for the Western District of Oklahoma. The preparation of this pleading will require considerable time, not only because of the magnitude of the litigation involved, but of the many intricate legal questions involved in drafting a bill which the Supreme Court of the United States will feel authorized to take jurisdiction of. We are unable to fix a definite time when the pleading can be finished, as its preparation and the collection of the necessary evidence to support it involve a large amount of work and, necessarily, considerable time, but we are steadily at work upon this endeavor and will do all we can through the legal department to protect the State of Texas in its rights.

As soon as we are able to obtain a copy of the petition in the case pending in the District Court of the United States for the Western District of Oklahoma we will determine what action we can appropriately take in that suit; but at the present time we are unable to advise your excellency what action this Department will take with reference to that suit. The order of the District Court of the United States in the case pending in the Western District of Oklahoma, which we have heretofore quoted, has in effect made it impossible for this Department through the machinery of the courts to hold continuous possession of the State's lands and vindicate its sovereignty in the manner made and provided for it under the Constitution and laws.

As heretofore suggested we are of the opinion that the order of the court entered in the case pending in the District Court of the United States for the Western District of Oklahoma in the particulars we have heretofore pointed out is void. And it is elementary that the disobedience of a void mandate, order, judgment or decree, or one issued by a court without jurisdiction, is not contempt. 13 Corpus Juris, pages 13 and 14; in re Ayers, 123 U. S., page 443.

If we are right in our legal conclusion that the order of the District Court of the United States for the Western District of Oklahoma is void, then it would not be contempt of court for you to hold possession of the property. If we are wrong in our conclusion it owuld be contempt of court. We regret the necessity of rendering an opinion the effect of which may involve the State's officers in contempt proceedings, but we have carefully considered the order of the District Court of the United States for the Western District of Oklahoma, which we have quoted in this opinion, and we can arrive at no other conclusion than that under all the facts and circumstances of the case the order is void to the extent heretofore pointed out, and the writer would be recreant to the trust confided to him if he hesitated to express that opinion which the exercise of proper diligence has forced upon him.

C. M. CURETON,
Attorney General of Texas.

Op. No. 2060, Bk. 52, P. 431.

PRISON COMMISSION—CONTRACTS.

A contract signed by two members only of the Prison Commission within

the scope of their authority, not in a formal meeting and approved by the Governor, creates no legal obligation upon the Prison Commission.

AUSTIN, TEXAS, April 28, 1919.

To His Excellency, Hon. W. P. Hobby, Governor of Texas, Capitol.

SIR: The facts upon which this opinion is to be based are stated in your communication of April 19th, as follows:

"After presenting a statement of facts, I desire to be informed as to the legality of a certain instrument purporting to be a contract between the Board of Prison Commissioners and Mr. Bassett Blakely. The statement of facts follows:

"Under date of February 1, 1916, the Board of Prison Commissioners of Texas, acting through its chairman, and Mr. Bassett Blakely entered into a contract, which was approved by the Governor, whereby Mr. Blakely leased to the State of Texas certain lands in Fort Bend County, Texas, comprising 3857 acres, known as Blue Ridge Farm No. 1. The lease was for a term of ten years, beginning January 1, 1916, and terminating 10 years from that date.

"Under the terms of the lease, the lessor agreed to furnish a sufficient number of mules for the cultivation of the land, and agreed to furnish proper equipment and machinery and housing facilities for the convicts who were to work the land for the State. For the tent and use of said premises, buildings, improvements, machinery, horses, mules, implements, etc., the Commission agreed and promised to pay to the lessor twenty-five per cent of the cotton, cotton seed, corn and other crops annually grown on said premises.

"In consideration of the premises and of the contract, agreements and undertakings therein contained, on the part of the Prison Commission, a provision occurs in Section A of Article 3 of the contract whereby the lessor 'hereby contracts and agrees to, and does hereby, grant, sell and convey, unto the Commission, the right and option, at any time prior to the first day of January, A. D., 1926, to buy said lands and premises, together with improvements of every kind and character upon said lands hereby leased to the Commission, and which may be added to from time to time, for the following prices: If said option to purchase is exercised within five years from the first day of January, 1916, the lessor agrees to convey said property to the said Commission at the rate of Fifty ($50.00) dollars per acre for said land; and if the said Commission exercises its option to buy after the expiration of five years of this lease, the lessor agrees to sell and convey said premises at the rate of Fifty-five Dollars ($55.00) per acre for said premises, upon such terms as may hereafter be agreed upon by the lessor and the Commission; provided that the lessor shall receive his twenty-five per cent of the crops grown on said premises during the year in which said option is exercised.'

"Section B of Article 3 contains the following stipulation: 'It is expressly agreed and stipulated that until the expiration of this lease, by time or purchase under the option herein given, the lessor reserves the right to prospect for oil, gas and minerals, and to drill or sink, or cause to be drilled or sunk, for oil, gas and other minerals, wells and shafts upon the following described tracts of land:' (here is described two certain tracts of land contained in the lease, containing 600 acres of land, more or less, out of the Heirs of Edward Drew Survey and 500 acres out of the same Survey).

"In another part of Section B of said Article 3, the following covenant is contained: 'In the event that no oil, gas, or other minerals, in paying quantities, shall be discovered upon said land before the expiration of this lease, the right so reserved shall terminate; but in the event that before said date oil, gas and minerals, or any, shall be discovered upon said 1100 acres of land, in paying quantities, then in the deed of conveyance to be executed to said Prison Commission, should it exercise its right to purchase as hereinbefore provided, there shall be reserved, and is hereby reserved, to the lessor, his successors in trust and lessees and assigns, the right and title to all oil, gas and other minerals, in, and upon and under said 1100 acres of land, or any part thereof, with full right, privilege and authority to enter upon said 1100 acres of land for the purpose of prospecting for and taking from and

out of it any and all such oil, gas and other minerals; provided that the work of prospecting for or taking from said 1100 acres of land such oil, gas, or other minerals, shall be so carried on as to not interfere with the use by the said Prison Commission of the premises herein described, and the lessor and his assigns shall also be responsible to said Prison Commission for and shall agree to indemnify and save it harmless against any and all loss and damage of whatsoever kind resulting to it from the carrying on of the business or operation of prospecting for or taking from such land such oil, gas or minerals.'

"Under date of February 24, 1919, I submitted a message to the Thirty-sixth Legislature with reference to the condition of the Prison System. In that message, after announcing the policy of this administration, that the operations of the System should be confined largely to farming interests, I made a comparison of the proceeds received by the System from the operation of State-owned farms with the proceeds derived from the operation of farms owned by individuals and operated under lease. The comparison justified the declaration of an intention on the part of the Board of Prison Commissioners and the Governor to terminate at a date as early as practicable all contracts whereby the State had leased lands, and after that date henceforth to confine the operations of the System entirely on lands owned by the State. One paragraph of that message is as follows: 'Under my direction, the Prison Commissioners have negotiated with the lessors to bring about an agreement to shorten the life of these contracts so that the State may at the earliest possible date go out of partnership with individuals in the cultivation of land by convicts, the consideration given the lessors by the Penitentiary Commissioners for shortening the contracts being to exclude from the contract the option of the Prison Commission to pay money rent, as well as the option to buy.' I then outlined an arrangement by which leases on most of the farms could be terminated within the next two years. In this connection, I made the following suggestion with reference to Blue Ridge Farm No. 1 which is the subject of this communication:

"'It can be arranged to terminate the leases on these prison farms as follows: * * * (3) By cultivating the Bassett Blakely lease at Rosenberg, 300 acres, and the Blue Ridge No. 1, 5932 acres, for three years, with the understanding that at the end of the year 1921, the lease contract be abrogated.'

"After disposing of the particular subject of terminating leases, on the theory that the State should operate exclusively on its own lands, in the same message I informed the Legislature that the Prison Commission had recommended that the State exercise the option to purchase the Blue Ridge Farm No. 1, but that the purchase had not been approved by me as Governor. In this connection, I made the following specific recommendation to the Legislature: 'I will not approve the purchase of additional land by the State unless it be authorized by the enactment of a law or by resolution adopted by the Legislature. In my judgment the better plan to adopt is that of gradually getting the State out of partnership with individuals. I, therefore, will approve an arrangement to accomplish this as I have outlined above, rather than the buying of more land, but if the purchase of the Blue Ridge Farm is recommended by your body I will approve the same.' The Legislature did not adopt any resolution authorizing or approving the purchase of this land, but on the contrary passed a law taking the power of purchase from the Prison Commission and the Governor. Accordingly, I did not approve the recommendation to buy this farm.

"Under date of Thursday, April 5, 1919, a representative of Mr. Bassett Blakely presented to me an instrument in blank constituting a proposed contract between the State and Mr. Bassett Blakely, lessor, which instrument set forth a description of all the lands constituting Blue Ridge Farm No. 1 and Blue Ridge Farm No. 2, reciting the existence of the contract first mentioned in this letter, and the contract under which other land had been procured under similar conditions, and thereafter the following provisions are contained in said instrument: "The provisions of said contracts and of each and all of them *giving to the State the option to buy said lands* and the option to pay money rental shall be and the same are hereby eliminated therefrom; and said lease contracts and all of them shall in other respects remain

the same, save and except as to the date of termination thereof, which shall be on the respective dates herein above specified, on which dates peaceable possession of said land, together with the improvements thereon and all personal property belonging to the owner thereof, shall be delivered to the owner and all contractual relations existing between the parties hereto shall terminate.' The proposed contract recited a consideration moving to the State in the fact that the State thereby would be relieved of the lease which would have run for six years longer on and after the year 1921.

