

OFFICIAL OPINIONS

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

OPINIONS RELATIVE TO POWERS AND DUTIES OF COMMISSIONERS' COURT AND COUNTY MATTERS.

Op. No. 2389, Bk. 56, P. 65.

CONSTITUTIONAL LAW—COUNTIES—DEBTS—POWER TO CREATE—HOW TO CALCULATE PROBABLE REVENUE—LIABILITY OF COUNTY OFFICERS IN CREATING VOID DEBTS.—WHEN DEBT IS CREATED—TRANSFER OF FUNDS—EFFECT OF VOID WARRANTS—REMEDY OF COUNTY WHERE ILLEGAL OBLIGATIONS CREATED AND PAID—STATE OF LIMITATION.

This opinion passes on the following questions:

1. Within the meaning of the State Constitution inhibiting the creation of debts by counties without making provision at the time of creating same for levying and collecting a tax to pay interest and provide at least two per cent as a sinking fund, in determining the current revenue of the year, is the current year, fiscal year or tax year to control?
2. In calculating the probable amount of revenue for the current year may it be assumed that all the taxes levied will be collected during the year?
3. What account should be taken of delinquent taxes which may be collected during the year?
4. What account should be taken of probable revenue other than taxes, and how should it be estimated?
5. Within the meaning of debt provision of the Constitution, when is the debt incurred, when the contract is made or when labor or material is furnished or warrant issued?
6. Is *payment* of warrant on a void obligation illegal, and if so, can the county recover back the amount so paid?
7. Such a void debt having been created, the warrant paid, the contract performed, and the county having received the benefits, are the county commissioners, county clerk, county auditor and county treasurer liable to the county and if so to what extent?
8. Should registered warrants representing illegal obligations be considered in calculating the county's outstanding obligations, so as to determine the limit of the debt creating ability of the county?
9. Does the issuance of funding warrants cure the illegality of previous warrants or obligations?
10. Where funding warrants are issued, should the amounts of the retired warrants be considered in determining amount of outstanding obligations?
11. Where an amount of taxes is set aside for interest and sinking fund, to what extent, if any, should such taxes be taken into consideration in determining the current available revenue of the year?
12. Can the general county fund, raised by ad valorem taxes, be transferred to the road and bridge fund and used for the latter purpose?
13. Can warrants properly chargeable to the road and bridge fund be issued against and paid out of the general county fund?
14. If the two preceding questions are answered in the negative, then can the county recover the funds illegally paid out from persons receiving the funds or the county commissioners, county clerk, county auditor, or county treasurer?
15. Can money transferred from general county fund to road and bridge fund be taken into account as funds within the control of the county in the latter fund, in determining the debt creating power of the county as regards the latter fund?
16. It being unlawful for the county judge to approve and allow a claim against the county, even where the commissioners court attempts to authorize him to do so, even where the service or material has been lawfully contracted

for, what is the liability of the county judge, county clerk and the county treasurer for allowing, drawing warrant and paying such a claim approved and allowed only by the county judge?

17. Does limitation run against the county as to suits for moneys illegally paid out by its officers, under any of the circumstances above asked about?

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, September 29, 1921.

Hon. E. R. Campbell, Attorney for Harris County, Houston, Texas.

DEAR SIR: Your communication of date May 4, 1921, addressed to the Attorney General, was referred to me for attention. It reads as follows:

"Questions are frequently arising in connection with the administration of county affairs, the answers to which are not conclusively apparent to the officers affected and who are called upon to make a practical determination of such matters. To that end we beg to submit to you, for your opinion, certain questions upon which it is desired by the various officers of this county to have the benefit of the experience, investigation, and mature judgment of your department. For the benefit of all concerned, will you kindly, at your earliest convenience, render to us your opinion upon the following questions:

"1. How may it be determined when current warrants, being issued during any year, upon one of the funds of a county provided for by the Constitution, have reached the limit of the current revenue for the year, and the funds then within the immediate control of the county, applicable to the particular fund in question, so that any future warrants drawn, or obligations incurred, will be the creation of a 'debt' within the meaning of Article 11, Section 7, of the Constitution?

"See *Brezeale v. Strength*, 196 S. W., 250; *Austin Bros. v. Patton*, 226 S. W., 702.

"Included within the above question are the following:

"By the term 'current revenue for the year,' as used in the decisions construing said provision of the Constitution, is it meant 'calendar year,' 'fiscal year,' or 'tax year' (period within which the taxes for that year are payable)? What period must be used as the basis for such calculation?

"2. How is the 'current revenue for the year' for such fund to be determined?

"May it be assumed that all the taxes levied for that fund for that year will be collected during the current year? Or must it be estimated what amount of such taxes will be actually collected during that current year? And if so, how may such calculation be made in advance? Can the proportionate collections during the previous year be used as the basis for such calculation?

"3. What account, if any, must be taken of the taxes levied for former years which it may be expected will be collected during the current year as delinquent taxes?

"4. What account, if any, should be taken of collections to such fund which may reasonably be expected during the year from other sources than the taxes levied for that fund; and if such expected revenues from such other sources should be taken into consideration, how should the same be estimated? May the receipts from such sources during the next preceding year be used as a basis for such estimation?

"5. The authorities hold that when an obligation is incurred by a county which it may not reasonably be contemplated can be paid out of the current revenues for the year, together with such funds as may then be within the immediate control of the county, and a tax is not at the time levied to pay the interest thereon and create a sinking fund to pay the same, such obligation or contract on the part of the county is *void*.

"Now then, in reference to such an obligation:

"When may it be considered as having been incurred? Is it when the contract therefor was made, or the labor and material furnished; or when the warrant is issued?

"6. If such an obligation is incurred and warrant issued therefor, and such warrant paid out of the subsequent years' revenues, was the *payment* of such

warrant illegal, and if so, can the amount of such payment be recovered at the suit of the county from the person to whom said warrant was issued and payment made?

"7. If such payment was illegal, then to what extent, if any, can the county—having received the full benefit of the service, labor or material for which the payment was made—sue for and recover such payments from the officers participating in the issuance, approval and payment of such warrant, to wit, the members of the commissioners court authorizing such warrant, the county clerk issuing such warrant, the county auditor approving such warrant, and the treasurer paying such warrant?

"8. Should the registered warrants representing such illegal obligations incurred during previous years to be taken into account in determining the amount of outstanding debts of the county in arriving at whether a current obligation being incurred is a 'debt' within the meaning of the Constitution? Or should such warrants issued during previous years, which were clearly illegal for the reasons stated, be eliminated, as void obligations, in determining the amount of the outstanding obligations of the county payable out of the particular fund under consideration?

"9. If a number of such obligations are represented by registered and outstanding warrants, and, for the purpose of putting such fund upon an apparent cash basis, a series of funding warrants are issued under authority of the commissioners court to the holder, by assignment, of a number of such warrants, payable during a period of future years and bearing interest, the order of the commissioners court authorizing the issuance of such funding warrants making levy of a tax to meet the interest and create a sinking fund for the payment of such funding warrants:

"Does such action of the court and the issuance of the new warrants cure the illegality of the original obligations and the original warrants issued therefor, or are the funding warrants illegal to the extent that they represent and become a substitute for warrants previously issued for illegal obligations?

"10. After funding warrants have been so issued, thereby superseding, cancelling and retiring warrants previously issued and registered, should the amounts of such retired warrants, represented by such funding warrants, be taken into account in determining when the funds within the control of the county, together with the expected revenues for the year, have been taken up with warrants outstanding, or should the same be eliminated from consideration in such respect because the time for the payment thereof has been extended by the funding warrants, and such warrants made a charge upon the revenues of future years to the extent of the amount of tax levied to create a sinking fund for such funding warrants?

"11. In years subsequent to the issuance of such funding warrants, or the creation of debts for which a tax is levied to pay interest and create a sinking fund, to what extent, if any, should the taxes so levied be taken into consideration in determining the amount of taxes which may be expected to be available for the payment of obligations incurred during the current year?

"12. May money in the general fund, representing taxes in good faith levied and collected for such fund and its use, be legally transferred to the road and bridge fund, where it is not needed for the general fund, but is needed for the road and bridge fund?

"See *Carroll v. Williams*, 202 S. W., 504.

"13. May warrants for obligations properly chargeable to, and payable out of, the road and bridge fund, be legally issued against, and paid out of, the general fund?

"See same authority.

"14. If both or either of the two preceding questions be answered in the negative, then can the county recover funds so illegally paid out, from both or either the persons receiving such warrants and money, or the officers authorizing, issuing, approving and paying such warrants?

"15. After money is transferred from the general fund to the road and bridge fund, can the same be taken into account as funds within the control of the county in that fund, in determining when an obligation of the county becomes a 'debt,' within the meaning of the Constitution?

"16. It has been held to be illegal for the county judge to pass on, allow, and order payment of, a claim against the county, even though the commissioners court has attempted to authorize him to do so, even where the service or material made the basis of the claim has been legally contracted for by the commissioners court. (See *Padgitt v. Young County*, 204 S. W., 1046.)

"Where such a claim or claims has or have been allowed or approved by the county judge alone, and warrant issued by the county clerk, upon the order of the county judge therefor, and such warrant paid by the treasurer, was such payment illegal, to the extent that the county can, by suit, recover such amounts from persons to whom they were paid, or from the county judge, clerk or treasurer?"

"17. Does limitation run against the county as to suits brought to recover funds illegally paid out by its officers, under any of the circumstances above asked about?"

Section 7 of Article XI of the Constitution of Texas contains this provision:

"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."

Section 5 of the same article has a very similar clause relative to cities only. It says:

"And no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent thereon."

There have been a good many court decisions in this State involving these constitutional provisions, and since it has been necessary to investigate them in considering your inquiries it may be well to preserve the result of our labor by here noting these court decisions at some length.

City of Corpus Christi vs. John Woessner, 58 Texas, 462 (*Supreme Court of Texas*).

In this case it appears that certain city warrants sued on could have been paid out of the current revenues for the year had it not been for the fact that in the year 1879 the City of Corpus Christi appropriated \$10,000 of the revenue arising from the wharf privileges to assist in deepening Corpus Christi Bay, and this, it would seem, without authority. In holding that the warrants did not represent a debt or debts unauthorized to be created without making special provision for interest and sinking fund, our Supreme Court said:

"We are of the opinion that the issuance of warrants on current expenses of a city, which do not exceed the current revenue derived from taxation, permitted by law to be levied to meet current expenses, and such other revenue as a city may have from other sources than taxation, cannot be said to be the creation of a debt prohibited by law unless a special tax be levied to meet the interest and create a sinking fund."

Dwyer vs. City of Brenham, 65 Texas, 526 (*Supreme Court of Texas*).

This case simply holds that a contract for the printing and binding in book form of the city ordinances is for current expenses and not within the class of debts contemplated in Section 5, Article 11, of the Constitution. Says the court:

"The debt contracted for, under the allegations of the petition, was in the

nature of current expense, and not such debt as that contemplated in Section 5, Article 11, of the Constitution."

City of Terrell vs. Dissaint, 71 Texas, 770, 9 S. W., 593 (*Supreme Court of Texas*).

The City of Terrell executed a promissory note for one thousand dollars, at 8 per cent interest from date in payment for material for waterworks supplies and the note stipulated it was "payable out of the tax of one-fourth of one per cent collected annually for general purposes." It was contended that this was not a debt within the meaning of the Constitution since it was for current expenses payable out of the current expense fund.

As to the facts in the case the court said:

"It was shown upon the trial that the city had exhausted its power of creating debts chargeable upon funds to be raised by special taxation when the note sued on was given. It was also shown that at the time, and ever since, the current expenses proper of the city exceeded its revenues for general purposes. We state these facts, not because we think their statement necessary to a decision of this cause, but because they serve to illustrate the doctrine we assert."

After quoting from *Corpus Christi vs. Woessner*, 58 Texas, 462, to the effect "the issue of warrants on current expenses of a city, which do not exceed the current revenue derived from taxation," is not the creation of a debt prohibited by the Constitution, the Supreme Court, through Justice Gaines, said:

"We do not doubt the correctness of that ruling. We freely concede that debts for the ordinary running expenses of a city, payable within a year out of the incoming revenues of the year, and with other indebtedness not clearly in excess of the yearly income for general purposes, can be created by a city. But 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 the current revenues for such purposes, and that such a debt cannot be created without such compliance, which matures at such time as would make it a charge upon the future revenues 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 for \$1500 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."

Citizens Bank vs. City of Terrell, 14 S. W., 1003 (*Supreme Court of Texas*).

Holding that where a city issues bonds in excess of the amount authorized by law the obligation is void to the extent of the excess. Says the court:

"When the debt is void in its inception for want of authority to create it, no subsequent ratification of it by the collection of taxes, or otherwise, can give to it any validity; nor can there then be such a thing as a bona fide holder of the obligations, with a right to collect them, notwithstanding the want of power in the city to create the debt."

Noel vs. City of San Antonio, 33 S. W., 263 (*Court of Civil Appeals*).

The syllabus of this case sufficiently discloses the court's holding:

"1. Const., Art. 11, Section 5, provides that no debt shall be created by any

city, unless at the same time provision shall be made to collect annually a sufficient sum to pay the interest thereon, and to create a sinking fund of at least 2 per cent thereon. Held, that a contract whereby a city executed its notes, payable annually for ten years at 6 per cent interest, in payment for the construction of garbage furnaces, was void, no provision having been made for the payment of annual interest and the creation of a sinking fund, and though bonds had been sold six years previously for the purpose, among others, of erecting such furnaces, there was no evidence that any part of the moneys thereby realized remained in the treasury.

"2. A city is not liable for an improvement erected according to contract, where the contract was made in violation of a constitutional provision.

"3. Under a city charter providing that the city council shall have control of the city and its finances, and shall exercise its powers by ordinance, the city cannot enter into a contract for the construction of an improvement involving deferred payments of a large amount, except by ordinance; and the council cannot, by motion, authorize the mayor to bind the city to such contract.

"4. A city is not estopped from denying its liability for an improvement constructed under a contract made in violation of constitutional provision."

We make a short quotation from the court's opinion tending to indicate that the execution of long time evidences of debt is prima facie evidence that the same was not contemplated to be paid out of current revenues of the year:

"If, as contended by appellant, it was a contract based on money then in the treasury, why give those interest-bearing evidences of debt, payable so long in future? A cash transaction, providing for the consideration to be paid in 10-year payments, with a good rate of interest, would be an absurdity and a contradiction of terms."

City of Cleburne vs. Cleburne Water, etc., Co., 14 C. A., 230, 37 S. W., 655 (*Court of Civil Appeals*).

Appellee had a contract with the city to furnish water for three years for fire protection free of charge and by which the next succeeding two years the city was to pay \$25 per hydrant. Suit was brought for \$1275 for the use of 51 water hydrants under the latter mentioned part of the contract. Payment was resisted on the ground that this was a debt in violation of the Constitution, but the court held that:

"The written contract did not bind the city to take any specified number of fire hydrants, but this was left to the discretion of the city council. The contract simply fixed a price at which they were to be furnished. The city could take a greater or a less number for each current year, as its current revenue might allow. According to the allegations of the petition, the 51 hydrants were furnished, with water and necessary pressure for fire protection, for that particular year, at the special instance and request of the city; that they were reasonably worth \$25 per hydrant, and the city agreed to pay that amount."

And further along in the opinion of the court we find this language:

"The debt was not created until the city designated and accepted the number of hydrants desired, and when this was done no reason is manifest to us why it should not be paid, like any other current expense of the city."

Biddle vs. City of Terrell, 82 Texas, 335, 8 S. W., 691 (*Supreme Court of Texas*).

This was a suit by appellant against the city to recover on two promissory notes executed by appellee October 27, 1885, due nine months after date. These notes were executed as a result of a compromise of a suit against the city to recover balance due on a contract to erect for

the city a town hall and school building. The court affirmed the decision of the lower court in sustaining general demurrer on the ground that plaintiff below did not allege that provision had been made by the city for the payment of the notes, it not being contended that the notes were for current expenses. The court said:

"The Constitution requires that cities, in creating debts, shall at the same time make provision for the payment of the debts by assessing and collecting tax to pay the interest thereon, and to furnish a sinking fund to meet the principal. This requirement of the Constitution has been held not to apply to debts created by the city for current expenses. It is not contended that the debts evidenced by these notes are for current expenses."

City of Dallas vs. Brown, 10 C. A., 621, 31 S. W., 298 (*Court of Civil Appeals*).

The City of Dallas was required by its charter to provide for the payment of the cost of paving its streets by special levy of a tax upon the abutting property. This it did to the extent of one-half the aggregate contract price of the work, a railway company having agreed to pay the other. Some extra work was done by the contractor not contemplated by the contract, and it was compensation for this extra work that was sued for. The court held that since the city had not made provision for this debt it could not be paid out of the city's revenues, although the city was authorized to turn over to the contractor a part of the amount sued for, which had been received from the railway company as its part of said debts.

McNeal vs. City of Waco, 89 Texas, 83, 33 S. W., 322 (*Supreme Court of Texas*).

The plaintiff in error contracted with the city to construct seven underground cisterns of brick and cement mortar at a cost of \$925 per cistern. Our Supreme Court held that it could not be held as a matter of law that an expense of this kind was an item of ordinary expenditure and that, therefore, the petition should have alleged some additional fact showing it not to be a debt unprovided for, such as that there was at the date of the contract a fund legally applicable thereto out of which the parties contemplated that such claim should be paid, saying:

"We conclude that the word 'debt,' as used in the constitutional provisions above quoted, means 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. *City of Corpus Christi v. Woessner*, 58 Texas, 465; *Terrell v. Dessaint*, 71 Texas, 770, 9 S. W., 593; *Appeal of City of Erie*, 91 Pa. St., 398; *Prince v. City of Quincy*, 105 Ill., 138. Prima facie, every pecuniary obligation attempted to be created by contract is a debt, within the meaning of the constitutional provisions above, and a party attempting to recover against the city thereon must allege the facts showing a compliance with the Constitution and statutes necessary to bind the city, or must allege such facts as bring the particular claim within the exception above stated in the definition of the word 'debt.' If it should appear from the pleadings or the face of the obligation that the subject of the contract was clearly a matter of ordinary expenditure, such as repairing streets or salary of an officer, this would be sufficient to bring it within the exception, for the prima facie presumption would be that such claim was intended to be paid out of the current revenues annually collected for payment of such claims, and it would not be presumed the city had attempted to make

contracts in excess of its revenues for the year; but where, as in the case at bar, the subject of the contract is not one which the court can say, as a matter of law, is an item of ordinary expenditure, the petition, in order to bring it within the exception, must allege some additional fact, such as that there was, at the date of the contract, a fund in the treasury, legally applicable thereto, out of which the parties contemplated that such claim should be paid. Since the petition seeks to enforce against the city a pecuniary obligation arising out of a contract, and alleges neither a compliance with said constitutional provisions nor any facts bringing the case within the exception above indicated in the definition of the word 'debts,' we conclude that the Court of Civil Appeals was correct in holding that the general demurrer should have been sustained; and in compliance with the mandate of the statute directing this court, in the event the decision of the Court of Civil Appeals is approved in a case brought to this court on the ground that the decision of the Court of Civil Appeals practically settles the case, to 'render final judgment accordingly.' The judgment of the court below is reversed, and judgment will be here rendered that plaintiff in error take nothing by his suit, and pay all costs."

Howard vs. Smith, 91 Texas, 8, 38 S. W., 15 (*Supreme Court of Texas*).

The City of Corsicana contracted with Howard for paving, the city agreeing that at the expiration of six months after completion of the work it would issue bonds to pay therefor. Held that the obligation was wholly void, no provision having been made in compliance with the Constitution for interest and sinking fund at the time the debt was created. The contract being void, it was held that the contractor could not recover against a guarantor. The following language of the court is explanatory of the court's holding on the question of creation of debt:

"The contract of November 4, 1890, if valid, imposed upon the city a pecuniary obligation, in that it thereby agreed to pay for the pavement, part in money and the balance by issuing and delivering its bonds within a given time, the failure to do which would, under settled rules of law, have entitled Howard to demand the entire sum in money; and, since the improvement was not a matter of current expense, and it does not appear that there was any fund, at the date of the contract, within the control of the city, out of which it was to be paid, such obligation was a debt within the meaning of the Constitution; and, since no provision was made for interest and sinking fund at the date of such contract, it was void, and imposed no obligation upon the city to pay for the work. *McNeill v. City of Waco* (Texas Sup.), 38 S. W., 322, and cases cited; *Bassett v. City of El Paso*, 88 Texas, 168, 30 S. W., 893; *Lake Co. v. Rollins*, 130 U. S., 662, 9 Sup. Ct., 651; *Borough of Millerstown v. Frederick*, 114 Pa. St., 435, 7 Atl., 156; *Crampton v. Zabriskie*, 101 U. S., 601; *Schumm v. Seymour*, 24 N. J. Eq., 143; *Mayor, etc.*, 16 How. Proc., 433."

Winston vs. City of Fort Worth, 47 S. W., 740 (*Court of Civil Appeals*).

A valid debt may be created by a city without complying with Constitution, Article 11, Section 7, where it has a fund on hand under its control from which it contemplates the debt shall be paid, though it was not in fact paid therefrom, and it remained unpaid and unprovided for until the passage of a subsequent ordinance.

Mineralized Rubber Co. vs. City of Cleburne, 56 S. W., 220 (*Court of Civil Appeals*).