"Under these circumstances I indicated my approval of said contract, on or about April 5, 1919.

"A representative of Mr. Bassett Blakely sent the instrument to the Prison Board in the City of Huntsville, Texas, on or about Friday, April 11, 1919, and on that date Mr. W. G. Pryor, a member of the Board of Prison Commissioners, signed the said contract.

"On Saturday, April 12th, a representative of Mr. Blakely went to the Eastham Farm in Madison County, and there saw Mr. E. L. Winfrey, at which time and place Mr. R. L. Winfrey, a member of the Board of Prison Commissioners, signed said instrument.

"Mr. Bassett Blakely, at another time and place, signed said instrument as party of the second part. For your consideration I am attaching hereto a copy of the instrument last referred to.

"As the time the representative of Mr. Blakely, the lessor, presented the proposed contract to me, no mention was made of the fact that any oil well had been brought in or it was expected would be brought in on said Blue Ridge Farm No. 1, and after investigation I am informed this fact was not mentioned to Mr. W. G. Pryor nor to Mr. R. L. Winfrey, members of the Board of Prison Commissioners. If such information had been brought to my attention, or their attention, the instrument would not have been signed.

"As a part of this statement of facts, I call your attention to the fact that Mr. R. L. Winfrey, at the time he signed said instrument, did so with the reservation expressed that he did not believe his action in signing would be binding on the Board of Prison Commissioners, or legal in any sense, because the Board was not convened at that time in a Board meeting; and that said action had not theretofore been authorized by the Board. Such action has not since been ratified by the Board of Prison Commissioners authorizing or ratifying the action of the two members of the Board in the premises.

"At a time about 8 o'clock p. m., on Monday, April 14, it became known that a large producing oil well had been brought in on said Blue Ridge Farm No. 1.

"On Tuesday, April 15, Mr. Bassett Blakely's representative presented to the Board of Prison Commissioners the minutes proposed to be entered on the records of the Board of Prison Commissioners, ratifying execution of the instrument last mentioned above. The Board of Prison Commissioners did not approve said minutes, but on the contrary refused to approve the document presented to be recorded, and expressed the opinion that the minutes for a transaction of such magnitude should be prepared by the Attorney General of the State of Texas.

"I desire to be advised as to whether the State of Texas has parted with its option to buy Blue Ridge Farm No. 1, under the terms of the contract entered into between the Board of Prison Commissioners and Mr. Bassett Blakely under date of September 1, 1916, and I desire to be informed as to the rights of the State of Texas in said land at this time. I would be pleased to have you advise me whether, in your opinion, any steps can be taken by the Board of Prison Commissioners or the Governor to the end of conserving the interests of the State in this land."

From the foregoing statement of facts it is apparent that the Prison Commission as part of its lease contract with Mr. Blakely held an option to purchase certain of the property above described, and that this option might be exercised on the terms named at any time during the life of the original contract, which was ten years. It is apparent also that this option has not been exercised, for the

reason that the consent of the Governor to its exercise was never given.

The only question, therefore, for determination under the statement of facts made by your excellency is whether or not the subsequent instrument approved by your excellency and signed by two of the Prison Commissioners is sufficient to create a new contract, in which the option agreement of the original contract was abrogated or waived. Your statement shows also that the Prison Commission prior to the attempted execution of the subsequent agreement never held a meting as a Prison Commission and accepted the terms of the subsequent agreement or authorized its execution by the Prison Commission or by any of its members; and that since the instrument was signed by two of the commissioners and approved by the Governor, their action has never been ratified by the Prison Commission as a commission. Under the facts thus stated by you and the inquiry made it becomes our duty to determine whether or not this last named instrument became a valid and binding contract on the Prison Commission of the State. This question we answer in the negative, for the reasons which follow.

Title 104, Chapters 1 and 2 of the Revised Civil Statutes of this State, is the basic law governing the present prison system of the State. These chapters of this title were passed by the Legislature in 1910. They have since been amended and particularly by Chapter 32, General Laws, passed at the First Called Session of the Thirty-fifth Legislature. However, at the present time the existence of the Board of Prison Commissioners has its fundamental basis in a constitutional amendment adopted November 5, 1912, and which is now Section 58 of Article 16 of the Constitution. This section reads as follows:

"The Board of Prison Commissioners, charged by law with the control and management of the State prisons, shall be composed of three members, appointed by the Governor, by and with the consent of the Senate, and whose term of office shall be six years, or until their successors are appointed and qualified; provided, that the terms of office of the Board of Prison Commissioners first appointed after the adoption of this amendment shall begin on January 20th of the year following the adoption of this amendment, and shall hold office as follows: One shall serve two years, one four years, and one six years. Their terms to be decided by lot after they shall have qualified and one Prison Commissioner shall be appointed every two years thereafter. In a case of a vacancy in said office the Governor of this State shall fill said vacancy by appointment for the unexpired term thereof. (Added and adopted at election, November 5th, 1912.)"

The genesis of this constitutional amendment is found in Article 6175, Revised Statutes, which was Section 4 of the original Prison Commission Act. This article reads:

"To better carry out such policy, the management and control of the prison system of the State of Texas shall be vested in a board to be known as the Board of Prison Commissioners, and for the purposes of this title shall be referred to as the Prison Commission. Said Board of Prison Commissioners shall be composed of three men, to be appointed by the Governor, with the advice and consent of the Senate, whose term of office shall be two years from date of appointment, except those first appointed under this Act, who shall hold their offices respectively for eight, sixteen and twenty-four months from the date of their appointment and qualifi-

cation. In the appointment of said Commissioners, first to be appointed under this chapter, the Governor shall designate the term each one shall hold under such appointment; provided, however, that in the event of a change in the Constitution, extending the term of office of the Prison Commissioners, then the members of said Board of Prison Commissioners then in office shall adjust their terms of office by lot in conformance with the provisions of such constitutional amendment without the necessity of further legislative enactment. (Id. Sec. 4.)"

Article 6177, Revised Statutes, requires each member of the Board of Prison Commissioners to reside at Huntsville, in Walker County, Texas, and that place is designated as the headquarters of the prison system. The Prison Commissioners, in addition to the other compensation fixed by statute, are permitted to occupy free of rent the residence houses belonging to the State at Huntsville.

By Article 6178 each member of the Prison Commission is required to devote his entire time to the discharge of the duties of office and is prohibited from engaging in any other occupation or business during his term of office.

By the terms of Article 6179 the exclusive management and control of the prison system is vested in 'said Prison Commission."

Article 6180 authorizes the said Prison Commission to appoint all necessary officers and other employees for the prison system.

Article 6181, as amended by Chapter 32, General Laws, of the First Called Session of the Thirty-second Legislature, declares: "The Prison Commission shall select one of its members as chairman, and a majority of said commission shall constitute a quorum for the transaction of business. The commission shall keep or cause to be kept in a well-bound book a minute of all proceedings."

Article 6182 gives "the Prison Commission" authority to discharge officers and employees of the system.

Article 6183 gives "the Prison Commission" authority to purchase lands, etc.

Article 6184 gives "the Prison Commission" power with the approval of the Governor to purchase lands, etc.

Article 6185 confers other and additional authority on "the Prison Commission" with reference to the purchase of lands.

Article 6186, as amended by the Act of the Legislature above named, authorizes "the Prison Commission" to construct the necessary buildings, etc., for the prison system.

Article 6187 gives "the Prison Commission" power to sell and dispose of the products of the system.

Article 6188, as amended by the legislative Act above mentioned, requires "the Prison Commission" to remit moneys received by it to the State Treasurer, with certain other rules and limitations as to their action, but refers to the commission always as "the Prison Commission."

Article 6189 gives authority to the Prison Commission to issue such orders and prescribe such rules and regulations for the government of the system as may be necessary.

Article 6190 declares: "It shall be the duty of some member or members of the Prison Commission to spend at least one whole day each month without notice at each prison camp, etc." It is to be noted with reference to this article that it does not make it the duty

of "the Prison Commission" to spend a day visiting the camps, but makes it the duty of some member or members of the commission to perform this duty. We may remark at this point that this evidences a clear intention on the part of the Legislature to make a distinction between those duties which the law requires of "the Prison Commission" and those which may be performed by "some member" or "members of the Prison Commission."

Article 6191 requires "the Prison Commission" to make a complete inventory of the commission's property and cause to be instituted an accounting system, etc.

Article 6194 confers authority upon "each member of the Board of Prison Commissioners" in the discharge of his duties to administer oaths.

Article 6195 declares: "If any member of the Board of Prison Commissioners" shall be guilty of certain conduct he shall be removed, etc.

Article 6196, as amended by the Acts of the Legislature which we have heretofore mentioned, gives authority within certain limitations to "the Prison Commission" to fix salaries.

Article 6200 requires the Prison Commission to have seal, and declares: "The Prison Commission shall provide a seal whereon shall be engraved in the center a star of five points and the words 'Board of Prison Commissioners of Texas,' around the margin, which seal shall be used to attest all official acts."

Article 6201, as amended, makes it the duty of "the Prison Commission" to make provisions for the transportation of prisoners to Huntsville.

Article 6203 requires "the Prison Commission" to provide school of instruction for the prisoners and make certain other regulations with reference to this subject.

Article 6204 makes it the duty of "the Prison Commission" to provide for religious services in the prison system.

Article 6205 says that "the Prison Commission" shall see that all State prisoners are fed good and wholesome food, and makes certain other provisions with reference to this subject.

Article 6206 makes it the duty of "the Prison Commission" to require monthly reports, showing the condition and treatment of prisoners.

Article 6207 makes it the duty of "the Prison Commission" to keep a register of all prisoners, giving certain information with reference to them.

Article 6208 declares that persons confined in the State prisons may have every opportunity and encouragement for moral reform, and, in addition to the requirements, declares it shall be the duty of "the Prison Commission" to provide reasonable and practicable means for encouraging such reforms. This article of the statute refers in various instances to the Board of Prison Commissioners and in all cases refers to them as "the Prison Commission."

Article 6210 makes it the duty of "the Prison Commission" to provide for labor for female prisoners.

Article 6211 requires "the Prison Commission" to keep the white female prisoners separate and apart from the negro female prisoners.

Article 6215, as amended, declares that prisoners shall not be worked on Sunday, except in cases of extreme emergency or necessity, but contains a proviso to the effect that "the Prison Commission" shall be authorized to work prisoners on Sunday at certain necessary labor.

Article 6220, as amended, declares that prisoners shall be kept at work under such rules and regulations as may be required by "the Prison Commission." This article, as amended, makes various references to the Board of Prison Commissioners, and at all times refers to them as "the Prison Commission" or "the Commission."

Article 6223, as amended, makes it the duty of "the Prison Commission" to make rules and regulations in regard to reports of death of prisoners.

Article 6224, as amended, makes it the duty of "the Prison Commission" to notify certain public officers in case of death of prisoners.

Article 6225 makes it the duty of "the Prison Commission" to provide medical treatment for prisoners.

Article 6226 requires "the Prison Commission" to provide a competent dentist for prisoners.

Article 6227 provides that when a prisoner is discharged that he shall be furnished a written or printed discharge from "the Prison Commission" signed by the chairman of the Board of Prison Commissioners with the seal of the Commission, etc.

Article 6229 gives authority to "the Prison Commission" with the Governor's approval to offer rewards for escaped prisoners.

Article 6231 gives authority to "the Prison Commission," with the consent of the Governor, to work convicts on public works upon certain conditions.

Article 6231A, contained in the amendment enacted by the Legislature to which we have referred, provides that "the Prison Commission" shall be authorized, subject to the approval of the Governor, to bring suits and be sued.

We are not attempting to refer to each article of the statute, in which some duty is prescribed for the Board of Prison Commissioners, but we have selected numerous instances where the duties devolving upon them are prescribed for "the Prison Commission," and this general purpose of conferring of duty upon "the Prison Commission" is to be found throughout the original and amended prison laws of this State.

We have thus seen from an examination of the Constitution and the statutes relative to the duties of the Board of Prison Commissioners that it is declared these duties shall be performed by " the Prison Commission." We have observed that the prison commission is required to select a chairman and to keep minutes of its proceedings—a majority of the commission is declared to be its quorum and it is required to have a seal by which it authenticates all its acts. These several provisions of law, in our opinion, clearly show that the commission can only act as a commission when sitting as a body for such purpose. If any other construction should be given the law the various references which we have collated would be meaningless.

It is to be noted that Article 6181, Revised Statutes, as amended, provides that a majority of the commission shall constitute "a *quorum* for the transaction of business."

The definition of the word "quorum," as stated in the American and English Encyclopedia of Law, Volume 23, 589, is: "A quorum is the number of members of a deliberative or judicial body whose presence is necessary for the transaction of business."

Further defining a quorum, the same author, on page 591, says:

"A quorum is, for all legal purposes, as much the body to which it appertains as if every member were present and when a quorum has met, an act of a majority of such quorum is an act of the body itself. *But the will of the majority must be expressed at a regular meeting at which all of the members might have been present.*"

The use of the word "quorum" under the definitions quoted above clearly implies that there must be a meeting of the Commission itself, or otherwise this word in the statute would be without purpose.

The statute having provided that the various acts authorized to be done by the Prison Commission shall be done by "the Prison Commission," it would seem to follow that these acts may not be done and performed by the individual members of the Commission, but that they must be done by the Commission acting as a body.

It is a familiar rule with statutes of this character that the expression of one thing excludes another. Where authority is given to do a particular thing and the mode of doing it is prescribed, it is limited to be done in that mode, and all other modes are excluded.

Sutherland on Statutory Construction, Sections 491 and 492.

This rule is adhered to and followed by the Texas courts.

Mercein vs. Burton, 17 Texas, 210;
Seibert vs. Richardson, 86 Texas, 295;
Etter vs. Railway Company, 2 Wilson, Civil Cases, Court of Appeals Section 58.

In no part of the statutes are the Prison Commissioners as individuals or as independent commissioners authorized to act with reference to the purchase or lease of lands or the making of contracts. In every case where the provision is made relative to these matters of judgment and discretion, the statute requires that the act shall be by "the Prison Commission," which, as we believe from a construction of the statute itself, means the Prison Commission acting as a Prison Commission, being presided over by its chairman and having a record made of its proceedings on its minute book, in accordance with the statute. Our opinion is that in no other way may it make a valid contract, and that whatever may be done by the Prison Commissioners themselves, must be done wholly and solely upon authority of the Prison Commission, directed while in session as a commission.

This conclusion which we have reached from a consideration of the statute itself is one supported by all American authorities on the subject.

We will first notice the general rule as laid down by the various text writers writing with reference to governmental boards and commissions.

Concerning the powers of boards, the Cyclopedia of Law, Volume 29, page 1433, says:

"Where official authority is conferred upon a board or commission composed of three or more persons, such authority may be exercised by a majority of the members of such board; but it may not be exercised by a single member of such body, or by a minority, unless ratified by a majority, except that under some statutes a minority present at the regular time of meeting, after waiting a reasonable time, may lawfully adjourn the meeting. This rule is applied in many cases, only where all the members of such board are present when the action is taken, and is frequently applied also when all have been notified in a legal manner of the meeting. But in no case is the action of a majority regarded as valid where all are not present or have not been notified."

With reference to the powers of county boards, Cyc., Volume 11, page 391, says:

"The powers of county boards must be exercised by them as boards and not as individuals. An individual member, unless expressly authorized, cannot bind the county by his acts, and notice to or knowledge by an individual member not shown to have been imparted to the Board is not binding upon the latter."

Concerning the matter of a quorum, the same authority, on pages 392-393, says:

"The number of members of a county board or court necessary to constitute a quorum for the transaction of official business is usually fixed by statute, and varies in the different jurisdictions. The usual rule would seem to be that a majority constitutes a quorum, unless a greater number is expressly required by law. In some states two-thirds of all the members elected constitute a quorum. Again there may be a provision to the effect that certain business shall not be transacted unless the full board be present and acting. Such statutory requirements as to a quorum must be complied with in order that the acts of the board may be valid, and the record should show such fact."

Mechem, on Public Officers, states the universal rule as to the action of boards or commissions composed of more than one person. The rule laid down by him is the same as that we have already adverted to. In Section 572, Mr. Mechem says:

"Where, however, a trust or agency is created by law or is public in its nature and requires the exercise of deliberation, discretion or judgment, whether it be judicial or quasi-judicial in its character, the rule is otherwise, and while all of the trustees, agents or officers, except where the law makes a less number a quorum, must be present to deliberate, or what is the same thing, must be duly notified and have an opportunity to be present; yet, except where the law clearly requires the joint action of them all, it is well settled that a majority of them, where the number is such as to admit a majority, if present, may act and that their act will be deemed the act of the body. Where the law prescribes what shall constitute a quorum, a majority of that quorum may act. The rule which applies in these cases has been comprehensively stated by Chief Justice Shaw as follows: 'Where a body or board of officers is constituted by law to perform a trust for the public, or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body. And where all have due notice of the time and place of meeting, in the manner prescribed by law if so prescribed, or by the rules and regulations of the body itself if there be any, otherwise if reasonable notice is given, and no practice or unfair means are used to prevent all fro mattending and participating in the proceedings, it is no objection that all the members do not attend if there be a quorum.'

"But if the statute clearly requires the joint action of all, a majority can not act.

"The act of the majority can only be upheld, however, when the conditions named exist. For if the minority took no part in the transaction, were ignorant of what was done, gave no implied consent to the action and were neither consulted nor had any opportunity to exert their legitimate influence in determining the course to be pursued, the action of the majority will be unavailing."