The city purchased fire hose, payable in three years with the privilege of paying within twelve months. Held, this was a debt unprovided for and void under the Constitution, even though the city had on hand at the time of creating the debt \$1000 in the street and bridge fund, it not appearing that this sum was set apart to pay this debt, nor was it within

the contemplation of the parties that the debt was to be paid out of this fund. The court held, however, that since the city made no provision for payment, and as the obligation was void, the rubber company had a right to recover the possession of the property sold as well as compensation for the use of the hose while in the city's possession.

City of Tyler vs. Jester, 74 S. W., 359 (*Court of Civil Appeals*).

This case was affirmed by the Supreme Court, 78 S. W., 1058, the next case discussed.

This case holds (1) that the debt clause of the Constitution does not apply to instruments acknowledging or extending the time of payment of valid existing obligations of a city; (2) but that a city cannot renew a debt barred by limitation without compliance with the Constitution, or increase the rate of interest, or provide for attorneys' fees for the collection of existing debt, without making the provision for interest and sinking fund under the Constitution; (3) that a contract for hydrant rental quarterly is an item of current ordinary expenses, it not being shown that the general revenues were not sufficient to pay said rentals, and that this expense was presumably intended to be paid out of current revenues and was, therefore, legally incurred, and hence was legally incurred; (4) that alderman's salary constituted ordinary expenses payable out of current revenues; (5) an indebtedness incurred by a city for purchase of cemetery property is not such a debt as a city can incur without compliance with Article 11, Sections 5, 7; (6) and the mere fact that the revenue of a city derived from taxes levied for general purposes cannot be charged with payment of a certain debt, and that there is no provision of law authorizing levy of a special tax to pay the same, does not render the debt void, or prevent its reduction to judgment; where it was a valid debt to begin with.

The court states the rule relative to the creation of debts, as follows:

"But it matters not what may be the form of the instruments evidencing the debt, if such instrument does in fact create a debt against the municipality, it not being intended that such debt should be paid out of the current funds of the year in which same was created, nor out of any funds in the hands of the city lawfully applicable to the payment of same, and no provision being made at the time of the creation of said debt for the assessment and collection annually of a sufficient tax to pay the interest thereon, and create a sinking fund of at least 2 per cent thereon, such debt was not legally incurred, and the notes or bonds evidencing same are void. Constitution, Article 11, Sections 5, 7; Waxahachie v. Brown, 67 Texas, 519, 4 S. W., 207; Terrell v. Dessaint, 71 Texas, 770, 9 S. W., 593; Bank v. Terrell, 78 Texas, 450, 14 S. W., 1003; McNeal v. Waco, 89 Texas, 83, 33 S. W., 322; Noel v. San Antonio (Texas Civ. App.), 33 S. W., 263."

City of Tyler vs. Jester & Co., 97 Texas, 344, 78 S. W., 1058 (*Supreme Court of Texas*).

Defendant in error sued the city on seven notes payable one to ten years from date. These notes were executed as refunding notes and represented prior debts for current debts of the city. It was alleged, among other things, that the notes were void as creating a debt in violation of the Constitution without making provision for interest and sinking fund. The case is very important and we quote from it at length, as follows:

"The obligations sued upon were executed by the city for the purpose of fund-

ing its outstanding indebtedness. Granting that the water contract was void, as charged, nevertheless the city must be held liable for what it received under that contract. *Brenham v. Water Co.*, 67 Texas, 566, 4 S. W., 143. The parties agreed on the value of the water furnished, so the right to recover does not depend upon that instrument. The execution of these notes did not increase the indebtedness of the city, because when they were delivered the old debts were taken up and extinguished, and the new notes did not create a debt against the city, which required the levy of taxes to provide for the interest and sinking fund. *Doon Township v. Cummins*, 142 U. S., 372, 12 Sup. Ct., 220, 35 L. Ed. 1044; *City of Valparaiso v. Gardner*, 97 Ind., 8, 49 Am. Rep., 416; *McNeal v. Waco*, 89 Texas, 83, 33 S. W., 322; *Corpus Christi v. Woessner*, 58 Texas, 462. The character of the debt was the same after the new notes were given as before.

"The Court of Civil Appeals found that the current expenses of the City of Tyler for the year 1889 exceeded its revenue, and plaintiff in error, under the thirteenth assignment in the application, makes a statement showing that the revenue for 1889 was not sufficient to discharge the current expenses for that year; but under no one of the assignments does the plaintiff in error raise the question that for the years in which the water was used by the City of Tyler the current expenses were greater than the current revenue. The making of a contract for water for a number of years to be delivered in the future did not create a debt against the city, but the liability of the city arose upon the use by it of the water during each year. *Valparaiso v. Gardner*, before cited. It is therefore immaterial that the current expenses for 1889 were greater than the current revenue of the City of Tyler, and we shall not further discuss that phase of the question.

"It appears from the findings of fact made by the Court of Civil Appeals that the debts upon which recovery was allowed were contracted for the current expenses of the City of Tyler for the several years mentioned in the said statement, and the presumption will be indulged that the current revenue for each year was sufficient, if it had been collected and properly applied, to have liquidated the current expenses. *McNeal v. Waco*, before cited. It appears that the parties to the contract intended that the sum should be paid out of the current revenue for the year, and there is nothing to indicate that they did not act in good faith, with reasonable ground to believe that the current revenue would be sufficient for that purpose. *McNeal v. Waco*, 89 Texas, 88, 33 S. W., 322. The water contract provided that the payments should be made quarterly during each year, and we see no reason to believe that the parties intended that it should be other than a contract payable during the year for which it was contracted. If it were held that a city could not make a binding contract unless at the time it had revenue sufficient to discharge all of its current expenses, and that every person who should deal with it must do so at his peril, taking the chance of a deficit in revenue, it would be absolutely destructive of the power of every city in the State to carry on its ordinary governmental affairs, for it is well known that the business of a city is conducted upon the basis of credit, and depends entirely upon the collection of taxes from time to time, with the claims for current expenses running over from one month to another. We believe that such a contract, though not paid off during the year for which it was made, remains a valid debt against the city, which it may and should discharge out of the revenues for future years in excess of its current expenses. *Corpus Christi v. Woessner*, before cited; Article 465, before quoted. In the case of *Corpus Christi v. Woessner*, debts contracted for several different years, not being paid, had gone over to succeeding years, and the city had diverted its fund from the payment of its debts to other purposes. In order to defeat the enforcement of the claims against the surplus of current revenue for subsequent years the city passed an ordinance practically refusing to pay any claim which was contracted prior to a given date, including the claim sued upon, and our Supreme Court sustained a general judgment against the city. The terms of Article 465 of the Revised Statutes of 1895 confer authority upon the city council 'to provide for funding the whole or any part of the existing debt of the city, or of any future debt,' showing that it was contemplated by the Legislature that the indebtedness of cities might not be liquidated by the revenues for each year, but would accumulate against such corporations, and, to

enable them to fully liquidate their debts, the power was given to fund all such indebtedness. Article 466 of the Revised Statutes of 1895 confers upon cities organized under the general laws authority 'to appropriate so much of the revenues of the city, emanating from whatever source, for the purpose of retiring and discharging the accrued indebtedness of the city.' This is direct and positive authority for the city to use its revenues, both from its ordinary sources of taxation and any other source of income that it might have, for the purpose of liquidating and discharging accrued indebtedness, which must mean debts of previous years and not of the current year; hence, it cannot be true that current expenses not paid each year become void. The Court of Civil Appeals did not err in holding that the debts contracted for the current expenses, lawful at the time that they were contracted, continued to be lawful after the expiration of the year for which they were made, and afforded sufficient basis for rendering judgment against the city, which might be enforced if it should become possessed of property or funds subject to the payment of such debts."

City of Houston vs. Clover, 40 C. A., 182, 89 S. W., 425 (Court of Civil Appeals).

This case holds that the employment of an architect to prepare plans for a proposed public building is not the creation of a debt in violation of the Constitution, it appearing that it was contemplated that the services be paid for out of current revenues of the city.

City of Houston vs. Potter, 41 C. A., 388, 91 S. W., 389 (Court of Civil Appeals).

Potter had a contract to supervise sewer construction to be paid out of the proceeds of a certain bond issue. The contract was made prior to a bond election which was re-held owing to doubt as to its legality. After the second election the city council authorized the mayor to change the contract so as to state therein the date of the last election. Held, that this was tantamount to entering into a new contract and the contract was not void as creating a debt unprovided for under the Constitution, Article 11, Sections 5, 7. The court also held that since the parties contemplated that the contract was to be paid out of the \$300,000 bond issue, the fact that a portion of said amount was diverted to other purposes and for that reason there was nothing in the fund out of which to pay the contract, that this would not render the obligation on the contract void. The court said:

"Appellant's second objection to the judgment cannot be sustained, for the reason that it does not appear that the fund arising from the sale of the bonds had been legally exhausted by the payment of proper claims against it, before paying appellee's claim. If at the time the contract with appellee was made the payment of his compensation was provided for as required by the Constitution, he could not be deprived of his right to recover by the use of the entire fund in payment of indebtedness subsequently contracted for by the city to be paid out of that fund, or by payments out of that fund of indebtedness not properly chargeable against it. The evidence shows and the trial court found that the work which appellee was employed to supervise cost \$261,271.39, to which must be added the amount of appellee's compensation under the contract, \$13,063.56. The amount realized from the bonds was \$300,000. There is no attempt made to show that the payments made out of this fund, which it is claimed exhausted it, were made upon contracts made before the contract with appellee. Appellee was required to see, when he made his contract, that proper provision was or had been made to pay his compensation as a debt against the city, in accordance with the provisions of the Constitution. He cannot be deprived of his pay by the action of the city in afterwards contracting debts against the fund in excess of the amount thereof and paying the same to the exclusion of the appellee's claim,

and if it has been done, and thus exhausted the fund upon which appellee had a right to rely for payment of his compensation, appellee cannot legally or justly be made to suffer."

Ault vs. Hill County, 102 Texas, 335, 116 S. W., 359 (*Supreme Court of Texas*).

Action for damages for breach of contract for improvements on a county courthouse. Held, that since there was not enough funds on hand or reasonably expected to be on hand out of the revenues it was the creation of a debt without provision being made therefor and hence void. Also, that funds collected ostensibly for "improvement fund" and transferred to the general fund, could not be taken into consideration. Said the court:

"Had the money been on hand, or had the prospect of collecting it out of the taxes legitimately levied for general county purposes been such as to justify a reasonable expectation that it would be on hand, to meet the payments on the contract as they fell due, we should have a question very different from that which is presented by the facts. *McNeal v. Waco*, 89 Texas, 83, 33 S. W., 322."

City of Cleburne vs. Gutta Percha, etc., Co., 127 S. W., 1073 (*Court of Civil Appeals*).

On April 10, 1900, the City of Cleburne executed two notes in payment of fire hose purchased, one payable in six months without interest, the other in ten months with 5 per cent interest. The court readily held that the trial court was correct in instructing a verdict on the first as it was payable within the year and did not create a debt within the meaning of the Constitution. "It matured concurrently with appellant's revenues for that year, and, if paid according to promise could not have been a charge on the revenue for future years," said the court.

The question as to validity of the second note was submitted to the jury. The court continues:

"If at the time of the execution of said second note the city council of the City of Cleburne reasonably anticipated and intended that the same would be paid and satisfied out of the current revenues of said city for the year of 1900, and the council had reasonable grounds for believing that such current revenues would be sufficient for that purpose, then the second note was not invalid. The true test of whether or not the note was a debt within the meaning of the constitutional inhibition is: Does it impose a burden on the revenues of the city for future years? *Corpus Christi v. Woessner*, supra; *Terrell v. Dessaint*, 71 Texas, 775, 9 S. W., 593; *Tyler v. Jester*, 97 Texas, 344, 78 S. W., 1058. The municipal or fiscal year of 1900 commenced April 10th, and ended in April, 1901, and the second note matured in February, 1901. The council of the appellant that came into office at the beginning of the fiscal year 1900 knew that it would raise and control appellant's revenues until the new council should come into office, in April, 1901, and made both notes to mature at such times as to become charges against the revenues for that fiscal or municipal year. The verdict embraces a finding that at the time the second note was executed the city council reasonably contemplated and intended that the same should be paid and satisfied out of the current revenues of the city for that municipal year, and that they had reasonable grounds for believing that said revenues would be sufficient for that purpose. There was evidence to support this finding.

"In this connection the court, at the request of plaintiff, gave a charge as follows: 'Gentlemen of the jury, in this case you are instructed that for the year 1900 the defendant, the City of Cleburne, would be permitted to contract debts to an amount equal to 25 cents on the \$100 of its assessed valuations for taxes for said year, and any other revenues belonging to the general fund of

said city and obligations contracted for the defendant for current expenses and payable out of the current revenues for said year, and not in excess of the amount above stated, would be valid obligations against the defendant." Appellant complains of this charge, and presents the proposition that a municipal corporation can make a legal contract for current expenses payable out of its current revenues to an amount not in excess of the funds available for that purpose at the time of the creation of the debt, and the charge complained of permits the city to contract at any time during the year for the payment of a debt in an amount not to exceed its current funds, whether said funds have been expended in whole or in part, and whether or not any portion of same is available at the time of the creation of the debt. This proposition is not sustained. The obligations which formed the basis of the notes sued on were contracted April 10, 1900, the day on which the municipal year began. The tax levy for the general fund for that year was 25 cents on \$100. There was evidence showing the amount received for poll taxes and saloon licenses. These revenues went to the general fund of the city. The charge was correct. *Corpus Christi v. Woessner*, supra; *City of Tyler v. Jester*, supra."

Sandifer vs. Foard County, 134 S. W., 823 (*Court of Civil Appeals*).

A contract by which a county lists land with a broker for sale, the commission payable out of the general fund, does not create a debt in violation of the Constitution. (Affirmed, 105 Texas, 420, 151 S. W., 523.)

Toole vs. First National Bank of Hemphill et al., 168 S. W., 423 (*Court of Civil Appeals, Galveston*).

In holding that a contract for the drilling of an artesian well in the courthouse square, created a debt in violation of the Constitution in view of the fact that there was not sufficient funds on hand or to be collected for the year with which to pay the price, the court in this case said:

"The undisputed evidence shows that no provision was made by the county at the time the contract was executed for the payment of the debt created thereby. The evidence further shows that the assessed value of all taxable property in Sabine county for the year 1910 was \$4,807,206, and for 1911 \$4,895,221. A tax of 20 cents on the \$100 was levied for 1910, and 25 cents for 1911. The book-keeper for the county treasurer testified that from November 8, 1909, to November 14, 1910, receipts from all sources amounted to \$9,328.59, and disbursements for said period were \$14,196.95, and from November 14, 1910, to November 13, 1911, receipts were \$10,393.31 and disbursements \$11,471.64. He further testified the average yearly receipts for 1909, 1910, and 1911 were \$8483, and the average ordinary expenses of the county for these years were \$8993.

"On November 14, 1910, the balance in the general county fund was \$1,226.36, and there were outstanding warrants which had been issued against this fund of from \$6000 to \$7000. We fail to find in the record any evidence from which it can be concluded that there was any fund on hand at the time the contract was made, or that the current revenues for the year 1910 would produce a fund available for that purpose out of which the debt created by the contract could be paid. This being so, neither the commissioners nor Smith had reasonable grounds to believe, or could have reasonably contemplated, that the contract price of the well could be paid out of the current revenues of the county. A contract for permanent improvements, of the character provided for in this contract, executed when there are no existing or prospective funds derived from the general current revenues of the county available to meet the obligation imposed on the county by such contract is the creation of a debt within the meaning of the Constitution, and when no provision is made for the payment of the debt, the contract is void. *Constitution of Texas*, Sections 5 and 7, Art. 11; *McNeal v. Waco*, 89 Texas, 83, 33 S. W., 322; *Terrell v. Dessaint*, 71 Texas, 771, 9 S. W., 593; *Pendleton v. Ferguson*, 99 Texas, 296, 89 S. W., 758; *Howard v. Smith*, 91

Texas, 15, 38 S. W., 15; Tyler v. Jester, 97 Texas, 344, 78 S. W., 1058; Biddle v. City of Terrell, 82 Texas, 336, 18 S. W., 691; Edwards County v. Jennings, 89 Texas, 619, 35 S. W., 1053; Ault v. Hill County, 102 Texas, 336, 116 S. W., 359; City of Tyler v. Building and Loan Co. (Civ. App.), 82 S. W., 1066; Peck-Smead Co. v. City of Sherman, 26 Texas Civ. App., 210, 63 S. W., 340; Mineralized Rubber Co. v. City of Cleburne, 22 Texas Civ. App., 621, 56 S. W., 220; Corpus Christi v. Woessner, 58 Texas, 462."

Boesen vs. County of Potter, 173 S. W., 462 (Court of Civil Appeals, Amarillo).

This was a suit by Boesen against the county to recover an amount due for publishing the delinquent tax record. The court overruled the contention that the obligation was void as being a debt unprovided for, upon three grounds: (1) that (seemingly) it was an item of current expense payable out of current revenues; (2) that since the statute provided for the collection of 25 cents publication fee in each delinquent tax suit, this alone was sufficient provision made for the payment of the publication; (3) that this was an obligation imposed by law, and hence not within the purview of the Constitution, Article 11, Section 5. The court cites and quotes from Wichita Falls vs. Skeen, 18 Texas Civ. App., 632, 45 S. W., 1037, holding that the expense of printing the delinquent tax list is to be regarded as an item of ordinary expenditure.

Rogers National Bank vs. Marion County, 181 S. W., 884 (Court of Civil Appeals, Texarkana).

A courthouse site was purchased by the county and on February 13, 1913, a county warrant was drawn in payment therefor payable February 15, 1915, that is, about two years from date. The court held this obligation void as being a debt unprovided for within the meaning of the Constitution. After quoting the definition of debt in McNeal vs. City of Waco, the court said:

"Tested by this definition, the warrant sued upon clearly was a 'debt' within the meaning of the part of Section 7 set out above; for it was a 'pecuniary obligation imposed by contract,' and was to be satisfied out of the revenues of the county for the year 1915, and not out of its current revenues for the year 1913, when it was created, nor out of any fund then 'within the immediate control' of the county."

Broussard vs. Wilson, 183 S. W., 814 (Court of Civil Appeals, Galveston).

By the contract complained of, of date November 12, 1914, the county of Jefferson, through its commissioners court, agreed to take, and Hanson Sons, Incorporated, agreed to sell and deliver for road repairing and building, at places and prices named, all the shell of the character described in the contract, for the period of one year after the commencement of deliveries; the county agreeing to take and pay for a minimum quantity of 30,000 cubic yards, and the minimum price named being 64 cents per cubic yard. The county was to give notice from time to time of what its requirements would be. Hanson Sons were to have 60 days from the date of the contract within which to begin deliveries. Payments were to be made by the county at regular intervals, either in scrip or cash, at its option.

This case may be in conflict with the Supreme Court's decision in Carroll vs. Williams, 202 S. W., 504, as to the transfer of funds, but

upon the question of creating a debt in view of current revenues, we quote from it as follows:

"The foregoing is practically all the material testimony with reference to said contract, and we conclude therefrom that the parties to the contract intended that the shell furnished to the county should be paid for out of the current revenue for the year, and that there was reasonable ground to believe that such current revenue would be sufficient for that purpose. The fact that the levy was made on August 10th, and the first contract entered into on August 15th, five days later, we think is a significant circumstance. This contract for supplies must have been one of the first entered into after the court had provided for its current revenues. The court is expressly authorized to purchase all material necessary in the 'construction of roads.' It does not seem to us important that this contract is for the purchase of shell 'in building or repairing roads.' It is evident that the special acts of the Legislature relating to Jefferson County were intended to give ample authority to the commissioners court in road matters; that there was no attempt to create a charge against future revenues, and, judging from the past year and from the rates levied for the current year, it was reasonably contemplated that there would be sufficient available money out of the current revenues to pay for this shell; that the contract fixed the rate for each cubic yard of shell to be paid for by the county; and that no debt was created until the quantity of shell necessary to meet the requirements of the county had been ascertained, as it would be from time to time by the county during the year and the county within the minimum at least of 30,000 cubic yards has the power to limit the quantity of shell to be taken and thus to bring the expense within its current revenue. The county is to 'give notice from time to time of what its requirements will be.' The contract further provides:

"Payments hereunder shall be made by second party to first party at regular monthly intervals, either in scrip or cash at the county's option."

"The instant case is unlike *Jefferson Iron Co. v. Hart*, 18 Texas Civ. App., 525, 45 S. W., 321. There the suit was to enjoin the collection of certain taxes on the ground that the levy was unnecessary for the purpose for which it was made and was made with the intent of transferring the levy so made to another fund already swelled to its full constitutional limit."

The court further said:

"We further conclude that the contract between Jefferson County and Hanson Sons, Incorporated, did not create a 'debt' within the meaning of the Constitution, for which provision should be made when it is created or incurred, but belongs to that class of obligations in good faith intended to be lawfully payable out of either the current revenue for the year of the contract, or some other fund within the immediate control of the commissioners court."

City of Fort Worth vs. Reynolds, 190 S. W., 501 (*Court of Civil Appeals, Fort Worth*).

The city, to secure lands for a reservoir, contracted to pay the owner a fixed price per acre, and, if another owner secured a fixed price or more in condemnation proceedings, to pay an additional price per acre, but failed to do so, and the land owner sued. The court ruled that the general demurrer raising the question whether a debt was created contrary to the Constitution must be treated as waived because not called attention or acted on by the court below, but indicated what its holding would be on the sufficiency of the demurrer. The court's holding is indicated by the following quoted language from the opinion:

"And if the plaintiff's petition must be construed as presenting alone an action upon the contract mentioned in the petition to recover the sum due by force of its terms, we would feel impelled, contrary to appellee's contention, to hold that the sum sued for was a debt within the meaning of the cited sections of the Constitution, and that hence the plaintiff's petition was subject to a general

demurrer, for the want of necessary allegations bringing the case within those constitutional provisions. See *McNeal v. Waco*, 89 Texas, 83, 33 S. W., 322; *Biddle v. City of Terrell*, 82 Texas, 335, 18 S. W., 691; *Kuhls v. City of Laredo*, 27 S. W., 791; *Rogers National Bank v. Marion County*, 181 S. W., 884; *City of Austin v. McCall*, 95 Texas, 565, 576, 68 S. W., 791; *Ault v. Hill County*, 102 Texas, 335, 116 S. W., 359; *Berlin Iron Bridge Co. v. City of San Antonio*, 50 S. W., 408."

Writ of error seems to have been granted by the Supreme Court in above case.

City of Laredo vs. Frishmuth, 196 S. W., 190 (*Court of Civil Appeals, San Antonio*).

Bonds were issued and while the tax rate provided was in itself insufficient to provide interest and sinking fund, there were other available funds out of which it was contemplated the balance should be paid. The court decided as follows:

"The ordinance of May 19, 1883, did not attempt to provide for the interest and sinking fund of a \$75,000 issue of bonds by taxation, but recognized the inadequacy of a tax rate of 25 cents on the \$100 to meet the interest and sinking fund and made other provisions out of other means to meet the demand. At the time it was enacted the city could have provided for a tax of 50 cents, but chose to secure the bonds in other ways which it had the right to do.

"It is the rule, well sustained by authority, that contracts may be made without incurring a debt within the meaning of the Constitution when the municipal corporation has cash in the treasury with which to meet the liabilities, or when the debt is made payable out of a special fund raised or to be raised. *Galveston v. Heard*, 54 Texas, 420; *Dillon Mun. Corp.*, Sections 197, 198; *State v. Neosho*, 203 Mo., 40, 101 S. W., 99. The fact that such special fund is not in existence at the time when the bonds were issued does not make expenditures incurred on the credit of the fund and only payable therefrom an indebtedness in the purview of the Constitution. *State v. Whatcom County*, 42 Wash., 521, 85 Pac., 256; *McNeal v. City of Waco*, 89 Texas, 83, 33 S. W., 322. As said in the last named case:

"These constitutional provisions were intended as restraint upon the power of municipal corporations to contract that class of pecuniary liabilities not to be satisfied out of the current revenue or other funds within their control lawfully applicable thereto, and which would therefore at the date of the contract be an unprovided for liability and properly included within the * * * meaning of the word "debt." They have no application, however, to that class of pecuniary obligations in good faith intended to be and lawfully payable out of either the current revenues, for the year of the contract or any other fund within the immediate control of the corporation."

"The intent of the Constitution is to protect the citizenship of the municipality from exorbitant taxes, and that was attained in this case when only the constitutional tax was levied. The fund provided by the ordinance to come out of rents, fines, forfeitures, and sales of land was more than sufficient to pay the interest and create a sinking fund for \$39,000 of the bonds, the amount unprovided for by taxation."

Brazeale vs. Strength, 196 S. W., 247 (*Court of Civil Appeals, Texarkana*).

The Court of Civil Appeals, Texarkana, held in this case that expense incurred for tick eradication work was an ordinary expense payable out of current revenues, and while it appeared that the county revenues would be insufficient to pay ordinary expenses incurred and contemplated to be incurred, yet it appeared it could be paid out of a fund on hand and was not the creation of a debt in the meaning of the Constitution. The court said:

"While the testimony showed that the current revenues of Harrison County for 1917 would be insufficient to pay ordinary expenses already incurred and which it was contemplated would be incurred by the county during the year, it further showed that the county, at the time the order in question was entered and at the time the judgment appealed from was rendered, had in hand funds sufficient to pay the expense of building the vats and dipping cattle and all ordinary expenses theretofore incurred by the county.

"So the question which confronted the trial court, was, it seems, whether it was beyond the power of the commissioners court to incur the expense contemplated by its order, because to do so, if other contemplated ordinary expenses of the county were incurred during the year, would result in creating indebtedness against the county which its current revenues were not sufficient to pay. If building the vats and dipping cattle was an ordinary expense of the county which it could pay out of 'some fund then within its immediate control,' as we have seen was the case, we do not think the commissioners court was without power to incur it for the reason stated. 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.

"There are provisions of the statute, however, which, it seems to us, point out a way to determine when the commissioners court has reached the limit of its power under the Constitution to create indebtedness against the county on account of its 'ordinary expenses.' Article 1433, Vernon's Statutes, provides for a classification of all claims against the county. Article 1438 provides for a classification of the funds belonging to the county. Article 1432 provides for the registration by the county treasurer of all claims against the county. Article 1436 requires the claims to be numbered in the order presented. Article 1437 requires the claims to be paid in the order they are registered. Where the requirements of the statute have been complied with, it seems to us it easily could be determined at any time whether the sum of claims representing ordinary expenses of the county amounted to as much as it reasonably could be expected the current revenues of the county would amount to. When it was found they did, it seems to us it might very well be said that such ordinary expenses of the county as were thereafterwards incurred were within the prohibition of Section 7 of Article 11 of the Constitution."

Lasater vs. Lopez, 202 S. W., 1039 (Court of Civil Appeals, San Antonio).

The court held that a contract with a contractor for work on roads to be paid for in interest bearing warrants over a period of years, was a debt within the meaning of the Constitution, but that provision in this case was made for interest and sinking fund, and that the warrants were valid. Affirmed by the Supreme Court in 217 S. W., 373.

American Roads Machinery Co. vs. City of Ballinger, 210 S. W., 267 (Court of Civil Appeals, Austin).

Warrants given in payment for road machinery, payable in six months to three years from date are void where no provision was made for interest and sinking fund as provided in the Constitution. Discussing *McNeal vs. Waco*, and *Mineralized Rubber Co. vs. City of Cleburne*, the court said:

"We believe they announce the settled law of this State."

Case Threshing Machine Co. vs. Camp County, 218 S. W., 1 (Court of Civil Appeals, Texarkana).

Camp County purchased road machinery and executed two warrants payable three and four years after date, respectively, with interest. No

provision was made at the time for taking care of their payment other than the regular 15-cent road and bridge tax. The court held this insufficient:

"To make provision for the levy and collection of the necessary taxes, when this has not been done by law, requires some affirmative action on the part of the county authorities with special reference to the particular debt being created or contemplated. It is not sufficient to provide for raising a fund which may or may not be lawfully used for its payment; but one must be provided for which cannot lawfully be diverted to any other purpose by a succeeding commissioners court. This provision of the Constitution is intended to operate as a limitation upon the power of commissioners courts to burden the counties with debts beyond the resources available for their payment, and must be applied by the courts with that end in view. The fact that it is averred that Camp County had the power to levy an additional tax of 15 cents on the \$100 does not materially alter the situation. The inquiry is, not what the commissioners court might have done in the exercise of its taxing power, but what did it do with reference to this particular debt? According to the averments of the appellant, it did nothing. It is true the petition states that ample funds were on hand for the payment of these warrants when they fell due; but that does not supply the vital omission. It is not enough to provide funds for the payment of the debt after it has been created; the Constitution requires this to be done at or before the time the debt is contracted. A compliance with that requirement is essential to enable the county authorities to contract a valid obligation to be paid out of the future revenues of the county. If the debt evidenced by the warrants sued on was, for the reasons stated, invalid at its inception, nothing the commissioners court could thereafter do would validate it. The county is not bound to pay a debt which was illegally created. The following authorities support the conclusions reached: *Rogers National Bank v. Marion County*, 181 S. W., 884; *Mitchell Co. v. Bank*, 91 Texas, 370, 43 S. W., 880; *Bassett v. City of El Paso*, 88 Texas, 168, 30 S. W., 893; *City of Terrell v. Dessaint*, 71 Texas, 770, 9 S. W., 593; *McNeal v. City of Waco*, 89 Texas, 83, 33 S. W., 322."

Austin Bros. vs. Patton, 1226 S. W., 702 (*Court of Civil Appeals, Galveston*).

Warrants given by Houston County in payment of road material and supplies. The court held that under the facts it was not shown that the warrants were invalid as creating a debt unprovided for. The rule was stated as follows:

"A valid debt may be created by a county without complying with the provisions of Article 11, Section 7. of the Constitution, requiring that it provide for payment at the time it is created, where it has a fund on hand under its control from which it contemplates the debt shall be paid, though it was not in fact paid therefrom. *Winston v. City of Fort Worth*, 47 S. W., 740."

City of Aransas Pass vs. Eureka Fire Hose Mfg. Co., 227 S. W., 330 (*Court of Civil Appeals, San Antonio*).

A city warrant was executed November 17, 1915, due July 2, 1916, in payment for fire hose purchased. The court held that it was not a debt in violation of the Constitution, saying:

"The evidence in this case shows that the hose was sold to plaintiff in error on an open account, the agreement being that it should be paid for in four months, with privilege of an extension for eight months more. At the end of four months the bill was unpaid and then the warrant was given payable July 2, 1916. The warrant provides for payment out of the general fund, and as it was to be paid within a year it can be assumed that it was to be paid out of the current funds of that year. The contract itself indicated that it was not to be paid out of revenues for future years, but out of current funds. The evi-

dence showed that the assessed valuation of the city property was \$1,200,000, and the rate of taxation was 25 cents on each \$100 of that valuation, which would amount to \$3000 per annum, besides poll taxes. The back taxes amounted to \$5000 or \$6000. There was collected for the general fund in 1915 the sum of \$7987.60. The warrant was to be paid out of that fund. The hose was necessary, if there was to be any protection from fire. The plaintiff in error got the hose and used it, and still has it, and paid nothing for it. The court was justified by the evidence in finding that the purchase price of the hose was to be paid out of current revenues of the city."

Capps vs. Citizens National Bank, 134 S. W., 808 (Court of Civil Appeals).

Holding that current expenses have priority of payment out of current revenues of a city over the debt of a general creditor, and hence where money held by a city to pay current expenses was inadequate for the purpose no part of the fund could be applied to the payment of a general creditor.

City of Beaumont vs. Masterson, 142 S. W., 984 (Court of Civil Appeals, Galveston), (writ of error denied by Supreme Court, 144 S. W., 14, 106 Texas, 618).

Constitution, Article 11, Sections 5, 7, have no application to proceedings for the improvement of streets, the cost to be paid in cash, two-thirds to be derived from special assessments on abutting property, and the other one-third in improvement bonds of the city.

The court also held that the fact that a part of the assessments levied were uncollectible did not require that the city foresee such event, and treat the uncollectible portion as a debt, within Constitution, Article 11, Section 5.

The court used this language:

"The provisions of the Constitution referred to (Article 11, Sections 5-7) have no application—in the nature of the case can have no application—to this case. Provision was made to pay cash for the work (two-thirds of it), and it was not contemplated that there would be any unpaid balance to provide for. That failure to collect part of the taxes created a deficit did not require that the city foresee that such would occur, and treat it as a debt, within the meaning of the article of the Constitution referred to. 20 Am. & Eng. Ency. of Law, 1176; Spilman v. Parkersburg, 35 W. Va., 605, 14 S. E., 279; Winton v. Fort Worth (Sup.), 47 S. W., 740."

Fabric Fire Hose Co. vs. Teague, 152 S. W., 506 (Court of Civil Appeals, Austin).

Contract for fire apparatus by city to be paid over a period of years without making provision for payment as required by the Constitution, is void.

Held, that the seller was entitled to recover the apparatus so sold to the city, and that the city's use of the property so purchased raised an implied promise to pay the reasonable rental value thereof and rendered the city liable for rent, which, being an ordinary debt, payable out of current revenues, was not within the contemplation of Article 11, Section 5, State Constitution. The court's reasoning on these two propositions is disclosed by the following, taken from the opinion:

"By Article 11, Section 5, of the State Constitution, it is provided that no debt shall ever be created by any city, unless at the same time provision be

made to assess and collect annually a sufficient sum to pay the interest thereon and to create a sinking fund of at least two per cent thereon. See, also, Article 488, R. S., 1895. It is conceded that this was not done, and the suit to recover possession of the fire apparatus was based on the theory that the purchase thereof, without complying with the constitutional provision, rendered the same null and void, and the court, in recognition of this contention, rendered judgment in favor of appellant therefor, which was correct. See *Mineralized Rubber Co. v. City of Cleburne*, 22 Texas Civ. App., 621, 56 S. W., 220; *McNeal v. City of Waco*, 89 Texas, 83, 33 S. W., 322; *Noel v. City of San Antonio*, 11 Texas Civ. App., 580, 33 S. W., 263; *City of Terrell v. Dessaint*, 71 Texas, 770, 9 S. W., 593.

"(2) But appellant urges that the court erred in not rendering a judgment in its favor for the rents of \$635 which it claimed to be entitled to. There is no question but what the city had the use and benefit of this property for a period of thirty-one months, and the court so finds. It has been expressly held, in *Mineralized Rubber Co. v. City of Cleburne*, supra, under circumstances similar to those in this case, that a city is liable for rent of property used by it. The use of this property by appellant would raise an implied promise to pay therefor the reasonable rental value thereof, which was found to be the sum of \$635. Now if this was a matter of ordinary expenditure, for which the city had the right to pay out of its current funds, then there is no reason why, under the pleadings and evidence, the city was not liable for such rent. This was not a debt in contemplation of law such as came within the constitutional provision above quoted, requiring that the city should, at the time of its creation, provide for the sinking fund for its payment, but was, in our judgment, a mere ordinary debt that could have been paid out of the current revenues of said city. See *McNeal v. City of Waco*, supra. And it does not appear but what the current revenue for the years during which the city had possession and use of said property was sufficient to have paid same."

Foard County vs. Sandifer, 105 Texas, 420, 151 S. W., 523 (*Supreme Court*) (*affirming* 134 S. W., 823).

A contract by the county by which it listed its school land for sale, agreeing to pay a commission, was held not to create a debt in violation of the Constitution, it being held that the claim was payable in the current year out of the current revenues of the year. The important part of the decision is that which holds that debts for current expenses may be based on the amount the county is authorized by law to raise by taxation. Upon this point our Supreme Court, through Chief Justice Brown, said:

"The contract required the sale to be made in six months by July 13, 1909. It was consummated before that time. The claim could have been provided for during the current year by a levy of a tax for that purpose. The power of the county to levy taxes had not been exhausted. It was necessary that the levy should have been made, and the test is: Did the county have sufficient power to pay the claim? There is no denial of that fact, which was proved, as was shown, by the evidence of Burk, the county judge of Foard County. In *City of Corpus Christi v. Woessner*, 58 Texas, 467, Judge Stayton said:

"We are of the opinion that the issuance of warrants on current expenses of a city, which do not exceed the current revenue derived from taxation, permitted by law to be levied to meet current expenses, and such other revenue as a city may have from other sources than taxation, cannot be said to be the creation of a debt prohibited by law unless a special tax be levied to meet the interest and create a sinking fund. The evidence shows that the revenue of the city for the year 1879, if it had been applied to proper municipal purposes, would have been more than sufficient to meet the payment of the warrants sued upon, after paying all other current and proper expenses. And it further appears that in addition to the money raised by taxation, permitted by law to meet current expenses, the city has an income of \$4000 per year for many years to come

from her wharf interests, and that from these two sources at the time of the trial of this cause there was a surplus in the treasury.' We cite *Terrell v. Dessaint*, 71 Texas, 770, 9 S. W., 593; *McNeal v. City of Waco*, 89 Texas, 83, 33 S. W., 324, by his irresistible logic, Judge Denman reaches this conclusion: 'We conclude that the word "debt" as used in the constitutional provisions above quoted, means 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.' The commissions in this case were by law made payable out of the county fund. It became due in the current year, and there was ability in the county by taxation to raise the fund for its payment. The claim did not constitute a debt within the meaning of the Constitution."

We now proceed to answer your inquiries seriatim, and as you will note we have for convenience numbered them from 1 to 17, inclusive, thus changing somewhat your method of numbering.

1.

THE CURRENT YEAR.

It is apparent from a reading of the Texas court decisions that the rule laid down in *McNeal vs. City of Waco* is considered the law in this State. This rule is as follows:

"The word 'debt,' as used in the constitutional provisions above quoted, means 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."

According to this rule, a debt incurred by a county *this year* to be paid out of *next year's* or *some future year's* revenues would be void unless provision be made at the time of its creation for a tax to provide for interest and sinking fund in obedience to the Constitution.

But what is *this year* and what is *next year* or a *future year*?

The State Constitution does not define the word *year*; nor does it expressly establish a "fiscal year." Our statutes do not fix a fiscal year except for certain purposes. Article 3896, R. C. S. of 1911, fixes the fiscal year to begin on December 1st for the purpose of the making of annual reports of fees of officers affected by the fee bill. Article 1491 of Vernon's Complete Statutes of 1920 provides that the annual report of the county auditor showing the condition of the finances of the county "shall be made to include all transactions during the year ending July 31st of each year." Interpreted in the light of our Constitution and the statutory law providing for county revenues, we hold that neither of these statutes fixes the fiscal year within the meaning of the Constitution as construed by our Supreme Court in *McNeal vs. City of Waco* and other cases as well as our Courts of Civil Appeals.

The expression "current revenues of the year" must be considered as if written in the Constitution, at least in the absence of a statute fixing a fiscal year and providing revenues according to such year; for the courts say the Constitution means as stated in *McNeal vs. City of Waco*, and the meaning of the Constitution is the Constitution.

The meaning of the word "year" may depend upon the connection in which it is used, and for that reason in different places it may not always mean the same thing. But when reference is made to a "year,"

in the absence of language showing another intention the calendar year is meant; that is, the year beginning January 1 and ending December 31. Based upon the authorities of America and England, 40 Cyc., page 2876, states it is a rule that—

“While the meaning of the term must be determined from the connection in which it is used and from the subject-matter with reference to which it is employed, unless from the context or otherwise a different intent is gathered, *the word means calendar year.*”

See also the following authorities:

Fretwell v. McLemore, 52 Ala., 124-145.

United States v. Dickson, 40 U. S. (15 Pet.), 162.

8 Words and Phrases, p. 7552, and authorities cited.

State v. Jennings, 47 S. W. (S. C.), 683.

Attention is also called to the fact that our statutes (Art. 5504, R. C. S. of 1911) define the word “year” to mean calendar year unless a different meaning is apparent from the context. This has been the law since, at least, 1879, as will be seen by referring to Article 3140 of Revised Statutes of 1879.

Our Supreme Court, then, is presumed to have meant calendar year unless we can point to some circumstance indicating the contrary. So far from there being any such circumstantial evidence, the Constitution and laws of this State providing for county revenues make it reasonably clear that the calendar year constitutes the fiscal year of the county within the meaning of the debt provision of the Constitution. Our State Constitution places a limitation on the amount of county taxes that may be levied “in any one year.” (Art. 8, Sec. 9.) Take ad valorem taxes, which constitute the principal source of county revenue. Property is assessed as of January first (Art. 7508, R. C. S.), and, for instance, taxes assessed as of January 1, 1921, and collected between the next October 1 and the next February 1 are “1921” taxes. As indicating conclusively that ad valorem taxes are for the calendar year, note that part of Article 7508, R. C. S., which provides that where the property is exempt from taxation and the period of exemption expires *between* January 1 and December 31, said property shall be assessed for only the pro rata of taxes *for the portion of such year remaining*. If we should call August 31 the end of the fiscal year, then clearly between August 31 and January 1 the commissioners court, if it should contract debts based on taxes accruing say eight months hence, would be burdening next year’s revenues for this year, and this is plainly what the Constitution inhibits unless the proper provision be made.

Again, poll taxes are levied as of January 1, and are for the calendar year (Art. 7354, R. C. S.). The same may be said of occupation taxes (Art. 7355 et seq.), and registration fees of motor vehicles, all registrations expiring with the calendar year (Art. 7012½, Vernon’s 1920 Stats.).

Upon the whole, we are of the opinion that county revenues are based upon the calendar year, and that our Supreme Court in using the expression “current revenues of the year” meant current revenues of the calendar year beginning January 1 and ending December 31, so far as counties are concerned.

2.

HOW YEAR'S REVENUE ESTIMATED.

Your next question is whether it may be assumed that all the taxes levied for a particular fund for the year will be collected during the current year.

The Supreme Court of Texas, in our opinion, has virtually answered this question in *Foard County vs. Sandifer*, supra. The rule to be deduced from this and other decisions is that the debt may be based upon the limit of the *ability to raise revenue at the time the debt is created*. Thus, if the commissioners court creates a debt in an amount reasonably payable out of taxes which it has thereafter during the year authority to levy for that year, it is to be presumed that the commissioners court intends to levy the tax and the debt is valid. See also 194 S. W., 553, 175 Ky., 399.