The same authority, in discussing the necessity of the meeting of boards or commissions as such and holding that their previous individual agreements as to how they might decide in such a meeting would be void, in Section 577 says:

"Inasmuch as the law thus contemplates that all will meet together and that the public will have the benefit of their combined judgment and discussion, it follows that their previous individual agreement as to how they will act when they meet as a body is opposed to public policy and void.

"Thus when the individual members of a school board had, in writing, agreed to a contract to purchase supplies for the district, and had in the same writing requested a special meeting of the board to be called, 'at which meeting we agree with each other that we will ratify this contract,' the court held the contract so agreed upon was void.

"'The board is constituted,' said the court, 'by statute, a body politic and corporate in law, and as such is invested with certain corporate powers and charged with the performance of certain public duties. These powers are to be exercised, and these duties discharged, in the mode prescribed by law. The members composing the board have no power to act as a board except when together in session. They then act as a body or unit. The statute requires the clerk to record, in a book to be provided for that purpose, all their official proceedings. They have, in their corporate capacity, the title, care and custody of all school property whatever within their jurisdiction, and are invested with full power to control the same in such manner as they may think will best subserve the interest of the common schools and the cause of education. They are required to prescribe rules and regulations for the government of all the common schools within the township. Clothed with such powers, and charged with such duties and such responsibilities, it will not be permitted to them to make any agreement among themselves or with others by which their public action is to be or may be restrained or embarrassed, or its freedom in any wise affected or impaired. The public, for whom they act, have the right to their best judgment after free and full discussion and consultation among themselves of and upon the public matters entrusted to them in the session provided for by the statute. This cannot be when the members by pre-engagement are under contract to pursue a certain line of argument or action, whether the same will be conducive to the public good or not. It is one of the oldest rules of the common law that contracts contrary to sound morals or against public policy will not be enforced by courts of justice,—ex facto illicito non oritur actio; and the court will not enter on the inquiry whether such contract would or would not, in a given case, be injurious in its consequences if enforced. It being against the public interest to enforce it, the law refuses to recognize its claim to validity.'"

Concerning this exercise of official authority by boards or official bodies composed of more than one person, the American and English Encyclopaedia of Law, Volume 23, pages 366-368, inclusive, among other things, says:

"When authority to do an act of a public nature is conferred by law upon a body or board of officers, one of such body or board cannot, inde-

pendently of the others, and without the concurrence of them, or some of them, exercise such authority.

"When it is not otherwise provided by law, it is not, however, necessary that all the members of such body or board should concur in the exercise of such authority. If all meet and consult and a majority agree to an act, such act is valid, even although the minority expressly dissent. Or if all have due notice of the time and place of meeting, it is no objection to the validity of the action taken that all the members do not attend, if there is a quorum. It seems that the action of a majority of a quorum, assembled after due notice, will bind the whole body. When action has been taken by such board or body the presumption is that all the members thereof were present and participated in the deliberation, unless the contrary expressly appears.

"When the performance of a power or duty is confined to only two persons, nothing can be done without the consent of both.

"When authority is conferred on two or more bodies, they must all come together for consultation and deliberation; but when they do, the vote of the majority of the persons present controls, even though one of the bodies should leave before the vote is taken.

"If the act is merely ministerial in its character, a majority at least must concur and unite in the performance of it; but they may act separately and need not be convened in a body, or notified so as to convene for that purpose. But if the act is one that requires the exercise of discretion and judgment, in which case it is usually termed a judicial act, unless special provision is otherwise made, the persons to whom the authority is given must meet and confer together, and be present when the act is performed."

That county boards can only act when convened as a board or commission is shown by the text of Corpus Juris, Volume 15, page 460, Section 107, wherein the writer says:

"The powers of county boards must be exercised by them as boards and not as individuals. An individual member, unless expressly authorized, cannot bind the county by his acts, and notice to, or knowledge by, an individual member not shown to have been imparted to the board is not binding on the latter."

Continuing further, in Section 108, the same authority says:

"As a natural consequence of the rule that a county board can act only as a body, it follows that a board of county commissioners can act officially only when convened as a board in legal session."

Dillon on Municipal Corporations, Vol. 2, Sec. 501.

Judge Dillon, writing with reference to the New England towns and ordinary city councils, said:

"Whether the corporation be the one class or the other, its affairs must be transacted at a corporate meeting. in the one case of the qualified inhabitants; and in the other of the members of the council or governing body, duly convened at the proper time and place, and upon due notice in cases where notice is requisite. It is a well-settled rule that when municipal councils or boards of any kind are called upon to perform legislative acts or acts involving discretion and judgment in administering the public affairs, they can only act at authorized meetings duly held. The council or board must meet and act as a board or council. The members cannot make a valid determination binding upon the corporation by their assent separately and individually expressed."

Discussing the same subject with reference to contracts, the same authority in Section 788 says:

"But the action or contract of the officers of a public corporation in their individual capacity is not binding upon the corporate body. * * * Contracts made by a majority of the board of aldermen, with out any official action of the city council, are not binding upon the city."

McQuillin on Municipal Corporations, Section 91, speaking with reference to the manner of acting on the part of municipal councils, declares the existence of the council or governing body is as a board or entity, and the members thereof can do no valid act except as a board.

The proposition which we are discussing and which is supported by the various text-books, which we have cited and quoted from, is well supported by the courts of this State in discussing the method of acting by city councils and commissioners' courts which are boards performing duties for cities and counties similar to those performed by the Prison Commission in the management of the Prison System. Some of the Texas cases are now to be cited and discussed.

Fayette County vs. Krause, 73 S. W., 51, 53.

The facts of this case, so far as is necessary to notice them in this discussion, were that Fayette County constructed a sewer from its courthouse and jail to the Colorado River. The appellees were owners of business property in the city adjacent to the county sewer, and claimed the right to connect their sewerage system with the sewer owned by the county. The suit was brought to enjoin the connection. It appears that in the course of proceedings preliminary to the construction of the county sewer that the commissioners' court appointed a committee to investigate the advisability of such construction. The committee recommended the construction and their report was approved by the commissioners' court. The Court of Civil Appeals held that no valid agreement had been entered into to permit the connection with the county sewer. Concerning the matter, the court in part said:

"Under appropriate assignments, the appellant contends that, upon the facts found by the court, judgment should have been rendered for the plaintiff. We think the contention is sound. The sewer in controversy was constructed and paid for by the appellant, and is the property of the county, in its corporate capacity, just as is the county jail or courthouse. No understanding or agreement entered into between the members of the committee appointed by the county to contract for and superintend the construction of said sewer would be binding upon the county unless said committee was authorized by the county to make same, or the county, with knowledge of the terms of said agreement, ratified it after it was made. The court finds that one of the members of this committee was a member of the commissioners' court, and three of the committee were members of the city council, and that by the concurrent agreement of the commissioners' court and the city council, acting through said committee, it was mutually agreed that the city of La-Grange, or the residents of said city, could connect their private sewers with said county sewer. There is no finding that this committee was authorized by the commissioners' court or the city council to make such an agreement, or that the agreement was ever ratified by either the court or the council. On the contrary, it affirmatively appears that the committee was only authorized to contract for and purchase, in the name of the county, any necessary material and labor for the construction of a sewer from the county jail to the river, and upon completion of same to make their report, accompanied by an account of the material and labor expended, and that no order authorizing or ratifying the understanding and agreement of the committee as to

the use of the sewer by the citizens of LaGrange was ever made by the commissioners' court or the city council, and no vote was ever taken by either of said bodies upon the subject of such agreement. The finding that the commissioners' court approved the work of the committee, accepted the sewer, and paid for it, upon the report of the committee, is not a finding that the court ratified the alleged agreement made by the committee with the city of La Grange, because it is not found that said agreement was contained in the report of the committee, nor was it in any way brought to the knowledge of the court. The fact that citizens of La Grange who had heretofore connected their private sewers with the county sewer had been granted permission by the commissioners' court to make such connection shows that the county has never acquiesced in any claim of right on the part of such citizens to use its sewer without its consent. The verbal permission given appellees by the members of the commissioners' court to connect their sewer with the county sewer was not the act of the commissioners' court, in any legal or binding sense. Had the court, by a proper order regularly entered, granted such permission, such grant, being without consideration, would have been a mere license, which might have been revoked at any time. It may be stated as a general rule that a contract or agreement made by a municipal corporation—either county or city—is only valid or binding when made by or under the authority of a resolution or order duly passed at a meeting of the legislative body of such municipality, and entered upon the minutes of such meeting.

Bryan vs. Page, 51 Texas, 534;
32 Am. Rep., 637;
Brown vs. Reese, 67 Texas, 318;
3 S. W., 292;
Wagner vs. Porter (Tex. Civ. App.)
56 S. W., 560."

Wagner vs. Porter, 56 S. W., 561.