The ability to tax being the criterion, it follows that it is to be presumed, so far as the authority to create debts is concerned, that the taxes for the year will be collected. As was stated by the Supreme Court of Utah in *Fenton vs. Blair*, 11 Utah, 78, 39 Pac., 485, taxes after they are levied are "regarded as a legal certainty, and are to be treated as if already collected, and allowances may be made against such taxes to the extent of such levy." And in *McCavick vs. Ind. School Dist.*, 25 S. D., 449, 127 N. W., 476, it was said that "a tax levy in process of collection is constructively in the treasury," for the purpose of determining whether the debt limit has been reached. The fact that some of the taxes will probably not be collected until after the close of the year is immaterial. *Fenton vs. Blair*, supra; *Farmersville State Bank vs. Police Jury*, 138 La., 835, 70 So., 852.

See also the following authorities:

- State v. Stanard*, 165 Pac. (Ore.), 575.
- Johnson v. Board of Com'rs*, 56 Pac. (Okla.), 703.
- Darling v. Taylor*, 75 N. W. (N. D.), 766.
- Lewis v. Lofley*, 19 S. W. (Ga.), 57.
- Walling v. Lummis*, 92 N. W. (S. D.), 1064.
- Board of Com'rs v. Standley*, 49 Pac. (Colo.), 828.

Hence, we respectfully advise you, in answer to this question, that it may be presumed, for the purpose of determining the authority of the county to create debts, that all the taxes levied for the year will be collected.

If it be thought that such a rule makes a violent presumption in the light of experience, the answer is that our court decisions have in effect established this rule; moreover, the effect of the rule next announced will to a great extent counterbalance the evil effect thereof.

3.

DELINQUENT TAXES.

You next ask, "what account, if any, must be taken of the taxes levied for former years which it may be expected will be collected during the current year as delinquent taxes?"

The prima facie presumption should be indulged against the probable collection, during the current year, of such taxes. Let us bear in

mind our rule which says "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, etc." As to delinquent taxes, the test is this: is it reasonably apparent that they will be collected during the current year? In the absence of some fact which would be reasonably calculated to induce the belief that such taxes will be collected during the current year, they could not be taken into consideration in arriving at the limit of the debt creating authority of the county. In *McCrocklin vs. Nelson County*, 192 S. W., 494, the Court of Appeals of Kentucky held that taxes levied in the previous year and delinquent during the current year cannot be considered as part of such income where it is not "made to appear therein (in the answer) that any part of such delinquent taxes is collectible, or what steps have been, or will be, taken to enforce their collection."

Even if it should reasonably appear that such delinquent taxes will be collected during the current year, it might be that the amount thereof could not form the basis of new obligations owing to the fact that during a prior year obligations had already been created based thereon.

4.

RECEIPTS OTHER THAN TAXES.

Account may properly be taken of collections authorized to be used for a particular purpose which may reasonably be expected to be made during the year from other sources than taxation. In speaking of "current revenues of the year" our courts plainly mean revenues from any source permissible to be devoted to a given purpose. The question addressing itself to the commissioners court at the time of creating an obligation against a particular fund is whether there is reasonable ground to believe that sufficient revenue will be collected for that current year for that fund out of which the obligation can be paid. We have seen that as to taxes it may be assumed all taxes will be collected, but that as to delinquent taxes a prima facie presumption should be indulged against their probable collection during the year. As to taxes there is a reasonable measure of the amount which may be expected to be collected to be found in the authorized rate of taxation, or, if the rate has been fixed, the fixed rate itself. As to other resources, if there is any way by which the commissioners court can calculate the amount that may reasonably be expected will be collected for the year, it would be justified in creating obligations based on such anticipated collections. In the absence of information that would render this source of information unreliable, it would seem that the probable amount could be calculated by averaging the collection from similar sources for prior years. A debt or obligation incurred in good faith under these circumstances would not be void; that is, a debt based on such current revenues and in an amount which can be paid out of same as thus estimated.

It must be borne in mind that it is at all times a question of fact in each particular case as to whether under all the circumstances the commissioners court has reasonable ground for assuming there will be sufficient revenues of this class, together with taxes, upon which to base pecuniary obligations.

However, by taking the precautions above suggested the danger of

creating debts beyond the constitutional limit will be minimized if not avoided altogether.

The purpose of the Constitution is to prevent the creation of debts payable out of revenues of the county for future years without making the provision for interest and sinking fund as prescribed; that is, a method was provided by the framers of the Constitution designed to compel counties to live within their income—to operate as nearly as may be upon a cash basis—and not unduly burden the revenues of future years. A debt created this year to be paid out of next year's revenue, or out of any future year's revenue, is void without providing for interest and sinking fund as provided in the Constitution. So that county officials should take care not to create obligations beyond the ability of the county to pay out of current yearly revenues or out of some fund under their control without making such provision for interest and sinking fund, and, moreover, the question should be investigated carefully whether there is authority in a particular instance to create an indebtedness payable in the future even by making such provision for interest and sinking fund.

It is believed by the writer that by proper precaution and business methods the counties will be able to avoid creating, or attempting to create, void obligations; for the amount of current yearly revenues is ascertainable with a fair degree of accuracy.

5.

WHEN IS DEBT INCURRED?

Your inquiry in this connection is:

“When may it (the debt) be considered as having been incurred (within the meaning of Section 7, Article 11, State Constitution)? Is it when the contract therefor was made, or the labor and material furnished; or when the warrant is issued?”

Our Supreme Court said “debt” in this connection “means any pecuniary obligation imposed by contract, except such as were, *at the date of the contract,*” payable out of current yearly revenues or out of some fund in the immediate control of the corporation.

There is a disparity of opinion among the courts as to when debts are created within the meaning of constitutional provisions similar to ours; that is, as to whether it is at the date of entering into the contract or at the time the service is performed or properly delivered. From the decisions it is apparent that not every contract entered into which may obligate the county to pay money in the future out of future revenue is the creation of a debt in violation of the Constitution. From the necessities of the situation, it has been held that counties and cities are not precluded by the debt provision of the Constitution from providing by contract for certain continuous service, such as a water supply or electric light service. In such cases it is held that the debt is not created until the service is performed. Such was the holding of our Supreme Court in *City of Tyler vs. Jester*, 97 Texas, 344, 78 S. W., 1058, in which the court said:

“The making of a contract for water for a number of years to be delivered in the future did not create a debt against the city, but the liability of the city arose upon the use by it of the water during each year.”

In *Trask vs. Livingston County*, 210 Mo., 582, 109 S. W., 656, 37 L. R. A. (N. S.), 1045, the Supreme Court of Missouri stated that—

“It is the rule in this State that, when a municipal corporation contracts for a usual and necessary thing, such as water or light, and agrees to pay for it annually or monthly as furnished, the contract does not create an indebtedness for the aggregate sum of all of the installments, since the debt for each year or month does not come into existence until it is earned.”

The weight of authority is to this effect. See 37 L. R. A. (N. S.), page 1042, and note at page 1058; also 1917-E, L. R. A., pages 435, 437.

However, this doctrine is not to be extended to contracts for public improvements payable in installments. *Anderson vs. International Schl. Dist.*, 32 N. D., 413, 156 N. W., 54, L. R. A., 1917-E, page 428; *Trask vs. Livingston County*, supra; see also note in 37 L. R. A. (N. S.), page 1058; L. R. A., 1917-E, page 437.

There may be other reasons for holding a particular contract does not create a present debt. Thus in *City of Cleburne vs. Cleburne Water, etc., Co.*, 14 C. A., 230, 37 S. W., 655, there was a contract to furnish water for two future years at \$25 per hydrant. The court said that “the contract did not bind the city to take any specified number of fire hydrants, but this was left to the discretion of the city council. The contract simply fixed a price at which they were to be furnished. The city could take a greater or a less number for each current year, as its current revenues might allow.” And also that “*the debt was not created until the city designated and accepted the number of hydrants desired, and when this was done no reason is manifest to us why it should not be paid, like any other current expense of the city.*”

Likewise, where the county makes a contract for shells for road purposes for a year, with a reservation of authority in the county to designate from time to time the amount desired over a certain minimum, no debt was created at the date of the contract except as to such minimum quantity. *Broussard vs. Wilson*, 183 S. W., 814.

In these two latter mentioned cases it will be seen that the city and the county, respectively, had some option at the time of delivery as to the amount of the service or material furnished. Obviously, the debt is not created until the city or county designates the quantity desired. Such contracts may have no more effect than to fix the price per unit of the service or material contracted to be furnished.

In so far as it is feasible to make a definite statement of the law in answer to your inquiry, I think it may be stated as a general rule that a contract for a definite amount of material or labor, with no option on the part of the county, where nothing is left to be done except performance by the other party, creates a debt at the time of the making of the contract as distinguished from the time of furnishing the labor or material or the issuance of the warrant; but that contracts for necessities such as water and light or analogous service to be paid for as furnished over a period of years does not create a present debt in an amount equal to the sum of the cost of the service for the entire period.

6.

EFFECT OF PAYMENT OF VOID DEBT.

“If such an obligation is incurred and warrant issued therefor, and such warrant paid out of subsequent years’ revenues, was the *payment* of such warrant

illegal, and if so, can the amount of such payment be recovered at the suit of the county from the person to whom said warrant was issued and payment made?"

It appears proper here to state briefly the rule as to the effect of the action of the commissioners court in allowing a claim. When is it and when is it not conclusive and beyond collateral attack?

The authority of the commissioners court to audit and settle accounts against the county is judicial in its nature, and cannot be delegated or collaterally attacked. But its power in this respect is limited to decisions on questions of fact, and even as to the latter the rule cannot be carried to the extent of giving a conclusive effect to action of the commissioners court in excess of its jurisdiction or contrary to statute or the Constitution.

Padgett v. Young Co., 204 S. W., 1046.
Edmondson v. Cummings, 203 S. W., 428.
Callaghar v. Sallaway, 5 Texas Civ. App., 239, 23 S. W., 837.
August A. Busch & Co. v. Canfield, 135 S. W., 244.
7 A. & E. Ency. of Law (2nd Ed.), 1003.
McKinney v. Robinson, 84 Texas, 496, 19 S. W., 699.
Shirk v. Pulaski Co., 4 Dill., 209 Fed. Cas. No. 12794.
1 Dill. Mun. Corp. (3rd Ed.), Secs. 502, 503, 504, and notes.
15 Corpus Juris, pages 658-9.

It would be illegal to pay such a void obligation as is involved in this question. But, while as a general rule a county is not estopped by the illegal acts of its officers, circumstances may arise under which a county would be in no position to ask for affirmative relief and recover the amount paid from the person to whom said warrant was issued and payment made. I refer to instances where the contract is fully performed, payment made, and the county has received the benefits thereof and is unwilling or unable to place the other party in *statu quo*.

In Edwards County vs. Jennings, 33 S. W., 585, the Court of Civil Appeals held that the county could recover the consideration paid on a void contract to supply the county and others with water, where the county received no benefits, the contract having been unperformed by the other party. The court said:

"The fact will remain, if the allegations in the petition are founded on truth, that appellee has received the county's money without returning an equivalent therefor, and, while enjoying the fruits of the contract, will not be heard to advance the plea of *ultra vires*."

The court's decision seems to have been that the county could recover the full amount of the consideration if no benefits were received, or that sum less any benefit that may have been received.

This case also held that while the consideration paid could be recovered from the contractor, no recovery could be had against the contractor's bondsmen, on the theory that the bond was based on a void contract and therefore was itself void. The Supreme Court affirmed the case in 89 Texas, 618, but did not pass upon the question whether the county had a right to recover from the contractor himself, the only question before the court being as to the liability of the bondsmen.

But suppose the void contract has been fully performed, the money paid by the county and the benefits received? In that event equity will not permit the county to recover back the money paid and at the same time receive and retain the benefits of the performed contract.

The Supreme Court of Ohio, in the case of *State vs. Fronizer*, 77 Ohio St., 7, 82 N. E., 518, laid down what would appear to the writer the sound rule in this regard. As appears from that case, an Ohio statute declared void any contract entered into by county commissioners unless the auditor "shall first certify that the money required for the payment of such obligation is in the treasury, etc." The county commissioners entered into a bridge contract which was void for failure to comply with the statute. The bridges were constructed for the county and the contract price paid, and suit was brought by the State for the recovery of the amount paid from the county treasury, upon the ground that the contract was void. The court held against the right to recover, saying:

"The principle applicable to the situation is the equitable one that where one has acquired possession of the property of another through an unauthorized and void contract, and has paid for the same, there can be no recovery back of the money paid without putting, or showing readiness to put, the other party in statu quo, and that rule controls this case unless such recovery is plainly authorized by the statute. The rule rests upon that principle of common honesty that imposes an obligation to do justice upon all persons, natural as well as artificial, and is recognized in many cases. *Chapman v. County of Douglas*, 107 U. S., 348, 2 Sup. Ct., 62, 27 L. Ed., 378; *Lee v. Board of Commissioners*, 114 Fed., 744, 52 C. C. A., 376; *Bridge Co. v. Utica (C. C.)*, 17 Fed., 316."

See also *Sacramento County vs. Southern Pac. Co.*, 127 Cal., 217, 59 Pac., 568, and authorities therein cited.

A county is a public instrumentality and has a being separate and apart from its officers. Its interests, which are those of the public, are therefore to be protected, where possible, against the illegal and unauthorized acts of its agents. The doctrine announced by the Court of Civil Appeals in *Edwards County vs. Jennings*, supra, is calculated to afford this protection, in a degree, without, as it seems to us, doing violence to legal principles. But a county is not to be permitted to enjoy the fruits of a contract which is void for no other reason than that it creates a debt beyond the constitutional limit, and then, without offering or being able to place the other party in statu quo, sue for and recover back the consideration paid.

You are therefore respectfully advised, upon this phase of your inquiries, that where a county incurs a debt which is void by reason of Section 7 of Article 11 of the Constitution, but which would be authorized in other respects, and has paid out county funds upon such contract, it may sue for and recover the consideration paid if the other party has not performed the contract, and if partially performed may recover the consideration paid less the benefits received. It would seem, upon principle, also, that where the county is able, and offers, to place the other party in statu quo the amount paid is recoverable by the county.

But where the void contract has been performed on both sides, there being no ability or offer to return to the other party that which has been received by the county, the county cannot recover the amount paid. If the county should be in position, and should offer to return a portion of that which is received under the contract it could recover pro tanto.

7.

PERSONAL LIABILITY OF OFFICERS.

County Commissioners.

"If such payment was illegal, then to what extent, if any, can the county—having received the full benefit of the service, labor or material for which the payment was made—sue for and recover such payments from the officers participating in the issuance, approval and payment of such warrant, to wit, the members of the commissioners court authorizing such warrant, the county clerk issuing such warrant, and the treasurer paying such warrant?"

The question of the conclusiveness of the action of the commissioners court in allowing a claim was treated in answer No. 6, supra.

A county can make contracts only through agents. It would not do to say that there is no personal liability to the county of officials having authority to expend county funds where such officials exceed their lawful authority to the county's injury and damage. To allow this to be true would be to condone, in a measure, wrongful acts of public officials, with no power in certain cases of redress so far as the material welfare of the county is concerned.

The correctness of the rule stated in 15 Corpus Juris, page 517, cannot be doubted:

"He (a county officer) is liable to the county, independently of his bond, for any breach of the duties imposed on him by statute, provided such breach results in financial loss to the county."

A similar statement, relative to the handling of public funds, is to be found in the following language in 23 A. & E. Ency. of Law, page 372:

"It is the duty of a public officer charged with the custody and expenditure of public money to keep it safely, and disburse and account for it in accordance with law, and to turn over to the proper authority any sum remaining in his hands at the expiration of his terms. For any failure to do so he and the sureties upon his official bond are liable."

While the relationship existing between a public officer and the government may not be in all things analogous to that of principal and agent, there is no good reason why the same rules should not apply in so far as personal liability to the principal for unauthorized acts are concerned. In speaking upon this subject, Mr. Throop, in his work on public officers, Section 773, says:

"In general, the rules of law relating to the individual liability of a public officer, in cases of this kind (among others, cases of acts in excess of powers), are the same as those which govern the individual liability of a private agent in similar cases, and are considered in treatises upon the law of principal and agent, the law of contracts, and the law of bills of exchange and promissory notes."

The authorities hold a private agent liable to his principal for any loss or damage resulting from disobedience to instructions.

2 C. J., 715, 720.

1 A. & E. Ency. of Law, 1058.

In Jones vs. Currie, 34 La. Ann., —, in passing upon an allegation that there was a diversion of funds by city authorities out of which a certain claim should be paid, the court said:

"Had the diversion charged taken place and had the plaintiff thereby sustained loss and injury, there can be no doubt that the defendants would have been liable."

And in *Walton vs. Adair*, 96 App. Div., 75, 89 N. Y. S., 230, it appears that the county treasurer paid over a fund to a place contrary to where the law provided he should pay it. The court said that:

"Having diverted the fund, however, from the channel in which he was by law commanded to place it, before he can be relieved from responsibility for his wilful act he must show clearly that the town has not lost thereby."

We call particular attention to *State vs. Allen et al.*, 46 S. W., 303, a Tennessee case. The State Comptroller and other officials made an unauthorized agreement whereby State money was deposited in a certain bank in consideration of a loan to the State and other concessions. Allen and his bondsmen, the Comptroller and his bondsmen were sued for interest upon the moneys which he permitted to remain deposited in the bank contracted with, or which, as was alleged, he retained for an unreasonable length of time before turning the same into the State Treasury. The court held, in substance, that the State Treasurer would have been liable to the State to the extent of any injury or damage suffered by the State, but that under the facts of the case the State had not suffered any loss, saying:

"Confining ourselves to this record, if we could see that the State suffered any damage by reason of the arrangement that was made under which this money was deposited with said bank, we would have no hesitancy in holding that the Comptroller and the sureties were liable, and that his good intention would not relieve him from liability. We take it that, if an officer of the State, handling its revenues, commits an act which does an injury to the State, he will, if his act be without the sanction of the law, be liable to the State for all the damages it sustains in consequence of his conduct. But, if an official does an act not sanctioned by the law, under the honest belief that his act will redound to the good of the State, he will not be responsible therefor unless it appear that damage resulted to the State in consequence of it. This is the aspect of this case on this subject."

This opinion would be unnecessarily lengthened to discuss the authorities further on this point. The truth is, no adjudicated case has arisen, that the writer is able to find, in which the exact case put by you has been decided. Upon principle, however, there can be no reasonable doubt that the county commissioners voting in favor of the proposition would be liable to the extent of any loss or damage suffered by the county; for your case presupposes a wrongful act. A void debt has been incurred, and it would not have been void had reasonable care been exercised. If in good faith it had been reasonably apparent that the debt was payable out of current revenues of the year or out of some fund under the control of the commissioners court, the debt would have been valid. Assuming a void debt, we assume a wrongful exercise of authority.

We conclude that the members of the commissioners court responsible for the creation of the void obligation contemplated by your question would be liable to the county to the extent of the damage or loss suffered by the county proximately caused by such unlawful act or acts in creating the void obligation.

True, in the case you put, the county has received the benefit of the contract which has been executed, but this does not necessarily mean

that the county has not been damaged. The facts in a particular case might show that the county had not suffered injury; if so, no recovery could be had against the commissioners. It will be remembered that in the supposed case the county has paid out public funds for an unlawful purpose, funds that perhaps were needed in other directions. It would be hazardous, to say the least, to presume that the county would not be injured.

Obviously, we could not advise you as to the extent of the injury and consequent extent of the right of recovery. Suffice it to say there would be a liability measured by the extent of the injury, if any, which must be determined in the light of the facts in each particular case.

The County Auditor.

No more liberal rule should apply relative to the liability of the county auditor than that which is applicable to the county commissioners, for under the law no claim, bill or account shall be allowed or paid until same shall have been examined and approved by the county auditor (Art. 1481, R. C. S.), and this officer is expressly inhibited from auditing or approving any claim against the county unless the same has been contracted as provided by law (Art. 1484, id.). The county auditor also must countersign warrants except for jury service (Art. 1485, id.). Besides, from the very nature of the duties of the county auditor he is peculiarly in a position to be familiar with the condition of county affairs, and would be calculated to know whether under the facts and circumstances the county has authority to incur an obligation without violating the Constitution.

Hence, we are inclined to the opinion that the liability of the county auditor, under the case supposed by you, is to be determined by the same rule applicable to county commissioners, which we have stated above.

The County Treasurer.

The statute law of this State (Art. 1509, R. C. S.), relative to the county treasurer, provides that

"If such treasurer shall have any doubt of the legality or propriety of any order, decree, certificate or warrant presented to him for payment, he shall not pay the same, but shall make report thereof to the commissioners court for their consideration and direction."

This statute imposes a duty upon the county treasurer in respect to any order, warrant, etc., as to the legality or propriety of which such officer has doubt. A breach of this duty clearly renders him liable to the county for any injury suffered by the latter by reason of such breach. If he has knowledge, or by the exercise of ordinary care should have knowledge that a particular obligation is void under the Constitution, he would violate the law and create a liability against himself to the county for any injury caused thereby, unless he complies with the statute above quoted by reporting the matter to the commissioners court for their consideration and direction.

In the case of McDonald vs. Farmer, County Treasurer, et al., 56 S. W., 555, the Court of Civil Appeals held that a county treasurer, acting in good faith, and exercising proper care and prudence, was not

liable to the county for paying a warrant which was subsequently discovered to be void. In that case the court used this language:

"He cannot have credit for a warrant issued for an illegal claim, if he has reason to believe that the demand for which it was issued was in fact illegal."

The court intimated, however, that the county treasurer would be relieved of liability for paying a claim which he had reason to believe illegal, by reporting it to the commissioners court and said court after consideration directing the claim to be paid; and that is probably correct. Upon this point the court said:

"If, after report to the commissioners court, it should direct the claim to be paid, it may be at least questionable if the treasurer has any further discretion as to payment."

Questions of fact enter into the matter of whether a debt has been created by the county without compliance with the Constitution, and it might well be held that after the county treasurer reports a doubtful claim to the commissioners court as provided by the statute and that court, after consideration, directs the payment of the claim, the questions of fact are conclusively determined so far as the treasurer is concerned.

Our statement as to the liability of the county treasurer under the circumstances stated by you is this: If he has knowledge of the facts reasonably indicating that the debt is void under the Constitution, or by the exercise of proper care should be in possession of such facts, he is liable to the county to the extent of any injury suffered by the latter, unless he complies with Article 1509, R. C. S., and after such compliance the commissioners court upon due consideration directs the payment of the claim; and in the latter event he would probably be relieved of personal liability for paying the claim.

We may here add that the fact that other county officials are also liable will not prevent a particular county officer being liable for his wrongful act if such act was also a proximate cause of the injury to the county. *Padgett vs. Young County*, 204 S. W., 1046, 1053; *Bow County vs. Davies*, 40 Mont., 418, 107 Pac., 81. In the latter cited case this language appears:

"The negligence of the treasurer and the misconduct of Farrell operated as concurrent causes. The principle applicable is that, where two causes operate concurrently to produce an injury, both are to be deemed direct proximate causes, and liability attaches to all persons who had to do with putting either of the causes in motion."

The County Clerk.

It is not so clear that the county clerk would be liable to the county, under any circumstances, for issuing a warrant upon an account such as you describe. The courts would probably be reluctant to hold him liable. In all probability it would have to be a very palpable and flagrant case of creating a debt in violation of the Constitution before the county clerk would incur a liability for issuing the warrant.

However, upon principle, the county clerk would not be justified in issuing a warrant upon an obligation which he knows, or by proper care, should know is illegal. He is the agent of the county and is responsible to his principal for his unauthorized acts the same as other county officials.

The only case we find involving the liability of the county clerk for issuing void warrants is *Myers vs. Colquitt*, 173 S. W., 993. That case is not an authority upon the proposition you put, as the warrants issued were fictitious and forged. The court held the county clerk and his bondsmen liable to the county for the act of the clerk's deputy in issuing and selling the fictitious warrants to the county's damage.

But the court *did* hold that the issuance of warrants is an "official act" of the county clerk. Certainly a court would not mandamus the county clerk to issue a warrant upon a claim clearly illegal. He would be justified in refusing to issue such a warrant. By a parity of reasoning he would probably not escape all liability for issuing a warrant upon a claim clearly void.

We are therefore constrained to advise you that the county clerk would be liable to the county to the extent of the injury suffered by the latter for issuing a warrant upon a claim or account which he knew at the time of such issuance was illegal and void under the provision of the Constitution under consideration, or which under the circumstances he by the use of ordinary care should have known was illegal and void.

8.

ILLEGAL OBLIGATIONS NOT CONSIDERED.

Answering your question numbered 8, beg to advise that illegal obligations incurred during previous years need not and should not be taken into consideration in determining the amount of outstanding debts of the county in arriving at whether a current obligation being incurred is a debt within the meaning of the Constitution. Unpaid warrants issued upon such void obligations should be eliminated.

We have seen from the decisions that an illegal and void debt under Section 7 of Article 11 is not collectible from the county. If this be true, why take it into consideration? A void obligation is no obligation at all.

9.

FUNDING WARRANTS.

The illegality of incurred obligations cannot be cured by the issuance of funding warrants, and any funding warrants based on prior illegal obligations would be void.

37 L. R. A., 1102.

Leavitt v. Somerville, 105 Me., 517, 75 Atl., 54.

L. R. A., 1917-E, p. 451.

Re Afton, 43 Okla., 720 L. R. A., 1915-D, 978, 144 Pac., 184.

City of Tyler v. Jester, 74 S. W., 359, affirmed 78 S. W., 1058, 197 Texas, 344.

10.

FUNDING WARRANTS—EFFECT OF ON CURRENT YEAR'S TRANSACTIONS.

Assuming the validity of funding warrants which supersede warrants previously issued and registered, and which funding warrants are payable in future years, interest and sinking fund having been duly provided for, it would not be necessary during the current year to take such warrants or indebtedness into account in determining when the funds

within the control of the county, together with the expected revenues, have been exhausted within the "debt" provision of the Constitution. Such funding warrants, assuming their legality, render the debt no longer a charge on current revenues of the year or any fund in the immediate control of the county, but on the other hand a lawful charge on future revenues. Therefore there would be no reason for taking such debt into consideration in calculating the debt creating power of the county payable out of current revenues of the year or funds on hand, except, of course, to the extent of any tax that may be set aside for that year for interest and sinking fund.

11.

OUTSTANDING DEBTS.

"In years subsequent to the issuance of such funding warrants, or the creation of debts for which a tax is levied to pay interest and create a sinking fund, to what extent, if any, should the taxes so levied be taken into consideration in determining the amount of taxes which may be expected to be available for the payment of obligations incurred during the current year?"

In answer to this question we respectfully advise that taxes so levied should be eliminated and should not be considered as a part of the available revenue of the year for which levied for the purpose of forming the basis of new obligations. We, of course, are again assuming the legality of the action of the commissioners court in issuing the funding warrants or creating the debts and levying the tax for interest and sinking fund. It would be futile to say there was authority to levy the tax for interest and sinking fund and then allow such tax to be used for other purposes or to create additional obligations based thereon.

The State of Kentucky operates under a very similar constitutional provision to ours. As indicating the holding of the Court of Appeals of that State as to the duty of the county authorities to take into consideration outstanding indebtedness created in former years, in arriving at the limit of their power to create new obligations, we quote the following from *McCrocklin vs. Nelson County*, 192 S. W., 494, 500:

"If, however, in good faith, a county does, in anticipation of its proper revenue, create debts in excess of what it collects, this surplus debt must be carried as a debt to the next year, and succeeding years until paid, and must be taken account of as an indebtedness of that year, and succeeding years, until paid, in exactly the same manner as if the carried-over debt was created in the year to which it was carried."

And also the following from *Southern Bitulithic Co. vs. Detreville*, 175 Ky., 399, 194 S. W., 553:

"To allow the municipal authorities in each year to create an indebtedness up to the income and revenue provided for the year, regardless of previous outstanding indebtedness created in former years, would be to defeat the plain purpose of the section in limiting the rate of taxation and in limiting the power of the municipality to become indebted in any manner or for any purpose beyond the income and revenue for the year, for under such a construction the limitations of the section as to the creating of indebtedness by a vote of the people would be practically useless."

The Kentucky cases may go too far, for it is conceivable that a county might have outstanding valid indebtedness incurred in prior years sufficient in amount to consume all or the major portion of the current

revenues for a particular year. In such an event, would the county be precluded from incurring debts absolutely essential to the carrying on of ordinary county business?

We do not believe your inquiry supposes such a situation, and for that reason the above statement may stand as the general rule.

12.

TRANSFER OF FUNDS.

Your question number 12 is answered in the negative. Money in the general fund of the county, representing taxes levied and collected for that fund, cannot be legally transferred to the road and bridge fund or used for the purpose of the road and bridge fund. This was expressly decided by our Supreme Court in *Carroll vs. Williams*, 202 S. W., 504.

13.

GENERAL FUND—ROAD PURPOSES.

Nor is it lawful for obligations properly chargeable to and payable out of the road and bridge fund to be issued against or paid out of the general county fund. The case next above cited is also cited as authority for this proposition.

14.

RECOVERY OF MONEY SO ILLEGALLY PAID.

I assume there were not sufficient funds on hand or under the control of the commissioners court for road and bridge purposes upon which to base the obligation, and that the same was not reasonably payable out of current revenues of the year authorized to be used for roads and bridges; for otherwise there would be no necessity of going into the general fund for road and bridge purposes. Under such circumstances, the status of the matter would not differ materially from that discussed in our reply to your questions numbers 6 and 7, and as to the right to recover the amount so illegally paid, from the persons receiving the payments, or from the officers authorizing, issuing, approving and paying the warrants, you are respectfully referred to our answer to those questions.

In the event, however, such obligation is valid, there being funds in the control of the commissioners court out of which such obligation is properly payable, or current revenues of the year upon which it may be properly based, but the same is actually paid out of the general fund or out of a part of such fund unlawfully transferred to the road and bridge fund, a different situation might be presented, depending on the facts in the particular case. Thus, if at the time the county demands the return of the money so paid out it has ample funds in the road and bridge fund out of which it might reimburse the general fund, it could probably not recover, at least without offering to make payment out of the road and bridge fund which would appear to be a useless circumlocution. On the other hand, if there are no moneys in the road and bridge fund out of which the payment may be made of the valid debt, and payment is actually made out of the other funds above mentioned, the payment would result in the same liabilities, it appears to the

writer, as those involved in the payment of a void debt; and this subject has already been discussed.

15.

FUNDS ILLEGALLY TRANSFERRED CANNOT FORM BASIS OF OBLIGATIONS.

After money representing ad valorem taxes is transferred from the general fund to the road and bridge fund, the same cannot be taken into account as funds within the control of the county in the latter mentioned fund, in determining when an obligation of the county becomes a debt within the meaning of the Constitution. This is not necessarily true with respect to "statutory funds" authorized to be transferred. But after even "statutory funds" have formed the basis of obligations in one fund they could not be transferred to another to form the basis of new obligations.

Our State Supreme Court in *Carroll vs. Williams*, above cited, has made it clear that the general fund derived from ad valorem taxes is not to be considered as applicable to the road and bridge fund. If the former cannot be used for the purpose of the latter, it is beyond question that it could not form the foundation of obligations incurred for the purpose of the latter.

16.

COUNTY JUDGE ALLOWING CLAIMS.

We have shown that the power and authority of the commissioners court to audit and settle accounts against the county is judicial and cannot be delegated. (See answer to question No. 6.) The county clerk would be wholly unjustified in issuing a warrant upon the county treasurer upon a claim allowed and approved by the county judge only. The county clerk is charged with a knowledge of the law, and in issuing warrants upon claims not authorized and allowed by the commissioners court he would be guilty of negligence as a matter of law. *Padgett vs. Young County*, 204 S. W., 1046. The county clerk would therefore be liable to the county for any injury suffered by the county proximately caused by such wrongful and unlawful conduct. If the county should be damaged to the extent of the amount paid out on such claim, then the county would have a cause of action against the county clerk for such amount.

The county judge would likewise, as a matter of law, be guilty of acts in excess of his authority, therefore unlawful acts, and his liability would be the same as that of the county clerk.

The county treasurer would also be liable to the same extent if he had actual knowledge of the fact that the commissioners court did not duly allow such claims, or if by the exercise of ordinary care he should have had such knowledge.

The right of the county to recover the amount so paid (but not yet due, or if due out of the wrong fund) from the person to whom it was paid would seem to be governed by the same rules set forth in answer to your question No. 6; for in both cases the *payment* was illegal. I respectfully direct your attention to what we said in answer to that question on page 34 of this opinion.

But where there is a valid debt, past due, properly payable out of a

proper fund, and which has been paid out of such fund in the unlawful manner suggested, it is doubtful whether the county could recover the amount so paid from the person receiving the payment. The duty owed by such person to pay the county would be of no more weight or dignity than the duty of the county to pay such person the debt due him.

17.

LIMITATION.

The four-year statute of limitation would apply in respect to suits on official bonds of the county officials herein discussed for the recovery of moneys illegally paid out under the circumstances asked about.

Hillman v. Gallagher, 103 Texas, 427, 128 S. W., 899.

Jeff Davis County v. Davis, 192 S. W., 291, writ of error refused, 197 S. W., 7, No. Op.

Charlton v. Harris County, 228 S. W., 969.

In our discussion of the liability of county officers to the county for breach of official duty resulting in injury to the county, we have seen that there is a liability irrespective of the official bond. As to this, the two-year statute would doubtless apply. That part of Article 5687 (Subdivision 4) fixing a two-year limitation for "actions for debt where the indebtedness is not evidenced by a contract in writing" appears to control, for the word "debt" as there used is not to be restricted to its technical or common law meaning, but includes any open, unliquidated claim for money.

O'Conner v. Koch, 29 S. W., 400, 9 C. A., 586.

Water Co. v. Cleburne, 1 C. A., 580, 21 S. W., 393.

Gordon v. Rhodes & Daniel, 117 S. W., 1027.

Hillman v. Gallagher, 120 S. W., 505.

Coleman v. Ebeling, 138 S. W., 199.

As to actions against those who receive the unlawful payments, for the amounts so paid, the two-year statute of limitation would apply, as their liability would be upon implied contract to return money unlawfully had and received and would not, in all probability, be based upon a contract in writing.

Jeff Davis County v. Davis et al., 192 S. W., 291.

There has been considerable delay in rendering this opinion, but it has been unavoidable. Aside from the fact that the matter presented called for an enormous amount of research, there has been an unprecedented quantity of business engaging the attention of this department during the recent past. The regular work of the office has been augmented by that occasioned by sessions of the Legislature.

Trusting the delay has not caused great inconvenience, and thanking you for the assistance you have given us in arriving at what we hope are correct conclusions, I am,

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2289, Bk. 55, P. 140.

BONDS—COMMISSIONERS COURT—AGENTS—WORDS AND PHRASES.

(1) County special road bonds and road district bonds must continue in the custody of and under the control of the commissioners court and must be sold by said court to the highest and best bidder for cash, either in whole or in parcels, at not less than their par value.

(2) The words "par value" mean a value equal to the face of the bonds and accrued interest to date of sale.

(3) The authority conferred upon the commissioners court to sell bonds carries with it the authority to employ agents to assist in such sale, but the court would not be bound by any contract entered into between an agent and the party bidding on the bonds.

(4) The commissions of a selling agent may be paid out of the proceeds from the sale of the bonds.

(5) The commissioners court is not required to advertise county special road bonds for sale.

February 9, 1921.

Hon. B. S. Wright, County Attorney, Wharton, Texas.

DEAR SIR: In your communication of the 6th instant, addressed to the Attorney General, you submit the following:

"Wharton County is contemplating the sale of certain county road bonds issued under the provisions of Chapter 2, Title 18, Revised Statutes of the State of Texas, as now amended. Article 632 provides that said bonds shall be sold 'at not less than their par value'; hence please advise whether said bonds must be sold for par and accrued interest, as specified under other statutes with reference to bond issues, and whether the term par value as used in said Article 632 includes accrued interest?"

"Also, please advise whether a commission can be paid to an agent to sell the bonds, and whether same can be paid out of the proceeds of the sale of the bonds, and if a commission can be paid by the county, but not out of the sale of said bonds, then out of what fund may same be legally paid?"

"Also, is it necessary that said bonds shall be advertised for sale to the highest and best bidder?"

Replying, I beg to say:

(1) By Article 632, R. S., 1911, as amended by Chapter 203, Acts 1917, it is provided that county special road bonds

"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 their 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. * * *"

The general law relative to county bonds provides that "no bond shall be sold at less than its par value and accrued interest, exclusive of commissions." (Art. 615, R. S., 1911.) The general law with reference to county bonds, when not in conflict with the provisions of the act authorizing the issuance of *county special road bonds* and *road district bonds* shall apply to the "issuance, approval, registration, sale and payment" of such special road bonds or road district bonds. (Art. 633, R. S., 1911.)

Judge Dillon in his work on Municipal Corporations, stated the following rule:

"In disposing of the bonds, municipalities are frequently prohibited from selling them 'at less than the par value thereof.' The words 'par value' when

so used mean a value equal to the face of the bonds and accrued interest to date of sale. When the bonds draw interest from their date, and are disposed of after their date, with accrued interest attached, their face or 'par value' within the meaning of the statute, is the sum of the principal and the accrued interest." (Dillon on Municipal Corporations, 5th Edition, Volume 2, Section 895.)

Therefore, the road bonds authorized by Wharton County under the provisions of Chapter 2, Title 18, R. S., 1911, and amendments, must be sold "at not less than their par value," and since the bonds are to draw interest from their date, the term "par value" within the meaning of the statute is par and accrued interest.

(2) The statute makes it the duty of the commissioners court to sell county and road district bonds and this authority cannot be transferred. In *Jones vs. Veltmann*, 171 S. W., 287, it was held by the San Antonio Court of Civil Appeals that an order of the commissioners court transferring the custody of the bonds to the county attorney and giving him unrestricted authority to sell, was void. The opinion in that case declares:

"It is a well-settled principle that the public powers or trusts devolved upon a council or governing body of any subdivision of a state, to be exercised by it when and in such manner as it shall deem best, cannot be delegated to others. Dillon, Mun. Corp., Sec. 244. No direct authority is found in the statutes for the employment of an agent to have the custody of and sell county or district bonds, and the principle should be always remembered that a public corporation is a governmental agency of very limited powers, hedged about with restrictions, and the authority to employ agents to assist in the performance of duties devolved on the governmental agency must be expressly given or strongly implied from the language of the statute. It has been held that power of a municipality to issue and sell bonds carries with it the implied power to secure such reasonable and necessary assistance as may be requisite to make an advantageous sale. *Armstrong v. Ft. Edward*, 159 N. Y., 315, 53 N. E., 1116; *Slayton vs. Rogers*, 128 Ky., 106, 107 S. W., 606. In the case of *Davis vs. City of San Antonio* (Civ. App.), 160 S. W., 1161, this court placed the authority of the city to employ agents to sell bonds on the language of the charter which permitted the employment of agents when 'deemed necessary for the good government and interest of the city.' But we are of opinion that the authority to sell lodged in a governmental agency would carry with it the authority to employ agents to assist in such sale, but at the same time it would not carry the authority to place the sale of the bonds at the absolute discretion of anyone. *Blair v. Waco*, 75 Fed., 800, 21 C. C. A., 517. In the employment of such agencies, the most absolute good faith would be required, and no pretended agency to sell bonds could be made the basis of an increase of an officer's salary. There could have been no necessity for releasing the custody of the bonds to Frank Lane, in the very teeth of the statute, because, if his assistance in selling the bonds had been demanded, he could have given that assistance fully as well with the bonds in the custody provided by law."

It will thus be seen that the authority to sell conferred upon the commissioners court carries with it the authority to employ agents to assist in such sale, but the commissioners court would not be bound by any contract entered into between an agent and the party bidding on the sale of the bonds. The bonds must continue "under the control of the commissioners court"; and must be sold "by said court." If the assistance of a selling agent is necessary, then his commissions may be paid out of the proceeds from the sale of the bonds. The Wharton County road bonds were authorized at an election held within that county on July 19, 1919, under the provisions of Articles 637a et seq. of Section 2, Chapter 203, Acts of 1917. This act was silent in re-

spect to expenses incident to the issue or sale of county road bonds, but it was amended by Section 1 of Chapter 38, Acts 1919, Second Called Session, and the amended act, among other things, provides:

"That the necessary expense incident to the issuance of said bonds may be paid out of the proceeds from the sale thereof."

This act became effective July 25, 1919, and its provisions will control the sale of the bonds in question, for "statutes speak from the time they take effect, and from that time they have posteriority." (Lewis' Sutherland on Statutory Construction, 280.)

(3) We find nothing in the law requiring the commissioners court to advertise county special road bonds for sale.

Yours very truly,

W. P. DUMAS,
Assistant Attorney General.

Op. No. 2419, Bk. 57, P. 59.

COUNTY WARRANTS—ROAD DISTRICTS—ROAD FUNDS.

1. Counties may issue warrants for the construction of road in any part of a county under proper contract.

2. Funds derived from the sale of road district bonds, when not issued for the construction of certain designated roads, may be used for the construction of any roads in said district. Any unused portion of said funds may be used to retire the bonds of such district.

March 30, 1922.

Judge F. J. Reese, County Judge of Comanche County, Comanche, Texas.

DEAR SIR: I have your letter of March 17, 1922, addressed to Hon. W. A. Keeling, Attorney General, and inasmuch as the letter contains a full statement of facts upon which you ask an opinion, I quote same in full, as follows:

"As county judge of Comanche County, Texas, and for the benefit of Comanche County, I desire to respectfully present the following state of circumstances to you and respectfully request your opinion and advice thereon:

"Road District No. 4 in Comanche County, Texas (which does not embrace the entire county by any means), held a proper election for the issuance of bonds and to levy a tax to pay the same, and which bonds were issued and duly approved; and were sold to the National Bank of Cleburne, Cleburne, Texas. The National Bank of Cleburne in payment for the bonds, issued its certificates of deposit, payable to the county treasurer of Comanche County, and in order to guarantee the payment of said certificates of deposit at the respective dates of maturity, the National Bank of Cleburne as principal and divers individuals of Johnson County as sureties, executed and delivered a guaranty bond payable to the county treasurer of Comanche County, Texas.

"All of the certificates of deposit have been paid except two in the sum of \$21,250 each, maturing, respectively, January 13, 1922, and February 13, 1922, which are unpaid.

"The National Bank of Cleburne is in the hands of a receiver and due presentment was made of said certificates of deposit to the officers of the bank, the receiver and the sureties.