Concerning the appointment of an attorney by the city, the Court of Civil Appeals in this case, among other things, said:

"The acts of the common council of a municipal corporation can only be shown by the minutes of the meetings of such council; and, if the city council of the City of Greenville had been authorized by law to make the contract with appellee alleged in his petition, the delegation by the council to the mayor of authority to make such contract could only be by affirmative action of the council as a body, and not by the acquiescence or consent of the individual members of the board; and such action by the council, in the absence of proof of the loss or destruction of its records, could only be shown by the authenticated minutes of the meeting at which such action was had. The same rule applies to proof of the ratification by the council of a contract made by the mayor. Articles 401, 404, Rev. St.; City of Bryan vs. Page, 51 Texas, 534; City of San Antonio vs. French, 80 Texas, 578; 16 S. W., 440; City of Denison vs. Foster (Tex. Civ. App.); 28 S. W., 1053; Penn vs. City of Laredo (Tex. Civ. App.); 26 S. W., 626; Brand vs. City of San Antonio, (Tex. Civ. App.); 37 S. W., 340."

City of Bryan vs. Page, 51 Texas, 532, 535.

This suit was instituted to recover of the City of Bryan the reasonable value of professional services rendered by the appellees in preparing a legal opinion for the city. The claim of the plaintiffs did not rest upon any ordinance, but upon the action of the mayor in employing them and, subsequently, the action of the council in availing themselves of the opinion. The Supreme Court of the State, speaking through Associate Justice Gould, held that the contract was void and that no recovery could be had, for the reason that the employment had not been made by the city council to which body the law confided

the exercise of the authority necessary to the making of valid contracts. Concerning the matter, the court in part said:

"We are of opinion that neither the mayor nor the common council were authorized to bind the city by contract for legal counsel for their assistance, no ordinance having been passed in relation to such employment.

"The charter gave the power to employ legal counsel, but prescribed that the power be exercised by, or at all events in accordance with, an ordinance of the common council. The charter—the source of all the power of the mayor—having limited the mode of its exercise, they could not in a different mode make a valid contract; nor could they by any subsequent approval or conduct impart validity to such contract. As without an ordinance they were without power to bind the city by an express contract to pay for legal services, the law would not imply any such contract against the city. 'The law never implies an obligation to do that which it forbids the party to agree to do.' (Brady vs. Mayor of New York, 16 How. Pr. 432, as cited in Zottman vs. San Francisco, 20 Cal., 105).

Polly vs. Hopkins, 74 Texas, 145, 147.

The question presented in this case was whether or not a contract for the erection of a courthouse had been legally executed or entered into. In discussing the validity of the contract, the Supreme Court of the State, through Chief Justice Stayton, among other things, said:

"County commissioners' courts alone have power to authorize contracts to be made for the building of courthouses, jails, and other buildings such as a county may need, and in the absence of such authorization a contract made by a county judge would impose no obligation, express or implied. Rev. Stats., Arts. 1514, 1521; Russell vs. Cage, 66 Texas, 428. * * * One dealing with a county for the erection of a public building could not rely upon the act or declaration of a county judge as to his power to make a contract for that purpose nor as to his power to issue bonds to pay for the building, but would have to look to the minutes of the County Commissioners' Court to ascertain whether that body had directed the building to be erected, determined its plan, and authorized a given contract to be made. Rev. Stats., Art. 1527; Brown vs. Reese, 67 Texas, 318."

Ball, Hutchings & Co. vs. Presidio County, 88 Tex., 60.

This was a suit by Ball, Hutchings & Co., against Presidio County on certain coupons for interest upon county bonds. The Supreme Court of the State, in discussing those conditions which are necessary to give validity to the acts of the county commissioners, with particular respect to bonds, held that the powers conferred upon the commissioners' court can not be exercised by the court except by order made and entered upon the minutes; that no obligation arises from the action of the county judge and commissioners themselves, but the action taken must be that of the county commissioners' court. The Supreme Court of the State in an opinion by Associate Justice Denman, in part said:

"It is well settled in this State, (1) that a county cannot issue its bonds without an Act of the Legislature conferring the power to do so (Nolan County vs. The State, 83 Texas, 193); and (2) that where the power to issue the bonds of a county has been by the Legislature conferred upon the Commissioners Court, as in case of court house and jail bonds, such power cannot be exercised by such court except by an order of court duly made and evidenced by the minutes of the court, Brown vs. Reese, 67 Texas, 318; Polly vs. Hopkins, 74 Texas, 145. The bond is not the obligation of the

court but of the county. The Legislature has not seen fit to authorize the county judge and commissioners to impose such obligation upon the county, but has authorized the 'County Commissioners' Court', *under certain conditions*, to issue bonds of the county to erect a court house and jail, and under the law such court can act only by an order."

Rankin vs. Noel, 185 S. W., pp. 883-885.

This action was an application for writ of mandamus by appellant against Noel, one of the County Commissioners, to compel him to open a certain second class road. It was contended that the commissioners' court of Frio County had passed an order directing Noel, who was one of the commissioners, to open the road and that the court had authority to make such an order under the Special Road Law of the county. The Court of Civil Appeals took a different view of the effect of this road law and held, among other things, that it takes an order of the commissioners' court, formally entered, for the valid performance of any duty devolving on that governmental agency. Concerning the matter the Court of Civil Appeals, through Chief Justice Fly, in part said:

"The commissioners' court is the governing body of each county, and the powers and duties conferred upon that court could not be taken away and conferred upon some member of the court. No attempt was made to curtail the powers of the commissioners' court by increasing those of a single commissioner, but all his duties are to be performed 'under such rules and regulations as the commissioners' courts shall prescribe,' and 'as the commissioners' courts may require.' He is an arm of the court, moved as the court may order and prescribe. No authority has the power to lay out a public road except the commissioners' court, and when it is laid out, it cannot be opened except by an order of that court. * * *"

"The rule formerly prevailed that contracts or agreements made by municipal corporations, county or city, are only valid and binding when entered upon the minutes. This rule has been modified. Fayette County vs. Krause, 31 Tex. Civ. App., 569; 73 S. W., 51. The modification is that where an order has been passed, the omission of the clerk to record it will not render it void. If an order is in fact passed by a commissioners' court, the failure to record it would not affect its validity under our decisions. But it would be necessary to prove the passage of the order before it could have any effect. Ewing vs. Duncan, 81 Texas, 230, 16 S. W., 1000. A mere conference by the commissioners and a verbal agreement to do a certain thing without a vote being taken would not constitute an order and would not be valid. There must be an order voted by the commissioners. Fayette County vs. Krause, herein cited. In speaking of the modification of the rule as set out in Ewing vs. Duncan, the Court of Civil Appeals said:

" 'Whatever may be the extent to which those decisions modify the rule as to the necessity for the entry in the minutes of orders made by a commissioners' court, they in no way modify the rule that all contracts made by a county, to be valid and binding, must be made by or under authority of an order of the commissioners' court.'

"The testimony of the clerk tends to show a mere discussion of opening the road, but no vote. Dixon, an interested party, would not swear positively to a vote, and neither would Gore. All other orders were entered on the minutes, and it was singular, if the very important order to open the road was ever passed, that no record of it was ever made. The court was justified in finding that it was not made."

Germo Manufacturing Co. vs. Coleman County, 184 S. W., 1063.

It appears in this case that the sheriff of the county had bought certain disinfectants for the county but his action was neither authorized

nor approved by the commissioners' court. The Court of Civil Appeals held that it created no obligation against the county and in disposing of the matter, the court, among other things, said:

"The court did not err in peremptorily instructing the jury to return a verdict for appellee. The commissioners' court have charge of the business affairs of the county, and they alone have authority to make contracts binding upon the county. Ferrier vs. Knox County, 33 S. W., 896; Lumber Co. vs. Van Zandt County, 77 S. W., 960; Fears vs. Nacogdoches County, 71 Texas, 337; 9 S. W., 265; Brown vs. Reese, 67 Texas, 318; 38 Tex. Civ. App.. 320; 85 S. W., 475; Fayette County vs. Krause, 31 Tex. Civ. App., 569; 73 S. W., 51.

"In Ferrier vs. Knox County, supra, the court said:

"'In dealing with a county, it is necessary to have an express contract with the commissioners' court, and that court can speak only by and through its minutes and records. No action can be maintained upon any implied promise upon its part to pay for anything.' Page 898, Col. 1, of 33 S. W.

"In Presidio County vs. Clarke, supra, speaking in reference to the contract there involved, the court said:

"'To be binding upon the county, it must, on its part, be made through the proper agency—the commissioners' court.' 38 Tex. Civ. App. 320, page 476, Col. 2 of 85 S. W.

"The commissioners' court may act through an agent appointed by them. Futch was not appointed by the commissioners' court to purchase disinfectants. He was not such agent by virtue of his office.

"A county, as an individual, may ratify the act of one who assumes, without authority, to be its agent. Brazoria County vs. Padgitt, 160 S. W., 1170; Brazoria County vs. Rothe, 168 S. W., 70; Harris County vs. Campbell, 68 Texas, 22, 3 S. W., 243; 2 Am. St. Rep., 467; Gallup vs. Liberty County, 57 Tex. Civ. App., 175; 122 S. W., 291; Boydston vs. Rockwall County, 86 Texas, 234; 24 S. W., 272. But such ratification must be through the only agency by which the county can act, viz, its commissioners' court."

American Disinfecting Co. vs. Freestone County, 193 S. W., 441.