"The road bonds were delivered to the National Bank of Cleburne and sold by it and all of the proceeds obtained from the sale of said bonds went into the possession of the National Bank of Cleburne and it received the full benefit from the sale of said bonds.

"In order to secure an extension of time and to further guarantee the payment of said two certificates of deposit (which bear interest from their maturity), the sureties on the original guaranty bond to the county treasurer of Comanche County, executed a contract whereby they as principals agreed to pay the same on November 13, 1923, with interest at 8 per cent from the respective dates of maturity of said certificates of deposit; so that the certificates of deposit payable to the county treasurer of Comanche County as above stated, have the following sources to look to for payment:

"1. The dividends (if any) paid by the receiver from the assets of the National Bank of Cleburne.

"2. The solvency of the divers sureties.

"A contract for building roads in Road District No. 4 was entered into by Comanche County with road contractors, a copy of which proposal, contract (omitting specifications), and bond is herewith submitted.

"The work has progressed under this contract with the contractors, and there will not be available funds to finish paying for this work, until the collection of the certificates of deposit above stated. The work will possibly be completed in the course of sixty or ninety days, at which time the balance of the money due the contractors under the contract, will be due and payable; and in default of which payment, suit will be brought against the county by the contractors.

"The above being the facts existing with reference to the situation, I desire to be advised as to the following matter:

"(1) Can the commissioners court of Comanche County in order to meet the emergency, under the general powers given the commissioners court under Revised Statutes of Texas, and in line with the decision of the Supreme Court in the case of Lassetter vs. Lopez, 217 S. W. R., 373, settle and direct the payment of this account to the contractors and in order to secure funds for the payment thereof, issue the interest-bearing warrants of Comanche County, maturing annually in future years?

"If this can be legally done, and be approved by your department, the warrants can be sold and money obtained with which to pay the balance due the contractors and avoid a lawsuit.

"(2) As shown in the above statement of facts, this money would be used to pay for roads wholly in Road District No. 4 of Comanche County; and although the certificates of deposit are payable to the county treasurer of Comanche County, yet in fact this represents the security obtained for the delivery of that much of the bonds of Road District No. 4.

"(3) Will it be legal for Road District No. 4 as a body corporate, acting through its commissioner as its proper official, to execute and deliver to Comanche County the obligation of Road District No. 4, bearing the same rate of interest as the proposed county warrants, and in the principal sum of \$42,500, and assign and transfer to Comanche County as additional security therefor, its right and title in the contract of payment by the Johnson County sureties, to reimburse Comanche County for the issuance of the warrants above proposed?

"The above course is contemplated by the commissioners court if the same meets the approval of this department.

"There is a pressing emergency in the matter as is apparent and Comanche County desires to at all means avoid a lawsuit, and if the course above contemplated should not in the opinion of your department be legal, will you kindly advise what course you suggest for Comanche County to pursue under the state of circumstances and facts above set out."

In answer to question 1, I have to say that the commissioners court of Comanche County would have authority to issue warrants for the construction of roads in any part of the county under a proper contract, said warrants to be issued and delivered after the work has been done. (See Lasater vs. Lopez, 217 S. W., 373.)

I have examined the record in the original bond issue for District No. 4 and find that the bonds mentioned in your letter were issued for the purpose of constructing, maintaining and operating macadamized, graveled or paved roads and turnpikes, or in aid thereof, and that no

particular roads in Road District No. 4 were designated to be built with the proceeds of this bond issue. In my opinion, a new contract would be necessary for the remaining portion of your roads, and in this connection I call your attention to Article 2268a, Vernon's Complete Statutes, 1920, which requires publication once a week for two weeks of all contracts calling for or requiring the expenditure of \$2000 or more out of any funds of the county, or subdivision of any county, and requiring competitive bids.

In the second clause of your first question you say, "If this can be legally done, and be approved by your Department, the warrants can be sold and money obtained with which to pay the balance due the contractors and avoid a lawsuit." You are advised that the Attorney General is not required to approve warrant issues and only examines and approves bond issues, and that "warrants cannot be sold and money obtained," but the warrants will have to be issued to the contractor who builds the road in payment for work performed. You will also understand, I presume, that the tax which must be levied at the time the warrants are issued to provide for the payment of the interest and create a sinking fund to pay the warrants at maturity must be levied as a part of the constitutional tax of 15 cents on the \$100 for road and bridge purposes.

In answer to questions contained in paragraphs 2 and 3 in your letter, I have to say that as the commissioners of the respective precincts, together, compose the commissioners court and as a court have control of the finances of the county, I do not see how they could legally assign and transfer the obligation referred to, but would suggest that as these roads are to be built in Road District No. 4, which is entirely in Commissioner's Precinct No. 4, that this matter could be adjusted by the court in apportioning the road funds to the commissioners precincts in proportion to the amount collected in such precincts, as provided in Article 6949 of Vernon's Complete Statutes, 1920. In other words, if the amount of taxes collected in Commissioner's Precinct No. 4 is \$10,000 and it requires \$5000 to provide for the interest and create a sinking fund to discharge said warrants at maturity, the court could deduct this amount in apportioning the funds to Precinct No. 4 and place same in the warrant sinking fund of Road District No. 4.

In answer to the further question which you asked in person regarding the disposition of the funds in payment of the balance due on the bonds sold by the Cleburne National Bank, you are advised that this money could be used in either of two ways:

(1) In the construction of other roads in Road District No. 4, for which purpose the bonds were originally voted; or

(2) The money could be placed in the bond sinking fund of Road District No. 4 and used to retire the outstanding bonds, thereby reducing the tax rate for that road district.

Yours very truly,

C. F. GIBSON,
Assistant Attorney General.

Op. No. 2320, Bk. 55, P. 346.

COMMISSIONERS COURTS—ROAD DISTRICTS—BONDS—WORDS AND PHRASES.

(1) Commissioners court acting for and on behalf of road district will be authorized to pay all expenses of suit against such district, including attorneys' fees, out of funds derived from the sale of road district bonds.

(2) Terms "political subdivision" and "defined district" explained.

March 29, 1921.

Hon. Walter E. Jones, County Attorney, Jourdanton, Texas.

DEAR SIR: In your communication of the 26th instant you state that certain taxpayers of Atascosa County Road District No. 4 filed suit for the purpose of compelling the commissioners court to reapportion funds for the construction of the roads within that district, and you request to be advised whether the commissioners court will be authorized to pay the expenses of defending this suit, including attorneys' fees, out of the proceeds of the sale of the road district bonds.

Replying, I beg to advise you as follows:

(1) By Chapter 2 of Title 18, R. S., 1911, as amended by Chapter 203, Acts 1917, Regular Session, it is provided that a political subdivision or a defined district of a county, upon a requisite vote, may issue bonds for road construction purposes. The generally accepted meaning of the term "political subdivision" is any part of a county that has been set aside by proper authority for the more efficient administration of public affairs, namely, a commissioner's precinct or a justice precinct. Therefore, a commissioner's precinct or a justice precinct, as such, is empowered to issue road bonds under the statute above referred to. A "defined district," as that term is used in the Road District Act, is any part of a county that is described and defined by proper order of the commissioners court for the purpose of issuing bonds to construct roads therein.

The statute authorizing a political subdivision or a defined district to issue road bonds was passed pursuant to the 1904 amendment to Section 52 of Article 3 of the Constitution, and where any political subdivision or defined district has been created and votes bonds under that statute, then such subdivision or district is a body corporate and constitutes an entity independent of the county. Such districts are invested with a corporate charter so as to better perform the object for which they are created and the statute distinctly declares that they "may sue and be sued in like manner as counties."

Inasmuch as a road district embraces only a part of the county and is for the purpose of its creation a separate and distinct corporation, the county has no interest in its financial affairs. We think the decision of the Commission of Appeals in *Horn vs. Matagorda County et al.*, 213 S. W., 934, has application to the question submitted by you. In that case it was held that a road district fund derived from the sale of bonds legally issued is subject to payment of damages for breach of contract made by the proper officers to carry out the purposes for which the bonds were voted.

(2) A road district has only two funds, namely: the interest and sinking fund and the construction fund. The sums in the interest and sinking fund account are collected by reason of the taxes levied by the

commissioners court on property within the district for the purpose of paying the interest and principal of the bonds issued by such district and can only be expended for that purpose, or such fund may be invested in certain bonds, as authorized by Article 637e of Chapter 203, Acts of 1917. The money in the construction fund is derived solely from the sale of bonds.

In the Horn case, above referred to, the court used the following language:

"Within the purpose for which these districts are created, and for which funds are raised, we believe the following general rules relating to contracts of municipal corporations apply:

"Upon an authorized contract—that is, upon a contract within the scope of the charter or legislative powers of the corporation and duly made by the proper officers or agents—they are liable in the same manner and to the same extent as private corporations or natural persons." Dillon, *Munic. Corp.* (5th Ed.), Vol. 4, Sec. 1610.

"Municipal contracts, being upon the same footing as those of natural persons, may not be breached with impunity, even when the Legislature has assumed to authorize it." 28 Cyc., 683.

"Remedies to contractors under municipal contracts are those ordinary ones open to parties to private contracts: (1) Actions to recover damages for breach of contract," etc. 28 Cyc., 684."

Since the county has no interest in any litigation on behalf of or against a road district, the commissioners court would not be authorized to pay any expenses incident thereto out of county funds, and for the reasons given in the Horn case we are of the opinion that the commissioners court of Atascosa County, acting for and on behalf of the road district in question, will be authorized to pay all expenses of the suit against that district, including attorneys' fees, out of the funds derived from the sale of the road district bonds.

Very truly yours,

W. P. DUMAS,
Assistant Attorney General.

Op. No. 2442, Bk. 57, P. 37.

COMMISSIONERS COURTS—COUNTY SPECIAL ROAD FUNDS.

Commissioners courts are not authorized to deposit money received from the sale of special road bonds in any bank outside of the State.

July 13, 1922.

Judge E. B. Lewis, Jefferson, Texas.

DEAR SIR: In reply to your letter of the 12th instant, in which you ask for an opinion as to whether or not it would be legal for the commissioners court of Marion County to deposit the proceeds of the recent road bond issue in a national bank in Shreveport, Louisiana, I have to say:

1. The commissioners court of any county would not be authorized to deposit money received from the sale of special road bonds in any bank outside of the State.

Chapter 2, Title 18, Revised Statutes, 1911, as amended by Chapter 203, Acts of 1917, and by Chapter 38, Acts of 1919, Second Called

Session, deals with the subject of "County Special Road Bonds," and Article 632 thereof contains the following provision:

"* * * such bonds, when so issued, shall continue in the custody of and under the control of the commissioners court * * * and shall be by said court sold * * * and the purchase money therefor shall be placed in the county treasury of such county. * * *"

The term "county treasury" appearing in the above statute, of course, means the county depository.

Funds derived from the sale of county special road bonds are county funds and should be placed in the county depository as other county funds and the depository will be due the county the same rate of interest thereon as other county funds. (Opinion of Attorney General of September 28, 1915; 1914-1916 Attorney General Report, 438.) However, since the opinion of the Attorney General here referred to, the Legislature, in 1917, enacted what is now Article 2443a, Vernon's Complete Texas Statutes, 1920, and which article authorizes the commissioners court, under certain conditions, to take road bond money out of the county depository and "cause the same to be deposited in some solvent national bank or State bank whose combined capital stock and surplus is in excess of such special fund."

The Legislature, in the language above quoted, undoubtedly intended that in the event the regular depository failed to give the additional bond required by the commissioners court, then the court would have the authority to deposit any money received from the issuance of bonds in some national bank or State bank whose combined capital stock and surplus is in excess of such special fund and located within the State of Texas. It is a matter of common knowledge that many of the banking institutions of this State are State banks and are under the jurisdiction and control of the State Banking Board, at Austin. Can it be maintained from a practical viewpoint that the Legislature intended that such funds should be deposited in a State bank of any other State within the discretion of the commissioners court? If so, then what State? This statute was not enacted for border counties alone, but it applies to each and every county throughout the State.

Laws must be reasonably construed, and, if possible, that construction will be adopted which will promote the public interests and accord with sound economic policy.

Queen Ins. Co. v. State, 24 S. W., 397.

Railway Co. v. Tod, 64 S. W., 778.

State v. DeGress, 11 S. W., 1029.

City of Austin v. Cahill, 88 S. W., 542.

Miller v. Tod, 67 S. W., 483.

It would not be either feasible or practicable for a county located in the central part of Texas to transfer any of its funds to a bank in Louisiana, or Iowa, or Rhode Island, or Connecticut. Yet, if this statute permits the placing of \$500,000 of Marion County money in a Louisiana bank it likewise authorizes the commissioners court to deposit such fund in a bank in Maine or Oregon. We do not think the Legislature had any such intent. If so, then it would have expressed such intent in language clear and unmistakable.

See 36 Cyc., pages 1106-1135.

State v. Lancashire Fire Ins. Co. (Ark.), 51 S. W., 633.

Ewen v. Thompson-Starrett Co. (N. Y.), 101 N. E., 894.

2. Since the statute in question undoubtedly applies to State banks authorized under the laws of Texas, it is equally plausible that the term "national bank" appearing in the act means a national bank located in the State of Texas.

In *State vs. Lancashire Fire Insurance Co.*, supra, the court said:

"* * * the legislature is presumed to intend that its statutes shall not apply to acts or contracts done or effected beyond the limits of the State, and having no reference to, or effect upon, persons or property in this State. As the legislature of each State assembles to legislate especially for the benefit of the people of that State, it is reasonable to suppose, when the statute does not expressly show to the contrary, that it was not designed to punish acts done, or contracts made, in foreign countries, and affecting only the people of such countries. * * *" (Italics mine.)

The opinion further declares:

"So, a learned English court, construing an act of parliament which abolished certain weights and measures, and enacted 'that any contract, bargain, or sale made by any such weights or measures shall be wholly null and void,' held that the general words used in the law should be limited to contracts in which the goods bought or sold were to be weighed in that country, and that the statute, though the words used were as broad as those under consideration here, had no application to contracts, though made in England, when the goods were to be weighed in a foreign country."

3. When the words of a statute are not explicit the intention is to be collected from the occasion and necessity of the law, and from the mischief and objects and remedy in view. (Michie's Encyc. Digest of Texas Reports, Vol. 15, p. 975.) This statute under discussion was enacted in 1917 by the Thirty-fifth Legislature. This same Legislature passed the State Highway Law and created the State Highway Department. It was the beginning of a broad and far-reaching road-building program for the entire State. The same Legislature passed the law authorizing counties to take over district roads. See Chapter 203, Acts of 1917, Regular Session. It was doubtless contemplated at the time that road bonds for large amounts would be voted and authorized by many counties in Texas. So, the plain purpose and intent of Article 2443a was to permit the commissioners courts to relieve small depository banks from onerous burdens that might be imposed by reason of large bond issues. In the very first part of the article county depositories are mentioned (and which are, of course, Texas banks) and the "special funds" authorized to be deposited in other banks are moneys received by reason of a vote of the qualified property taxpayers of the county or the political subdivision in Texas.

4. Can it be contended, even as a matter of law, that the Legislature intended that such funds shall be placed beyond the jurisdiction and control of Texas courts?

5. It is a well-recognized rule of statutory construction that the intention of the Legislature, in enacting a law, is the law itself, and must be enforced when ascertained, although it may not be consistent with the strict letter of the statute. The courts will not follow the letter of a statute when it leads away from the true intent and purpose of the Legislature and to conclusions inconsistent with the general purpose of the act. In construing a statute, the proper course is to start out and follow the true intent of the Legislature and to

adopt that sense which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the Legislature. See Lewis' Sutherland on Statutory Construction, Vol. II, Secs. 347, 363, 364.

You are advised that the commissioners court of Marion County would not be authorized to deposit the proceeds of the sale of Marion County special road bonds in the First National Bank of Shreveport or in any other bank outside the State of Texas.

Yours very truly,

C. F. GIBSON,
Assistant Attorney General.

Op. No. 2264, Bk. 55, P. —.

BONDS—COUNTIES AND ROAD DISTRICTS.

(1) It is not essential to the validity of bonds that the entire amount authorized be issued at one time.

(2) Article 637h, of Chapter 38, Acts 1919, Second Called Session, provides that county road bonds and road district bonds may be cancelled if the same cannot be legally sold; held that an election cannot be ordered under this statute to cancel a bond issue, unless it affirmatively appears, after the approval and registration of such bonds, that the same cannot be legally sold.

December 10, 1920.

Hon. W. G. Gillis, County Judge, Cameron, Texas.

DEAR SIR: In Re Milam County Road District No. 21—\$65,000 Road Bonds.

In your letter of the 9th inst. you state that the above district has voted bonds in the sum of \$65,000; that the bond order has been entered and tax levied and extended on the rolls; that owing to the condition of the bond market at this time, the district "can't hope to dispose of all the issue," but can arrange to dispose of probably \$15,000 in bonds through local sources; and that the taxpayers desire to retain about \$15,000 of this issue and retire or cancel the remainder of the issue, and you request to be advised the necessary procedure with reference thereto.

Replying, I beg to say:

(1) It is not necessary to a legal issue of bonds that the authority conferred be immediately exercised and they have been held valid when issued several years after the election authorizing them. This course is at times rendered expedient by general financial conditions. (Abbott on Public Securities, Sec. 164.) Nor is it essential to the validity of bonds that the entire amount authorized be issued at one time. (City of Austin vs. Valle, 71 S. W., 414; Wells vs. City of Sioux Falls, 94 N. W., 425; Aylmore vs. City of Seattle, 92 Pac., 932; Cohen vs. City of Houston, 176 S. W., 809.

In Cohen vs. City of Houston, above, it was held that the bonds were not invalidated because the total amount authorized was such that the city could not levy a tax sufficient to pay the interest thereon and provide the required sinking fund. The opinion in this case reads, in part, as follows:

"The question presented * * * is whether the city can lawfully issue the

bonds in annual installments, running for a period of five years? We think the answer should be in the affirmative, provided that at the time of issuing each installment the city has property values sufficient to raise, by taxation, the sum of money necessary to pay the interest upon and to create a sinking fund of at least two per cent, for the redemption of such installment at maturity." Citing *City of Austin v. Valle*, 71 S. W., 414, and *Wells v. City of Sioux Falls*, 94 N. W., 425.

The word "issue" has been variously defined. In this State, the Galveston Court of Civil Appeals, in *Moller vs. City of Galveston*, 57 S. W., 1116, held that city bonds legally executed, certified by the Attorney General, and registered by the Comptroller, are "issued" though they remain unsold, but in the case of *City of Austin vs. Valle*, 71 S. W., 414, the Austin Court of Civil Appeals held that the word "issued," as found in the charter, would be construed as referring to the time of the sale of the bonds. The Supreme Court refused writs of error in both of said cases. It seems that the best and safest rule to follow is to consider bonds "issued" only when they are delivered to the buyers and the purchase money actually received therefor. The generally accepted meaning of the term "bond issue" is "bonded debts" or "pecuniary obligations" owing by a public corporation.

(2) By Article 637h, Chapter 38, Acts 1919, Second Called Session, it is provided that county road bonds or road district bonds may be cancelled, if such securities cannot be legally sold. This statute provides that where bonds are voted by a road district and such bonds "shall have remained unsold and the commissioners court shall find that the bonds cannot be legally sold in conformity with the law" then the court may order an election for the purpose of cancelling the bond issue, or if a petition is presented to the court to have the issue cancelled, then it becomes the duty of the court to order an election for that purpose. It is our opinion that the provisions of this law apply only to road bonds that cannot be legally sold. This was undoubtedly the intent of the Legislature in the passage of this statute, for the above article further declares that if the election results in favor of the cancellation of the bond issue, then—

"* * * such unsold bonds shall become totally null and void and it shall thereupon become the duty of the commissioners court to cancel and destroy such unsold bonds by burning and shall forward a certified copy of their minutes showing such destruction and cancellation to the Comptroller of Public Accounts, who shall thereupon cancel the registration of said bonds, as shown on the records of his office."

With reference to a *legal sale* of road district bonds, you are no doubt familiar with the provisions of Article 632, R. S., 1911, as amended by Chapter 203, Acts 1917. This article requires road district bonds to be sold "to the highest and best bidder, for cash, either in whole or in parcels, at not less than their par value."

The statute (Art. 637h) contemplates that the commissioners court shall first pass the order authorizing the issuance of the bonds and levy the tax in payment thereof and then present the record and bonds to the Attorney General for approval, and, if approved, have the bonds registered in the office of the Comptroller of Public Accounts. The bonds, after such registration, remain in the custody of the commissioners court until sold for cash at not less than par, and may be sold by said court "either in whole or in parcels." It would seem, there-

fore, that an election cannot be ordered to cancel the issue unless it affirmatively appears, after the approval and registration of the bonds, that the same cannot be legally sold.

(3) While the statute makes it the duty of the commissioners court to order an election to cancel bonds that cannot be legally sold when petition for such election is properly presented to the court, yet it will be observed that such petition must be signed by "two-thirds majority of the qualified property taxpaying voters of such * * * defined district * * * *as shown by the records in the office of the county tax collector.*" (Italics mine.) In this respect it is different from the original petition, in that the statute (Art. 628) only requires the petition to be signed by fifty or a majority of the resident property taxpaying voters of the district, regardless of the records in the tax collector's office.

From all of the above, it is concluded:

(a) The commissioners court of Milam County is required under the law to pass an order authorizing the issuance of bonds for the amount now desired to be issued, that is, if the district desires to issue at this time bonds in the sum of \$15,000, then the bond order should authorize the issuance of bonds for that amount. If such court refuses to perform this duty, it may be compelled to do so by a mandamus suit. (McCrary on Elections, 2nd Edition, Sec. 321; Simonton on Municipal Bonds, Sec. 160.)

(b) The tax levied by the commissioners court should be at a rate sufficient to provide the interest on and the necessary sinking fund for the amount of bonds proposed to be issued and not the amount of bonds voted.

(c) The remaining amount of bonds may be issued at a later date if desired. (See authorities cited in paragraph 1 of this opinion.) If, however, the district does not desire to issue the remaining amount of such bonds, then the only debt against the district will be the amount of bonds authorized in the bond order; and to hold an election at this time for the purpose of cancelling the remaining amount of the bonds would be not only an unnecessary expense, but, under the facts in the case, it is doubtful if such election would be authorized by law.

Yours very truly,

W. P. DUMAS,
Assistant Attorney General.

Op. No. 2369, Bk. 56, P. 149.

COMMISSIONERS COURT—RIGHT TO EMPLOY AN ATTORNEY.

1. The commissioners court cannot employ an attorney at a stated salary to interpret contracts, furnish legal advice to the commissioners court, the county auditor and interpret the highway laws of the State.

2. In lawsuits where the law requires the county attorney to represent the county, the commissioners court may employ counsel to assist the county attorney, but they cannot exclude the county attorney from appearing and representing the county.

3. The commissioners court may employ an attorney to represent the county in cases pending in the courts when under the law it is not the duty of the county attorney to represent the county.

July 23, 1921.

Hon. H. M. Skelton, County Auditor, Brownsville, Texas.

DEAR SIR: Your letter of July 8th addressed to the Attorney General received. In your letter you state that Cameron County has a duly elected, qualified and acting district attorney, county judge and county attorney. After reciting these facts, you ask:

"Has the county commissioners court authority to employ attorneys and pay them a compensation:

- "1. To interpret contracts?
- "2. To avoid lawsuits?
- "3. To represent the county to bring suit or suits against other persons?
- "4. To represent the county when sued by other persons?
- "5. To confer with the county auditor as to the interpretation of contracts?
- "6. To confer with the county auditor as to the interpretation of the highway laws?"

In reply you are advised that Article 356a, Revised Civil Statutes, makes it the duty of the district and county attorneys to give all county and precinct officers, upon request, "an opinion and advice in writing touching their official duties." County attorneys may, when the fees of the office do not reach the maximum amount allowed by law, be paid an ex-officio salary. See Articles 3881-3893. This ex-officio salary may be presumed to be allowed as compensation for services rendered for which no fee is allowed. In any event it is always the duty of an officer to discharge all the duties of his office, even though no provision is made for paying him for his services.

Your questions Nos. 1, 2, 5 and 6 as asked must be answered in the negative for the reason that it is the duty of the district or county attorney to perform these services. Under certain circumstances it might be permissible for the commissioners court to employ a lawyer to do the things, or some of the things, mentioned in your questions Nos. 1, 2, 5 and 6. See *Galveston County vs. Gresham*, 220 S. W., 560.

The commissioners court is without authority to make a permanent contract for such services. *Groom vs. Atascosa County*, 32 S. W., 188; *Jones vs. Beltman*, 171 S. W., 287. In the unusual cases where such employment would be permissible, it must be for the interpretation of a particular contract; to avoid a particular and specific lawsuit, or to give advice upon a particular and specific question of law. *City National Bank vs. Presidio County*, 26 S. W., 775. A county auditor would not be bound by the interpretation of the highway laws by private counsel. He must look to the district or county attorney, or else to the Attorney General, for his legal advice. The commissioners court may employ private counsel to institute suits in behalf of a county or to defend suits brought against the county. *City National Bank vs. Presidio County*, 26 S. W., 775; *Grooms vs. Atascosa County*, 32 S. W., 188; *Jones vs. Beltman*, 171 S. W., 287.

In those cases where the law makes it the duty of the county attorney to represent the county, the commissioners court may employ an attorney to assist the county attorney, but they cannot employ an attorney to represent the county, to the exclusion of the county attorney. *Terrell vs. Green*, 88 Texas, 539.

This answers your questions Nos. 3 and 4, and what has been said also answers the inquiry contained in the last paragraph of your letter.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2391, Bk. 56, P. 340.

DISTRICT ATTORNEYS—DELINQUENT TAXES—COMMISSIONERS COURTS.

Commissioners courts, of counties having no county attorney, situated in a judicial district composed of two or more counties, have no authority to employ a private attorney to file suit for the collection of delinquent taxes, this being a duty imposed by statute upon the district attorney.

District attorneys in judicial districts of two or more counties and whose compensation is on a per diem basis are entitled to the fees prescribed by statute for bringing suit for the collection of delinquent taxes in those counties of his district which have no county attorney. Such district attorneys are not subject to the operation of the "Fee Bill" and do not have to account for such fees as "fees of office."

Article 1120 Code of Criminal Procedure, as amended by Chapter 70, General Laws, passed at the Regular Session of the Thirty-sixth Legislature.

Articles 3885 and 7691, Revised Civil Statutes, 1911, Section 3, Chapter 64, General Laws, passed at the Second Called Session of the Thirty-sixth Legislature.

Section 21, Article 5, of our State Constitution, passed by the act of Twenty-sixth Legislature.

AUSTIN, TEXAS, September 30, 1921.

Hon. E. E. Murphy, County Attorney, San Angelo, Texas.

DEAR SIR: Your letter of the 21st instant addressed to the Attorney General has been received. It reads as follows:

"The commissioners court of Coke County, an adjoining county in this judicial district, has written to the district attorney asking if it will be possible for him to file some suits for the collection of the delinquent taxes for that county. There is no county attorney in Coke County, and the district attorney for this district, who lives here, has no assistant. His time is very near taken up with the regular duties of his office and he has talked with me in regard to this matter. If it can be legally done, he desires that I handle the collection of these taxes or assist him in such suits. This arrangement would be satisfactory with the commissioners court of Coke County.

"Under the above statement of facts, the district attorney and myself will thank you for a ruling upon the following questions:

"1. Has the commissioners court of Coke County the authority to employ me as a private attorney to file the suits for the collection of delinquent taxes?

"2. If I handled the collection of these taxes for the district attorney, or assisted him in the filing and trial of these suits, the fees being paid to me, would the district attorney be required to report these fees in computing the total fees of his office? In other words, could the district attorney pay to me the fees derived from the trial of these tax suits and still retain in addition thereto the maximum amount of fees allowed him as district attorney?

"We desire to give the court an answer as soon as possible in this regard and will appreciate an early ruling from your department."

I will answer your questions in the order in which they have been propounded.

(1) Article 7691, Revised Civil Statutes, 1911, reads, in part, as follows:

"The county attorney, or district attorney in counties where there is no county

attorney, shall represent the State and county in all suits against delinquent taxpayers that are provided for in this act, and all sums collected shall be paid immediately to the county collector."

Section 3 Chapter 64, General Laws passed at the Second Called Session of the Thirty-sixth Legislature, reads, in part, as follows:

"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. * * *"

Section 21, Article 5, of our State Constitution provides for the election of county and district attorneys and confers upon the Legislature the power to prescribe their respective duties.

We think it fundamental that where a duty is imposed upon a public officer that the same cannot be delegated by that officer to another. It, therefore, follows that if it is the duty of the district attorney to bring suits for the collection of delinquent taxes that he cannot delegate his authority to anyone else, neither can the commissioners court employ someone to perform his duties, in the absence of some provision either in the Constitution or the statute authorizing such action.

By the provision of the two sections of our statutes, quoted above, it is made the duty of the district attorney to file suits for the collection of delinquent taxes in those counties that have no county attorney. We, therefore, most respectfully answer your first question in the negative.

(2) Article 1120 of the Code of Criminal Procedure, as amended by Chapter 70, General Laws, passed at the Regular Session of the Thirty-sixth Legislature, fixes the compensation which district attorneys may receive in judicial districts of this State composed of two counties, or more. A portion of said article reads:

"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 1118 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."

The exceptions contained in this article apply only to the fees and commissions that district attorneys are entitled to for representing the State in criminal cases and the forfeiture of bail bonds, which fees and commissions are paid either directly or indirectly by the State. It was evidently the intention of the Legislature that the compensation provided for in this article should be in lieu of all other compensation allowed district attorneys for their services and which compensation was paid by the State either directly or indirectly for representing it in criminal and quasi criminal cases.

This article, however, must be construed in connection with those provisions of the civil statute quoted above. The fees paid district attorneys for representing the State in the collection of delinquent taxes are not paid by the State but by the delinquent taxpayer. It is a fundamental proposition of law that all public officers are entitled to the compensation provided by law for their services rendered the State, unless the statute clearly and specifically exempts the same and makes it the duty of the officer to pay over to the State a portion thereof. In this instance there is no such an exception. The statute uses plain and unambiguous language and declares that the district attorney shall be entitled to certain fees for his services in bringing tax suits. We think it is clear that the Legislature intended that he should receive the same as compensation for his services over and above the amounts prescribed in Article 1120 of the Code of Criminal Procedure, as amended.

District attorneys in judicial districts composed of two or more counties and who are compensated on a per diem basis are not subject to the general operation of the fee bill as set out in Chapter 4, Title 58, Revised Civil Statutes of 1911, with amendments. It is provided in Article 3885 of said chapter that—

"The maximum fixed for the compensation of the district attorney shall be construed to be the amount which that officer is authorized to retain of fees allowed such officer in his district, whether composed of one or more counties."

It is true that Article 1120, as amended, provides that the provisions of said article "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."

The above quoted provision was placed in the original Act of 1907, which took for the first time district attorneys in judicial districts composed of four or more counties out from under the fee bill and placed them on a salary, or per diem, basis. The original act has been amended many times and this provision has been brought forward with each re-enactment. The records of the Comptroller's office show that at this time there is but one judicial district in Texas composed of two or more counties whose district attorney is affected by this proviso, and, therefore, on a fee basis. This is the Sixth Judicial District.

When the original Act of 1907 was adopted the district attorneys in districts composed of several counties were receiving fees and com-

missions for their services as contained in Article 1118 of the Code of Criminal Procedure and in Chapter 5 of the General Laws, passed at the First Called Session of the Twenty-fifth Legislature. District attorneys were being so poorly compensated for their services in districts composed of four or more counties that the Legislature fell upon the plan of putting such district attorneys upon a per diem basis, but wanted to exempt those district attorneys who had been making out of their fees of office as much as two thousand four hundred and ninety-five dollars per annum, which was the maximum amount district attorneys in districts composed of four or more counties could collect from the State under the act putting them on a salary or per diem basis. Later the act was amended to apply to district attorneys in two or more counties. District attorneys affected by the exception contained in Article 1120, Code of Criminal Procedure, such as the district attorney of the Sixth Judicial District are subject to the provisions of the "fee bill" but all other district attorneys, such as the district attorney of Coke County, are not.

It is the opinion of this Department, and you are so advised, that the district attorney of the district in which Coke County is situated may employ you to assist him in filing suit for delinquent taxes in Coke County and compensate you for your services upon such basis as may be agreed upon between you and him. The fees collected by the district attorney of that district are his and he does not have to account for the same. These suits must be instituted by the district attorney, who alone is authorized to sign the petition and he must represent the State in the trial of said case, but he may employ you to assist him in getting up the data on which the suit is based and to render him such other assistance in the trial of the case as are not inconsistent with his statutory duties.

What has been said above applies to all district attorneys in districts composed of two or more counties where the district attorney is on a per diem basis.

We hope we have given you the information desired.

With great respect, I am,

Yours very truly,

BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 2396, Bk. 56, P. 52.

COMMISSIONERS COURT—AUTHORITY TO AUDIT COUNTY FINANCES.

The commissioners court of any county in this State not having a county auditor under the provisions of Chapter 2 of Title 29, Revised Civil Statutes of 1911, as amended by Chapter 11, page 17, General Laws, Regular Session of the Thirty-fourth Legislature (1915), and by Chapter 134, page 137, General Laws, Regular Session of the Thirty-sixth Legislature (1919), have the authority to have such an audit made of the county's finances as may be necessary to enable such court intelligently and efficiently to discharge its duties, and to pay the necessary expenses thereby incurred out of the general county fund.

AUSTIN, TEXAS, October 28, 1921.

Hon. William McMurray, County Attorney, Cold Springs, Texas.

DEAR SIR: Replying to yours of January 28, 1921, you are ad-

vised that in our opinion county commissioners courts in counties having no county auditor under the provisions of Chapter 2 of Title 29 of the Revised Civil Statutes of 1911, as amended by Chapter 11, page 17, General Laws, Regular Session of the Thirty-fourth Legislature (1915), and by Chapter 134, page 137, General Laws, Regular Session of the Thirty-sixth Legislature (1919), have the authority to have such an audit made of the county's finances as may be necessary to enable such court intelligently and efficiently to discharge its duties, and to pay the necessary expense thereby incurred out of the general county fund.

This question has not been decided by any of the appellate courts of this State as far as we have been able to ascertain, nor has it been passed upon by this Department.

There is no statute of this State expressly and in terms authorizing or requiring the commissioners courts to make or to have made at stated times or otherwise, a general audit of the finances of the county, and it is not, of course, a legal duty resting upon such courts to do so. Neither is there any statute denying such courts the power to make such an audit. It is also true that such courts are courts of limited jurisdiction and powers and can exercise only such jurisdiction and powers as are expressly or by necessary or reasonable implication vested in them by the Constitution and laws of the State.

In view, however, of the numerous and highly important duties and responsibilities placed by law upon these courts with respect to the various public funds of the county, and of such districts in the county as may be created for some special purpose, the employment of deputies and assistants to certain county officers, the examination and approval of official accounts and reports of county and precinct officers, the auditing and settlement of claims and accounts against and in favor of the county, the scaling, adjustment and compromise of indebtedness owing by the county, the levy, assessment and collection of taxes, and various other such duties and requirements so well known and so numerous that to attempt to set them out here would be too tedious and is unnecessary and in view of the wording of these various statutes with respect to these duties and responsibilities, we think the authority of such court to make or to have made at such time as may be necessary such an audit of the finances of the county as may be required for a proper performance of these duties by it is fairly if not clearly implied.

In opinion No. 284 by this Department, prepared by Hon. W. A. Keeling, then Assistant Attorney General and now First Assistant Attorney General, dated February 6, 1913, and addressed to Hon. John V. Huntress, county auditor of Bexar County, it is said:

"We are of the opinion that it was not necessary for the commissioners court to advertise for bids in order for it to make a contract with a suitable person to audit the county books. This power is lodged in the commissioners court, and was not taken from them by the auditor's act. In other words, that power given in the statutes to commissioners to audit, compromise and adjust all claims in favor of or against the county carries with it ample authority to employ a special auditor, and that without having to advertise for bids. There is a confidence involved in the authority natural to this transaction which would be destroyed should the commissioners leave it to the lowest bidder.

"We further think that the commissioners court would have ample authority to pay such person so employed a proper compensation from the proper fund of

the county, and you, as auditor, would be authorized to approve all claims for supplies, stationery, blanks, etc., to be furnished to the contracting auditor."

In another opinion by this Department, prepared by Hon. John Maxwell, then Assistant Attorney General, dated December 1, 1919, and addressed to Hon. Charles E. Gross, county auditor of Dallas County (Rep. and Op. Atty. Gen., 1918-1919, p. 363), it was held:

"* * * That the county commissioners in counties where there is an auditor under the provisions of Articles 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."

Each of these counties had a county auditor at the time these opinions were rendered, and if in a county having a county auditor the commissioners court of such county may nevertheless have an audit of its finances made, as was held in the Keeling opinion, and if the commissioners court of a county having a county auditor may audit the books of its county auditor, even if this may be done only when it may "appear upon reasonable grounds that the work of the county auditor's office was improperly done," we can see no good reason for holding that the commissioners court in a county not having a county auditor should not have the authority to have an audit of its finances made, particularly in so far as such an audit may be necessary to a proper discharge of the duties required of such court.

We have considered Chapter 2 of Title 29 of the Revised Civil Statutes of 1911, amended as hereinbefore stated, and are of the opinion that it does not deny to commissioners courts of counties not having a county auditor the authority to have such an audit of its finances made as may be necessary for its information and benefit. Those statutes deal with the office of county auditor and are not applicable to counties not having such auditor. It is true that Article 1460a, added to said chapter by said Act of 1919, provides a method by which a county having a population of less than forty thousand inhabitants and a tax valuation of less than fifteen million dollars may have a county auditor, but this is permissive only and not obligatory, and even though the commissioners court of such a county might consider a county auditor for the county a public necessity, such court has no authority to create such office nor to appoint some person to fill it. Such court can only certify such necessity to the judge or judges of the district court or courts of such county, and after such certification such judge or judges may or may not appoint a county auditor. Not only so, but such office may be abolished by such judge or judges at any time after the expiration of one year from its creation, even though such abolishment might be contrary to the wishes of the commissioners court of the county. Besides, the commissioners court of such county might not consider the office of county auditor a public necessity and yet find that an audit of the county's finances, at least in part, is necessary to a proper discharge of its duties. Hence we do not understand that these statutes do or can apply to counties not

having a county auditor, nor that they preclude the commissioners court of such a county from having such an audit made of such of its finances as may be necessary to a proper discharge by such court of its duties.

We have also considered Articles 1453 to 1456 of the Revised Civil Statutes of 1911 and are of the opinion that they do not preclude such an audit in such counties. They authorize the district judge of any county, whether it has a county auditor or not, upon request of the grand jury, to appoint a committee "to examine all the books, accounts, reports, vouchers and orders of the commissioners court relating to the finances of the county, * * * to count all the money in the office of the county treasurer belonging to the county, and to make such other examination as to them may seem necessary and proper in order to ascertain the true condition of the finances of the county," and require such committee to "make to said district court a report in writing, in detail, stating whether the books and accounts required to be kept by the provisions of this title are correctly kept in accordance with said provisions, and setting forth fully the condition of the finances of the county, the state of each officer's account, and specifying all irregularities, omissions or malfeasances of any kind that they may discover" and provide that such report shall be "filed in the office of the clerk of said district court, and the attention of the grand jury called thereto as soon after the filing of same as practicable." It seems quite clear to us that the examination here authorized is, at least primarily, for the benefit and information of the district court, particularly the grand jury, in the discharge of its duties, and we do not understand that the authority thus conferred upon the district court was intended to preclude or that it does preclude the commissioners court of such county from having such an audit of the county's finances made as it may find necessary. These articles do not deal nor attempt to deal with the powers and duties of the commissioners court with respect to county finances. Certainly no conclusion or alleged fact shown by the report of such a committee would be in any sense conclusive or binding upon the commissioners court of the county, nor preclude the commissioners court from investigating for its own information and guidance the financial affairs of the county, and to that end from employing such auditor, accountant or other clerical service as might be necessary.

We note the statement by Judge Moursund of the Court of Civil Appeals at San Antonio, in the case of *Palacios vs. Corbett*, 172 S. W., 777, that:

"Appellants do not cite any statute which gives the commissioners court the exclusive power to appoint an auditor or in fact any power to do so, nor have we found any such statute, but Article 1451 imposes upon the commissioners court the duty of examining the accounts and reports of the county officers at each term."

That part of this statement that might seem to conflict with our opinion herein is, we think, clearly dicta. Notwithstanding this, however, coming from such an able jurist as Judge Moursund, we would nevertheless be inclined to follow it if we regarded ours in conflict with it. We do not understand, however, that our opinion as herein expressed is in conflict with the decision of the court in this case.

That was a case in which certain citizens of Duval County sought by mandamus to compel the commissioners court and certain other county officers to permit an auditor employed by such citizens to audit the books, records and files of the county. The commissioners court and county officers contended (1) that these citizens being private citizens, had no right to have a privately employed auditor make an audit of the county finance records, and (2) that such right is only confided to the commissioners court. It was with respect to these contentions that the statement herein quoted was made by Judge Moursund. The issue in that case was not the power of the commissioners court to employ such an auditor and accountant to make for it such an audit and report of the finances of the county as might be necessary to a proper discharge of its duties, but whether or not that court had such exclusive power to make a general audit of the county's finances as precluded the citizens of the county, at their private expense, from having an audit made. Both the trial court and the appellate court held that no such exclusive power was vested in the commissioners court and that the citizens of the county had the right to have the audit made, and the writ was awarded. We are not holding to the contrary.

Wherefore, you are advised that in our opinion county commissioners courts in counties having no county auditor under the provisions of Chapter 2 of Title 29 of the Revised Civil Statutes of 1911, as amended by Chapter 11, page 17, General Laws, Regular Session, Thirty-fourth Legislature (1915), and as amended by Chapter 134, page 137, General Laws, Regular Session, Thirty-sixth Legislature (1919), have the authority to have such an audit made of the county's finances as may be necessary to enable such court intelligently and efficiently to discharge its duties, and to pay the necessary expense thereby incurred out of the general county fund.

Yours very truly,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2363, Bk. 56, P. 175.

CONTRACTS—AUTHORITY OF COMMISSIONERS COURT—SIGNATURE OF COUNTY JUDGE.

The validity of a contract entered into by the county depends upon the order of the commissioners court authorizing same, and the signature of the county judge is immaterial.