This suit was brought by the appellant against Freestone County to recover the price of certain disinfectants alleged to have been sold the county. The goods were sold upon an order given by the sheriff of the county, whose duty it was to keep the courthouse and jail in proper healthful and sanitary conditions. The disinfectant, when received, was used by the sheriff for this purpose. These facts were set forth fully in the petition, but the trial court sustained a general demurer to the petition. The Court of Civil Appeals affirmed the decree of the court below, holding that the petition failed to show any liability, because it did not allege that the commissioners' court, acting as such, passed any order authorizing the purchase of the disinfectant. In its opinion the court, in part, said:

"The petition in this respect fails to show any liability of Freestone county. It is not alleged that the commissioners' court, acting as such, passed any order authorizing the purchase of the said Obugo by the sheriff, or any one else. The sheriff of said county is not endowed by law, by virtue of his office, to bind the county in making such purchases. That authority is vested alone in the commissioners' court and in creating debts against the county said court must act as such in creating such an indebtedness. Mfg. Co. vs. Coleman Co., 184 S. W., 1063."

Other jurisdictions with reference to various kinds of boards and commissions adhere to the same doctrine.

Pike County vs. Spencer, 192 Federal, 11.

In this case, the United States Circuit Court of Appeals held that two of the three members of the Board of County Commissioners could not bind the county by written contract signed by themselves individually, which varies materially in its terms from the contract relating to the same subject matter authorized by a resolution passed by the board while in session. From the facts of the case, it appears that a proposition had been made to the county commissioners while in session, and that the commissioners, by resolution, had accepted such contract, but not in the terms offered. Thereafter two of the commissioners signed the contract. The Circuit Court of Appeals held, however, the signed instrument insufficient as a contract, saying:

"But it is apparent that this modified proposition of the plaintiff was never accepted by the defendant. The commissioners never acted upon it as a board and it is clear, as we have said, that the signature and acknowledgments of the paper by the two commissioners did not and could not bind the defendant county. It follows then inasmuch as the plaintiff never accepted the contract offered by the resolution of the board of commissioners, the minds of the parties never met and the new board after their election in January properly repudiated the claim made by plaintiff in that regard."

Newcombe vs. Chesebrough, 33 Mich., 322.

In this case, the Supreme Court of Michigan, speaking with reference to the actions of state boards, among other things, said:

"It is well settled that the action of a board of several members must be determined by their votes, and the votes must be looked for in their record. Their action separately can amount to nothing, and their joint action, whether meeting or not meeting (supposing they can act be consent expressed by writing, upon which no opinion need be given), must be evidenced in some way as the action of a lawful majority."

Petrie vs. Doe, 30 Miss., 698.

In this case, the Supreme Court of Mississippi held that less than a majority of the whole board of commissioners appointed by an act of the Legislature, for the purpose of supplying and making titles to land belonging to the county, cannot execute a deed so as to vest the legal title in the grantee.

Railroad Company vs. Commissioners, 16 Kansas, 302.

This action was brought by the Board of County Commissioners, to cancel a subscription of $160,000 purported to have been made by said county to the stock of the Paola and Fall River Ry. Co., and for the return and cancellation of $160,000 of county bonds issued and deposited with the State Treasurer to pay such subscription. The opinion in the case was delivered by Judge Brewer, at that time on the Supreme Court of Kansas and who afterwards was on the Supreme Court of the United States. The court in passing on the validity of these bonds held that the powers of a county vested in the Board of Commissioners must be exercised by the commissioners as corporate entity and not by them separately or as individual members; that before they can act they must be in legal session and that a casual meeting of the commissioners does not constitute a legal session. In discussing the matter the court, in part, said:

"This was an action by the defendant in error to cancel a subscription for stock, and for the return and cancellation of the bonds of the county issued in payment of the stock. A demurrer to the petition was overruled by the district court, and this ruling is the matter here presented for review. We shall content ourselves with the examination of a single question, for upon that we think the ruling must be sustained. The subscription was ordered at a special session of county board, and it is insisted that such session was not legally called, nor validly held. The facts respecting it are, as stated in the petition, and for the purposes of the demurrer, admitted to be true, as follows:

"And said plaintiffs aver, that two members of said board did not request that such special session of said board should be held, nor that the same should be called by the chairman of said board; that no call for such special session was ever made by the chairman of said board; that all the members of said board were not present at such so-called special session; that N. M. Lingo, at that time an acting and legally elected and qualified member of said board, was absent from said so-called special session, and no notice of such special session, or of any call therefor, was given to or served upon the said B. M. Lingo, or at his residence, although, as said Railway Company and its agents then and there well knew, the said B. M. Lingo was then in said county, and resided therein with his family, and had no knowledge of notice of such intended special session, or of any call therefor; but that knowledge and notice of such intended special session was intentionally and fraudulently concealed and kept from the said B. M. Lingo by the said Railway Company and its agents; and said session was not a regular session of said board, nor was it an adjourned session from any regular session thereof, nor from any duly-called special session of said board.

"Was such session a legal one, and the acts of the two commissioners thereat binding on the county? And if not, is it stopped from asserting its illegality in this action? The statute providing for session of the county board is found in Sec. 13, p. 256 of the Gen. Stat. That section, after providing for the meeting of the Board in regular session, adds, 'and in special session at the call of the chairman, at the request of two members of the board, as often as the interests of the county may demand.' This is the only statutory provision on the subject. It does not specify whether the call shall be made, nor require a record to be preserved of it. And the same is true as to the request. But still it requires a *call;* and a call of a meeting, in the legal sense of the term, is a summons to the parties entitled to meet, directing them to meet. It involves something more than a mere purpose in the mind of the caller, or an expression of that purpose unheard, unseen, and unknown. It implies a communication of that purpose to the parties to be affected by it. How it shall be communicated is sometimes prescribed by statute, or by by-law. It is sometimes provided that it shall be by publication in the newspapers, sometimes by printed notice served personally or at the residence, and sometimes by mere oral personal notice. But in some way or other notice must be given; and if there be no regulation as to the manner of notice, it must be personal, at least where personal notice is practicable. This is no new question. It has arisen in respect to the sessions of common councils of cities, boards of directors or trustees of private corporations, the town meetings of New England, the meetings of members of corporations, boards of electors, etc. And there is but one uniform rule running through the authorities. In the case of *Rex vs. Mayor, etc., of Shrewsbury,* Rep. Temp. Hard. 151, it was said by the court, that 'When the acts are to be done by a select number, notice must be given of the time of meeting, * * * and in such case the acts of a majority would bind the whole body; or if all were present through accident, without notice, their acts would be good; but the acts of a majority, present by accident, would not be binding.' It was a saying of LORD KENYON'S, that 'special notice must be given to every member who has a right to vote.' Ch. J. TILGHAM, in the case of the *Baltimore Turnpike,* 5 Binney, 481, said, 'that when several persons are authorized to do an act of a public nature which requires deliberation, they all should be convened, because the advice and opinions of all may be useful, though all do not unite in opinion.' In Wilcox on Munic. Corp., Sec. 58, we find it laid down, that 'all corporation affairs must be transacted at an as-

sembly convened upon due notice at a proper time and place, consisting of a majority of the persons of each class to which the prescription or charter has confided the power.' And SELDEN, J., in *People vs. Bachelor*, 22 N. Y., 128, uses this language: "It is not only a plain dictate of reason, but a general rule of law, that no power or function intrusted to a body consisting of a number of persons can be legally exercised without notice to all the members composing such body.' DILLON in his work on Munic. Corp., Sec. 224, lays down the law thus: 'If the meeting be a *special* one, the general rule is, unless modified by the charter or statute, that *notice* is necessary, and must be personally served if practicable upon *every member* entitled to be present, so that each one may be afforded an opportunity to participate and vote.' See also further, *King vs. Theodorick*, 8 East, 543; *King vs. Gavorian*, 11 East, 77; *Ex parte Rogers*, 7 Cowen, 526, and note; *Downing vs. Rugar*, 21 Wend, 178; *Stow vs. Wise*, 7 Conn. 214; *Harding vs. Vandwater*, 40 Cal. 77; *Wiggin vs. Freewill Baptist*, 8 Met. (Miss.) 301. Nor is this merely an arbitrary rule, but one founded upon the clearest dictates of reason. Wherever a matter calls for the exercise of deliberation and judgment, it is right that all parties and interests to be affected by the result should have the benefit of the counsel and judgment of all persons to whom has been intrusted the decision. It may be that all will not concur in the conclusion; but the information and counsel of each may well affect and modify the final judgment of the body. Were the rule otherwise, it might often happen that the very one whose judgment should and would carry the most weight, either by reason of his greater knowledge and experience concerning the special matter, by his riper wisdom and better judgment or by his greater familiarity with the wishes and necessities of those specially to be affected, or from any other reason, and who was both able and willing to attend, is through lack of notice an absentee. All the benefit, in short, which can flow from the mutual consultation, the experience and knowledge, the wisdom and judgment of each and all the members, is endangered by any other rule. Again, any other rule would be fraught with danger to the rights of even a majority, as, when legally convened, the ordinary rule, in the absence of special restriction, being that a quorum can act and a majority of the quorum bind the body, it would, but for this rule, often be in the power of an unscrupulous minority to bind both the body and the corporation for which it acts to measure, which neither approves of. Thus, were the body composed of twelve members, a quorum of seven could act, and a majority of that quorum, four, could bind the body. An unscrupulous minority of four, by withholding notice to five, might thus bind both the body and the corporation. Reason therefore and authority unite in saying that notice to all the members to whom notice is practicable is essential to a legal special session.

"But we are referred by counsel to that clause in the act concerning the construction of statutes (Gen. Stat., p. 999), which reads, 'Words giving a joint authority to three or more public officers or other persons shall be construed as giving authority to a majority of them, unless it be otherwise expressed in the act of giving the majority.' We do not see that this affects the question. *Whenever there is a legal session, unquestionably a majority of the commissioners can act and bind the county. But this casts no light upon the question as to the manner of convening a legal session. It must be remembered that the powers of the county are not vested in three or more commissioners as such, but in a single board.* (Gen. Stat., p. 254, Sec. 3.) *Two commissioners casually meeting have no power to act for the county. There must be a session of the 'Board.' This single entity, the 'board,' alone can by its action bind the county. And it exists only when legally convened.*"

Eigeman vs. Board of Commissioners, 82 Ind., 413.

In this case the Supreme Court of Indiana held that the authority of the board of county commissioners for doing of extra work in construction of a county jail cannot be shown by proving the separate individual assent of the individual members of the board. Concerning the matter in controversy, the court said:

"The stronger and more satisfactory ground for upholding the decision of the circuit court, however, is, that, without the direction and order of the board, the architect had no authority to make or permit any alterations or additions in the plans of the work, and that it was incompetent to show that the changes, which were made, were made with the knowledge and acquiescence of the individual members of the board. The individual action or acquiescence of the commissioners was, as the appellant had agreed and was bound to know, as meaningless and ineffective as the action of any other citizens would have been. It was not offered to show that the extra work was done with the joint approval of the individual members of the board acting together. So that the question, what would have been the effect of such action? is not presented. The averment of individual acquiescence of the members, if it does not import the separate act of the members, certainly cannot be construed to mean their joint official action."

County Commissioners vs. Seawell, 3 Oklahoma, 381.

In this case the Supreme Court of the territory of Oklahoma held that a board of county commissioners can only contract to bind the county while they are sitting as a board and that an agreement with one of the commissioners in the absence of the other does not bind the county. Concerning the matter, the court, in part, said:

"It is claimed that one of the individual members at a time subsequent to the date upon which the contract was entered into had a conversation with Seawell, in which such members consented to begin occupation of the building on February 9. Article 6, Chapter 24, Laws of 1890, which provides for a board of county commissioners, also makes provision for the time and place of the meeting of such board, how they shall transact business and the record they shall keep of all transactions had on behalf of the county. Under such law the only way by which the county could be bound upon a contract was by action taken by the board while it was in session. And the evidence of what was done were the records kept by the board. Under this law a board of county commissioners could only act to bind the county while they were sitting as a board, and an agreement of one of the members, in the absence of the others, could not bind such county."

Pike County vs. Rowland, 94 Penn. State, 238.

In this case the Supreme Court of Pennsylvania held that where a board such as the commissioners of the county proposed to do any deliberate act that would be binding on the absent members, it should be done at a regular stated meeting or a regular adjourned meeting and if at a special meeting, then that notice is necessary and must be served, if practicable, upon every member entitled to be present. Concerning this question, the court, in part, said:

"The Act of 1834 provides that the corporate powers of a county shall be exercised by the commissioners; that two of them shall form a board for the transaction of business, and when convened in pursuance of notice or according to adjournment, shall be competent to perform all duties appertaining to the office. To these officers are intrusted the care and management of county business and property. The voice of the inhabitants is not directly heard in the levying of taxes, making of contracts or expenditure of money—their power is only felt at the election of commissioners. The question presented in the fourth and fifth assignments is, may two of the commissioners convene and lawfully transact business requiring deliberation, not according to adjournment, and without notice to or knowledge of the other? This concerns every citizen of the county, as well as each member of the board.

"By law the affairs of the county are administered by three representatives. Absent members, equally with those who are present, are bound by whatever is lawfully done at a regular or stated meeting or any regular adjourned

meeting. If the meeting be a special one, the general rule is that notice is necessary, and must be personally served, if practicable, upon every member entitled to be present, so that each one may be afforded an opportunity to participate and vote. Such notice is essential to the power of the board to do any deliberative act which shall bind the corporation. If all have notice, two shall form the board, and their acts bind the absent as if it were a stated or adjourned meeting. Notice may be dispensed with by the presence and consent of all; and if one has quit the municipality, and has no family or house within its limits, notice to him is unnecessary. Dillon on Mun. Corp., Sections 200, 201, 223, 224. All authorities seem to agree as to the general rule, unless there is a modification in the charter or statute. It applies alike to public and private corporations. Our statute, which declares that a majority shall form a board when duly convened, in pursuance of notice or adjournment, is an enactment of the well-settled rule without adding to or taking from. * * *"

"If two of the commissioners, without notice to or knowledge of the others, can form a board for transaction of business, the statutory direction for notice is futile. To say they have convened in pursuance of notice is nonsense, unless we speak of notice to the two by a person who desires business of interest to himself to be done in the other's absence. Such meeting savors of conspiracy. A designing man could observe the superiority of an able and upright commissioner over his weaker fellows, and take care to convene the two weaker ones for consummation of his purpose, if notice to all is not essential. Superior numbers often yield to superior weight, and sometimes the corrupt quail in presence of an honest man. Just in proportion as a clandestine meeting of two commissioners for transaction of business would be dangerous is it to the interest if the inhabitants of the county that all three should have notice and opportunity to be present at every special meeting of the board. The opinions, reasoning, perhaps protest of the one may advantage the county. He may prevent hasty and inconsiderate action. Had Geyer been present on the evening the bonds were signed, he might have discussed the matter with Rosecrans till Drake's pendulous mind had swung the other way, and thereby saved the county from the Rowland contract. Be this as it may, Geyer ought to have had opportunity to consult, advise, and, if need be, protest."

Buell vs. Cook, 4 Conn., 238.

In this case, the action was on a contract by which Buell undertook to lease the county courthouse to Cook. The county court at the time was composed of five persons, and the plaintiff offered to prove that three of these persons had separately assented to the contract. The Supreme Court held that the sanction of the court could only be given when acting as a body, and among other things, said:

"The sanction of the court could alone be given when acting in a body; and the only evidence of their act, on this, as on all other subjects, is the record of their transactions. It has been said, that by the expression, 'a majority of the county court,' was meant the personal approbation of the greater number of the judges. Much may be said on this question, on either side, as stress is laid on the word *majority*, on the one hand, and on the words *the county court*, on the other; that is, if the words are tenaciously adhered to, and the spirit and intent of the contract is abandoned. Waiving a particular discussion, founded merely on the meaning of the words above mentioned, and declaring it as my opinion that it is no unusual phraseology when the determination of the court acting judicially is spoken of, for persons to say, 'the majority of the court,' thereby intending to express the thought that the question was decided in a particular manner, I will place my opinion on a surer ground. The agreement was suspended on the approbation of those who had right to approve the leasing of the county property and not of those who had no such right. Now, who had this right; and in what manner must their approbation be evinced? I answer, the county court; and their record is the only mouth through which they can speak. To me it seems little less

than infatuation to assert, that the property of the county, of every description, is confided literally to the county court; and yet that this is not a united body, deliberating and acting together, each one of the judges aiding the reflections of the other, and the thought of each being filtered through the minds of all, and thus producing a wise result, but, that this county court, is, the judges acting separately, without deliberation, without inter-communication, in haste, or at the corners of the street, and when their separate opinions are thus obtained, that there is no permanent memorial of them, but that they are to be proved ore tenus; and by the aid of arithmetic that the result is to be ascertained. I cannot yield my assent to a pretension entirely unnecessary, and which jeopardizes the county property; is pregnant with manifold abuses; and is recommended, by no possible benefit, to countervail its numerous disadvantages. On the contrary, it is manifestly clear, when there is any act, not ministerial, confided to the discretion of several persons, that they must jointly act and deliberate. This is the case with auditors, referees, committees and arbitrators. And emphatically, when the county court is to transact business, not judicial, but which requires the exercise of discretion, as in the ascertainment of the property belonging to a person who intends making application for a pension, they must act unitedly, and their doings be made a matter of record."

Perry vs. Tynen, 22 Barbour (N. Y.), 137.

It is unnecessary to cite the facts of the case, but we direct attention to the adherence of the New York courts to the principle of law enunciate, to-wit: that where authority is conferred upon the board, and where the matter involved requires the exercise of judgment and discretion, that the board must act as such.

Concerning the matter, the court, in part, said:

"In cases of the delegation of a public authority to three or more persons, the authority conferred may be exercised and performed by a majority of the whole number. If the act to be done by virtue of such public authority requires the exercise of discretion and judgment—in other words, if it is a judicial act—the persons to whom the authority is delegated must meet and confer together, and at least a majority must meet, confer, and be present, after all have been notified to attend."

Martin vs. Lemon, 26 Conn., 192.

Under the laws of Connecticut, it was provided that should any person take any part of a highway or erect any fence thereon in such manner as to obstruct the same, then that the selectmen of the town in which the offense was committed, or a committee appointed by them for such purpose, should take the necessary action to remove the obstruction. In this particular case, the plaintiff was one of a committee of three persons appointed under this Act, and he, acting without the concurrence or advice of the other members of the committee, undertook to enforce the law. The Supreme Court held that his action was invalid and could not be sustained. Concerning the matter, the court, in part, said:

"His right to recover depends on the question whether he legally possessed the power which he thus exercised; and hence the inquiry is presented, whether, by the true construction of that section, the power of removing encroachments is given to each of the members of such a committee consisting of several persons, acting separately and without the concurrence of the other members or any of them. We are clearly of the opinion that that statute does not empower each of the members of the committee appointed under it so to act. There is no general legal principle that where, as in this case, an authority to do an act of a public nature is given by law to more

persons than one, each of them independently of the others, and without the concurrence of them, or of some of them, may exercise that authority. On the contrary, the rule on this subject is, that in such a case, if the act is merely ministerial in its character, a majority at least must concur and unite in the performance of it, but they may act separately and need not be convened in a body or notified so to convene for that purpose; but if the act is one which requires the exercise of discretion and judgment, in which case it is usually termed a judicial act, unless special provision is otherwise made, the persons to whom the authority is given must meet and confer together, and be present when the act is performed, in which case a majority of them may perform the act; or, after all of them have been notified to meet, a majority of them having met will constitute a quorum or sufficient number to perform the act, and according to some modern authorities, the act may be legally done by the direction or with the concurrence of a majority of the quorum so assembled. Damon vs. Granby, 2 Pick., 345, 354.

"These appear to be the principles of the common law on this subject. Grindley vs. Baker, 1 Bos. & Pul., 229; Keeler vs. Frost, 22 Barb. S. C., 400; Perry vs. Tynen, id., 137.

"The courts in this State, however, have gone further, and held in a particular class of cases where the act requires the exercise of judgment and discretion, that a majority of the persons on whom the authority is conferred may perform it, and that they may act separately for that purpose, and need not act in a board or collective body. Gallup vs. Tracy, 25 Conn., 10. There is no occasion in the present case for pursuing this particular subject further. There is nothing in the Act now in question which takes it out of the operation of these principles, or provides that the authority conferred by it may be exercised by one only of the members of the committee mentioned in it. Its terms contain no express delegation to the individual members of the committee of the power given to the committee, nor do those terms so apply that they may separately exercise that power. On the other hand, they import that one of them can not so act where the committee consists of more than one person. They prescribe that the acts therein authorized shall be done by a 'committee.' and there is nothing to indicate that they may be done by a particular portion of the persons composing it. This term, when it is applicable, as it is in the present case, to more persons than one, is a collective word, or, as grammarians would say, a noun of multitude, and indicates a plurality of persons. The expression which is thus used in the Act is therefore not appropriate to express the idea that the power conferred on a committee may be exercised by each individual member of it separately. And accordingly, as a reference to our statutes will abundantly show, wherever an authority is conferred by a statute on several persons, by whatever term they are designated, and it is intended that a particular portion of them may exercise that power, it is usual to insert some phrase which expresses such intention. We also infer from the magnitude of the power which is given by the Act in question to the committee of encroachments, and the serious consequences which might ensue to the persons on whom it is brought to bear, that it was the intention of the Legislature that it should not be exercised by one only of the members of the committee on his sole judgment and opinion, but that it was designed that its exercise should be the result of deliberation and consultation between them."

Honaker vs. Board of Education, 32 L. R. A., 413.

In this case the Supreme Court of West Virginia held that the members of a school board, acting individually and separately and not as a board, could not accept a proposal or make any contract whatever binding on the school district. Concerning the matter, the court said:

"And the members of the board, acting individually and separately and not as a board convened for the transaction of business, can not make a contract that will bind them as a corporation."

Conger vs. Board of Commissioners, 48 Pac., 1064.

In this case the Supreme Court of Idaho held that in the employment of counsel by county commissioners in order to bind the county, they must act as a board and their action therein must be made a matter of record. Concerning this matter, the Supreme Court, in part, said:

"The real contention is that the board of county commissioners did not employ William H. Claggett, Esq., to assist in the prosecution of said criminal cases. The record shows that the members of said board individually requested him to assist in said prosecution, and that as a board they did not act in said employment. In Rankin vs. Jauman, 39 Pac., 1111, this court held that a board of county commissioners are an entity and can only act to bind the county when sitting as a board. See also Hampton vs. Board (Idaho), 43 Pac., 324; Meller vs. Board (Idaho), 35 Pac., 712. In the case at bar, the employment was made by the members of the board individually. The members of the board, acting individually and separately, are not authorized to employ counsel. It is the county commissioners acting as a board that are given that authority. If such employment could be made by the members of the board, acting separately and individually, no record thereof would be made, and no order entered on the record from which an appeal could be taken. The commissioners, in order to bind the county in the employment of counsel, must act as a board. The above cited authorities are decisive of this case."

Butler vs. School District, 24 Atlantic, 308.

In this case the plaintiff sold the school board certain fixtures and in the contract provision was made that these fixtures were to be tried out for a certain period of time and the school board in order to relieve itself of liability must show that it gave notice of disapproval within the fixed time. The Supreme Court of Pennsylvania held that the school board under the contract, in order to give a legal notice of dissatisfaction with the utilities furnished, must exercise its power by joint action; that mere loose discussion without any motion or united action was not sufficient to authorize the notice of disapproval. Concerning the matter, the Court, in part, said:

"A body of this kind must exercise its powers by joint action as a board; loose discussion without any motion or united action is not sufficient."

Independent School District vs. Wirtner, 52 N. W., 243.

In this case the law provided that the president of a school board should appear in behalf of the school district in all suits brought against the district, and also provided that counsel could be employed by the board of directors. It was contended that this language authorized the president of the school board to file suit and to maintain an action on behalf of the board. The Supreme Court of Iowa held to the contrary and took occasion to say:

"It is the general rule that corporations act through their board of directors and no corporate act can be done by the individual members of the board, unless authorized by law or by the charter of the corporation."

Reed vs. Lancaster, 25 N. E., 974.

This is a Massachusetts case. By the failure of the town to choose directors of the Almshouse, their duties were imposed upon the over-

seers of the poor. The board of overseers consisted of three members elected for three years, one member being elected at the town meeting in March of each year; one of the members having resigned, leaving a vacancy to be filled, the two remaining members contracted in writing for the services of a superintendent and matron of the almshouse. The Supreme Judicial Court of Massachusetts held that this contract was ineffectual and did not bind the town and that the contract could not be ratified by the overseers when a full board was elected by individual action. Concerning the matter, the court took occasion to say:

"If ratified, it must have been so by them as a body, and not individually. While they may act by a majority, the members are still to act together, and not by the agreement of members separately obtained. Id. C. 3, Sec. 3; Worcester vs. Railroad Co., 113 Mass., 161; Shea vs. Milford, 145 Mass., 528; 14 N. E. Rep., 764. The fact that plaintiff continued to render service at the almshouse, after the new board was organized, would not tend to show that the new board had ratified an invalid executory contract, so that he would be entitled to claim damages against the town for a breach thereof."

We have thus gone into this matter at great length. The authorities in all jurisdictions hold that where a duty is conferred upon a board or commission composed of more than one member, and where this duty involves judgment and discretion, that it may not be performed by the members of the board or commission separately and individually, but that it must be performed by them meeting together and taking official action as a board or commission.

The Prison Commission of this State is clearly within this rule. It can only act as a board or commission, and for such purpose its members must meet together and hold a session as a board or commission before it can legally transact business involving judgment and discretion. The acts of its individual members, however solemnly entered into, are not binding on the State or on the Commission itself.

In the instance of the present inquiry, the subsequent instrument signed by two members of the Prison Commission and approved by the Governor, waiving the State's option to purchase lands involved, was never authorized by the Board of Prison Commissioners meeting in session as is contemplated by the laws of the State and as is required before the Commission can create a legal obligation or relinquish one previously created. Nor was the attempted execution of this instrument ever ratified by the Prison Commission. These facts we deduce from the statement made by Your Excellency.

In other words, the Prison Commission of Texas has never authorized, executed or approved any instrument releasing or waiving the State's option to purchase the lands known as the Blue Ridge Plantation Number One. It follows from what we have said that the State of Texas has not parted with its option to buy Blue Ridge Farm Number One under the terms of the contract entered into between the Board of Prison Commissioners and Mr. Bassett Blakely under date of September 1, 1916.

You are further advised that steps can be taken to the end of conserving the interest of the State in this land.

In concluding this opinion, I desire to make proper acknowledgment to my assistants, W. J. Townsend, John Maxwell and E. F. Smith, who

exhausted the American authorities on the legal question here involved and prepared the office briefs from which I have been able to prepare this opinion.

Respectfully,
C. M. CURETON,
Attorney General.