The commissioners court is the "medium" through which the county acts and can sign a contract without the appointment of an agent for that purpose.

AUSTIN, TEXAS, June 24, 1921.

*Hon. R. M. Hubbard, Chairman, State Highway Commission of Texas,
Austin, Texas.*

DEAR SIR: Answering your question submitted with contract entered into by and between the State Highway Commission of Texas and Hill County, dated the 18th day of June, 1921, wherein you ask if said contract is valid without the signature of the county judge, I beg to advise as follows:

Hill County is operating under a special road law passed by Regular Session of the Thirty-sixth Legislature, Chapter 33, Local and Special Laws, Thirty-sixth Legislature. Section 5 of said chapter adopts Articles 627 to 641 of the General Laws of Texas, Title 18, Chapter 2, Revised Civil Statutes of 1911, as amended, relating to the issuance of bonds in county, political subdivisions or defined districts. Article 639, above referred to, makes the county commissioner, in whose precinct a subdivision or defined district is located, ex-officio road superintendent with power to contract for and in behalf of such road district.

"Provided, such contract shall not exceed the sum of fifty (\$50.00) dollars, which shall be approved by the commissioners court and all contracts exceeding the sum of fifty (\$50.00) dollars shall be awarded by the entire court, which contract shall be binding on said county, political subdivision or defined district."

The contract presented is on behalf of certain road districts of Hill County and is made in the name of Hill County on behalf of said districts. It bears the signature of the four county commissioners and the sole question presented is whether or not it is valid without the signature of the county judge.

Aside from the authority above given to the commissioners court, and as determining the nature and authority of the commissioners court, it has been held that said court is made, by organic law, the executive board for administering the affairs of the county.

Webb County vs. Board of School Trustees, 95 Texas, 131-9.

Cassin vs. Zavala County, 70 Texas, 419.

The commissioners court, presided over by the county judge, is virtually a council vested with power to manage and direct all such material and financial interests of the county or political subdivision or defined district thereof as the laws of the State may have confided to its jurisdiction. The authority to act is vested in the commissioners court as a whole and not in the individual members.

Looscan vs. Harris County, 58 Texas, 511-4.

Also, in Edwards County vs. Jennings, 89 Texas, 618, it is said the commissioners court is the "medium" through which the different counties act. It is further held in Gaines vs. Newbrough, 34 S. W., 1048, that the commissioners court as such is but the representative of the people. A majority of the commissioners court, as provided by law, may act for the entire court, the condition being that with the presence of the county judge and two or more commissioners, there is a sufficient quorum to transact business, or such quorum may be obtained by the presence of all commissioners in the absence of the county judge.

It clearly appears from the holding of the courts that all contracts between individuals and a county must be made through the agency of the commissioners court.

Presidio County vs. Clark, 85 S. W., 475.

Fayette County vs. Krause, 97 Texas, 632.

All contracts entered into by the county must be based upon proper order, which it is the duty of the clerk to enter upon the minutes of the court. Fayette County vs. Krause, supra.

I am of the opinion, therefore, that a majority of the commission-

ers court signing a contract based upon proper order regularly entered, sufficiently binds the county as the "medium" acting in its behalf. I find no provision of the law requiring the county judge to sign a contract in behalf of the county.

Article 1373, Revised Statutes, provides that the county may appoint an "agent or agents to make any contract, on behalf of the county, for the erection or repairing of any county buildings, and to superintend the erection or repairing, or for any other purpose authorized by law." It has been held that the county judge, or any member of the commissioners court may act as such agent when so designated by proper order. It has also been held that any person, not a member of the court, may act as such agent. I find no authority holding, nor is there any reason in a conclusion that an agent must be appointed in order to make and enter into contracts. In the absence of such provision or holding, the commissioners court, acting as a whole or by a majority or quorum, would certainly have the authority to sign a contract which it had the authority to make.

It has also been held that the entering of an order containing the terms of the contract, by the commissioners court amount to a written contract, and that it is immaterial whether further contracts be entered into in writing or not.

It, therefore, appears that if proper order has been entered authorizing the making of the contract submitted in the terms stated, the signature of the county judge is immaterial. The important question to consider is whether or not such order has been properly entered on the minutes of the commissioners court as evidence of its action in passing such order and authorizing the contract.

I am giving no consideration to other questions that might bear on the validity of this contract other than the question of the signature of the county judge.

Yours very truly,

TOM L. BEAUCHAMP,
Assistant Attorney General.

Op. No. 2302, Bk. 55, P. 256.

COMMISSIONERS COURT—COUNTY AUDITOR—TICK ERADICATION LAW.

1. The provision in the county auditor's law to the effect that the auditor shall see that law is enforced does not authorize the county auditor to pass upon the advisability and necessity of expending county funds in tick eradication work, since to hold that he has such authority would be to substitute the county auditor for the commissioners court in the exercise of authority committed in plain terms in the Tick Eradication Law to the commissioners court.

2. The county auditor is without authority to question the expenditure of county funds for tick eradication work upon the ground that such county auditor is of the opinion that the county will not receive benefits commensurate with the amount of money expended.

3. The opinion holds that the county auditor does not state any reason why the commissioners court is not authorized to continue to expend money in tick eradication work.

4. It is the function of the commissioners court to determine how many inspectors shall be needed under the Tick Eradication Law and to fix the compensation and provide for the payment of same out of county funds, but au-

thority to appoint such inspectors, vests exclusively in the Live Stock Sanitary Commission.

AUSTIN, TEXAS, March 3, 1921.

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

DEAR SIR: I have yours of February 19th, addressed to the Attorney General, and also your telegram of February 28.

Your inquiry reads as follows:

"During the years 1919 and 1920 there was spent by the commissioners court of this county approximately \$30,000 out of the general fund of the county for tick eradication. The county is still under the quarantine and on last Friday the commissioners court of this county made an appropriation from ten to twelve thousand dollars to carry on the work for the year 1921 to be paid out of the general fund of the county. I am opposed to the appropriation made by the commissioners court on last Friday on the ground that the court is without authority to continue paying for this work indefinitely, in other words to continue this work year after year means a heavy drain on the general fund of our county and will more than likely result in an increase tax rate during the year 1921.

"Article 7314d, Vernon's Complete Texas Statutes of 1920, or the Acts of the Thirty-sixth Legislature, page 78, provides, 'It is the duty of the commissioners court to co-operate with the Live Stock Sanitary Commission,' and further on in the same article, 'and the said commissioners courts are hereby authorized, empowered and directed to appropriate moneys out of the general fund of their counties for the purpose of constructing or leasing necessary public dipping vats within their counties, and for the purchase of dipping material, and for the constructing of any other facilities and for the purchasing of any other materials for the hire of labor necessary to destroy the diseases and the carriers herein mentioned.'

"Under the above law the commissioners court of our county made the appropriation on last Friday, which does not only contemplate the buying of dip, etc., but the *hiring of about seven inspectors at the county's expense.*

"Has the commissioners court the authority to continue to appropriate out of the general fund of the county moneys for the purchase of dip, etc., and especially are they authorized to employ inspectors at a monthly salary?

"Article 1473 of Vernon's Complete Texas Statutes of 1920 provides, 'The auditor shall see that the law is strictly enforced.' Considering this article and other articles dealing with the duties and powers of county auditors, would I have the authority to question the expenditure of this money, if in my opinion the county was not receiving a benefit commensurate with the amount of money expended?

"In other words considering the amount of money previously spent on this project, with no assurance definite that another appropriation will not have to be made in 1922 or at other times, has the commissioners court of this county the authority under the law to make same?

"As stated above in passing on the authority of the commissioners court to make the appropriation, I will ask that you consider Article 1473 and other articles dealing with the power and duties of county auditors relative to accounts presented for payment for any work done, and which is a charge against the county.

"I trust it will be convenient for you to let me have answer by Tuesday morning of the coming week. Quite a number of the taxpayers of this county are interested and an early reply will be appreciated."

The duties of a county auditor are set forth in Chapter 2, of Title 29 of the Revised Civil Statutes of 1911, as amended, and said chapter is carried forward in Vernon's Complete Statutes of 1920.

In a general way it may be said that the duties of the county auditor are to exercise a general oversight over all the books and records of

county officers or other officers who collect moneys or property for the county. In the exercise of his duties he has access to books, accounts, reports, vouchers and records. It is not our purpose, nor is it necessary, to set out in detail the duties of a county auditor under the law. Suffice it to say, that his duties are those of an auditor as that term is ordinarily understood, and in determining in a particular instance what authority he may exercise we must take into consideration not only the general nature of the office but also the intent and purpose of the statutes creating the office of county auditor and construe such statutes in the light of such purpose and intent and in connection with our Constitution and laws on this and other subjects.

We find among other provisions relative to the duties of a county auditor the following, which is Article 1473 of the Revised Civil Statutes:

“The auditor shall see that the law is strictly enforced.”

It will be admitted that this language is broad, and taken by itself the powers of the auditor would be unlimited as to law enforcement. However, I do not believe that it could reasonably be contended by any one that the county auditor by reason of this provision has unlimited power as to law enforcement. We must construe this in connection with the nature of the duties of a county auditor, and, so far as your inquiry is concerned, in connection with the duties of the commissioners court under the law relative to tick eradication work.

The commissioners court under the Tick Eradication Law has certain duties to perform and undoubtedly is given certain discretion in connection with such duties. I call particular attention to the following language in the Tick Eradication Law to be found in Article 7314d, of Vernon's Complete Texas Statutes of 1920:

“Art. 7314d. Duties of Commissioners Court and County Judge.—It shall be the duty of the commissioners court to co-operate with and assist the Live Stock Sanitary Commission in protecting the live stock of their respective counties from all contagious, infectious or communicable diseases, whether such exists within or outside of the county, and in other ways protecting the live stock interest of their counties. It shall be the duty of the said commissioners court to co-operate with the Live Stock Sanitary Commissioner (Commission) and the officers working under the authority or direction of said commission in the suppression and eradication of contagious, infectious or communicable diseases. Provided, when it becomes necessary to disinfect any premises under order of the Live Stock Sanitary Commission, the county judge shall have such disinfecting done at the expense of the county, and in no case shall the owner, or lessee or tenant of the premises be held answerable to any of the provisions of this act by reason of the fact that the county fails to disinfect the premises, as herein provided. (Id., Sec. 5.)”

This statute gives the commissioners court specific authority to appropriate moneys out of the general fund of the county for the purpose of constructing or leasing necessary public dipping vats within the county, and for the purchase of dipping material, and for the constructing of any other facilities and for the purchase of any other materials for the hire or labor necessary to destroy the diseases and the carriers mentioned. Provided that for permanent improvements funds may be expended out of the county permanent fund.

The law having in plain terms conferred this authority upon the commissioners court, the county auditor is without authority to pass upon

the necessity or policy of the county making such expenditures. Answering your specific inquiry, therefore, beg to advise that you would not have authority to question the expenditure of any such funds merely because in your opinion the county is not receiving or will not receive a benefit commensurate with the amount of money expended. To hold that you as county auditor have such authority, would be to substitute you for the commissioners court and thus allow you to exercise authority and discretion conferred by law in plain terms upon the commissioners court. Nowhere in the county auditor's law or other law do we find any intimation that the county auditor is to substitute his own opinion and discretion with reference to the expenditure of county funds for tick eradication in the place of whatever opinion and discretion the commissioners court may have relative to such expenditure.

You further inquire whether the commissioners court has authority to continue to appropriate out of the general fund of the county moneys for the purchase of dip, etc., and especially whether they are authorized to employ inspectors at a monthly salary.

We answer the first part of this inquiry by saying that your communication does not disclose any reason why the commissioners court should not continue to expend county funds for such purpose. Not knowing the facts, we cannot pass upon the status of county finances.

As to the employment of inspectors, the law is plain upon this point. Article 7314i of Vernon's 1920 Statutes makes it the duty of the Live Stock Sanitary Commission to appoint the inspectors, but it is the province of the commissioners court to say how many inspectors are needed and to fix the compensation of such inspectors and to pay such compensation out of the county treasury. In other words, the county commissioners court has no authority to appoint the inspectors, but has authority to determine how many inspectors shall be appointed and to provide for the compensation of such inspectors out of county funds.

Very truly yours,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2387, Bk. 56, P. 127.

COMMISSIONERS COURT—COUNTY OFFICERS—EXPENSES.

1. The commissioners court has no authority to purchase out of the general fund of the county a typewriter for the use of the district clerk's office.
2. A typewriter may be purchased by the district clerk under Article 3397 and if in the opinion of the commissioners court and the county auditor such expense was actually and necessarily incurred in the conduct of the office of the district clerk, the amount thereof may be deducted from excess fees, if any, due the county from such district clerk.
3. Commissioners court has no authority to purchase out of the general fund of the county a typewriter for the use of the county auditor's office.
4. There is no authority to purchase an adding machine out of the general fund of the county to be used in the office of the county school superintendent. Such a purchase, if it can be made at all, must be made out of the amount provided by the county board of school trustees for the expenses of the county superintendent, which expenses must come out of the State and county available school fund and cannot exceed \$300.

AUSTIN, TEXAS, September 22, 1921.

Hon. O. L. Crouch, County Attorney, Bonham, Texas.

DEAR SIR: We have very similar inquiries from E. A. McMahon, the county auditor of your county, and yourself, dated the 14th and 15th instants, respectively, and have decided to answer them in the same opinion.

The questions propounded may be stated as follows:

1. Has the commissioners court legal authority to purchase out of the general fund of the county, a typewriter for the use of the district clerk's office where said office does not produce any excess fees?
2. Is the commissioners court authorized to purchase out of the general fund of the county a typewriter for the tax collector's office where said office collects excess fees, and then deduct the price of the typewriter from the excess fees of the office when the annual report of the tax collector is made at the end of the year?
3. Has the commissioners court legal authority to purchase out of the general fund of the county a typewriter for the use of the county auditor's office?
4. Is there any authority to purchase an adding machine out of the general fund of the county to be used in the office of the county school superintendent?

First: Answering your first question, beg to advise as follows: Article 3905, Revised Civil Statutes of 1911, reads as follows:

"Stationery, etc., allowed certain county officers.—There shall be allowed to county judges, clerks of the district and county courts, sheriffs and county treasurers, such books, stationery, including blank bail bonds and blank complaints, and office furniture as may be necessary for their offices, to be paid for on the order of the commissioners court out of the county treasury; and suitable offices shall be provided by the commissioners court for said officers at the expense of the county. And such books and stationery as are necessary in their performance of their duties shall also be furnished justices of the peace by said commissioners court."

The things authorized to be allowed by this article of the statutes may evidently be purchased out of the general fund of the county. But is the language used sufficient to include a typewriter? If so, it must be held that the word "stationery" or the expression "office furniture" includes typewriters.

Webster defines "stationery" to be "such articles as are usually sold by stationers, as paper, ink, quills, pens, blank books, etc." The same authority defines "stationer" as follows: "One who sells paper, pens, quills, ink, inkstands, pencils, blank books or other articles used in writing."

The Standard defines the word "stationery" to be "writing materials in general, including paper, envelopes, blank books, pens, ink, etc.; a term of somewhat indefinite extent, sometimes restricted to note paper and envelopes."

Crook vs. Commissioners Court of Calhoun County, 39 So., 383; 144 Ala., 505.

In the case just cited the Supreme Court of Alabama held, however, that the word "stationery" would not include postage used by the judge in his official capacity within the meaning of a statute providing that the judge of probate must be allowed a reasonable expense and "suitable books, stationery, * * * to be paid for by the county."

In *State vs. Dupre*, 7 So., 727; 42 La. Ann., 561, the court gave Worcester's definition of "stationery" as "the goods sold by a stationer,

such as books, paper, pens, sealing wax, ink, etc." But stated that in modern use the term "stationery" probably covers only blank books, account books, etc.

In *Cole vs. White County*, 32 Ark., 45, 54, it was held that the term "stationery" was sufficient to include postage stamps.

It has been held that stationery as used in a statute providing that all county commissioners shall make allowances to clerks of courts for articles of stationery for their respective courts, includes blank forms indispensable for the prompt performance of the duties of the office of the clerk of the court. *Knox County vs. Arms*, 22 Ill. (12 Peck), 175, 179.

On the other hand, blanks used by a clerk of a district court have been held not to be "stationery" within the meaning of a statute providing that the county board of commissioners shall provide suitable books and stationery for the use of the county officers. *Arapahoe County Commissioners vs. Keons*, 1 Colo., 160.

In *Pike County Commissioners vs. Goldthwaite*, 35 Ala., 704, 706, the court held that the word "stationery" includes blank writs, subpoenas, witness certificates, etc., procured by a circuit clerk and actually used in his office.

In *Harris County vs. Clarke*, 37 S. W., 22, a Texas case, the Court of Civil Appeals held that under Article 2475 of Revised Civil Statutes of 1895 (now Article 3905) printed forms with blanks therein to be filled by the officer furnished same as occasion required, could be furnished by the county for the sheriff. The court quoted with approval Webster's definition of "stationery" which we have already stated.

In *Oklahoma County vs. Blakeney*, 48 Pa., 101, 103; 5 Okla., 70, it was held that stationery embraces all writing materials and implements, together with the numerous appliances of the desk and of mercantile and commercial offices; and that, therefore, supplying of election tickets cannot come within the provision of a statute authorizing a contract for furnishing all blanks and stationery for a county.

It has been held that a sale of a building "including vault, safe, stationery and all bank fixtures contained therein" does not include revenue stamps, the use of which was no longer required by law, as the word "stationery" does not include stamps of any kind. *Gregory vs. Keller*, 137 Ill. App., 441, 444.

Under a Mississippi statute providing that the board of supervisors shall furnish the county officers with necessary stationery, furniture and "all other necessary articles," the Supreme Court of Mississippi held that the chancery clerk of a county was entitled to be furnished with postage necessary in the business of his office. *Downing vs. Hinds County*, 84 Miss., 29; 36 So., 73.

In *Sparks vs. Kaufman County*, 194 S. W., 605, the Court of Civil Appeals at Dallas held that the commissioners court could not reimburse the county clerk out of county funds for expenditures for postage stamps and new typewriters, although such supplies are necessary in conducting his office, but based their decision upon the proposition that the county clerk made the purchase without authority from the commissioners court; holding that if there is any authority to make such purchases it resides in the commissioners court and that a county is not liable on equitable principles to pay for such purchases where the com-

missioners court did not authorize or consent to the supplies being acquired. In holding that the officer could not bind the county in making such purchases the holding of the court seems to be contrary to that in *Harris County vs. Clarke*, before mentioned. But in the *Sparks vs. Kaufman County* case the question was not passed upon as to whether the commissioners court would be authorized to purchase stamps and typewriters for the county clerk under Article 3905.

Article 2262, Revised Civil Statutes of 1911, throws some light on the sense in which the word "stationery" is used in Article 3905. Said Article 2262 reads as follows:

"Stationery to be classified.—The stationery shall be divided into four classes: Class 'A' shall embrace all blank books and all work requiring permanent and substantial binding. Class 'B' shall embrace all legal blanks, letterheads and other printing, stationery and blank papers. Class 'C' shall embrace typewriter ribbons, pens, ink, mucilage, pencils, penholders, inkstands and wares of like kind. Class 'D,' poll tax receipts and all election supplies of whatever state. Each and every bid shall be upon some particular class, separate and apart from any other class. To the lowest bidder on class 'A' shall be awarded the contract for all work of that class; to the lowest bidder on articles in class 'B' shall be awarded the contract for supplying the articles embraced in that class; to the lowest bidder for articles in class 'C' shall be awarded the contract for supplying articles in that class; and to the lowest bidder for articles in class 'D' shall be awarded the contract for supplying articles in that class."

The paramount purpose of this article is evidently to classify the various articles of stationery rather than to define the word. But it makes it beyond controversy that the word shall include, among other things, "typewriter ribbons, pens, ink, mucilage, pencils, penholders; inkstands and wares of like kind." The words "wares of like kind" would be insufficient to include typewriters.

It would be difficult to enumerate just what articles are to be included within the meaning of the word "stationery." We shall not attempt to do so, leaving it to be interpreted in the light of the facts of each particular case. It is clear in our opinion, however, that typewriters are not to be considered "stationery." It is true that in the definition given of that term, pens and pencils, which are instruments used for writing, are included. Typewriters are also used for a similar purpose. But while this is true, typewriters are not usually kept and sold by stationers, and it is probable that they were not in general use when the act of the Legislature under consideration was passed. This being the case, is it not probable that if the Legislature had intended to authorize their purchase it would have done so *eo nomine* or by the use of some general expression appropriate to accomplish that end?

We conclude that typewriters cannot be purchased under Article 3905 as stationery.

Article 3905 also authorizes the purchase of "office furniture" for the officers therein named. It will, therefore, be necessary to determine whether a typewriter is office furniture.

In our opinion it is not, within the meaning of Article 3905. The term "office furniture," as used in that article of the statutes, means, in our judgment, necessary desks, tables, chairs and the like.

In a Maine case the term "office furniture" was held to include an iron safe used in an office within the contemplation of a mortgage bill of sale containing the words "all the desks, chairs, trunks, and office furniture"

in a certain office. *Skowhegan Bank vs. Farrar*, 46 Me., 293, 296. On the other hand, a Texas court has held that an iron safe in a saloon was not covered by a policy covering the "bar fixtures, chairs, counters, shelving, glassware, paintings, screenwork and such other furniture and fixtures as is usual to saloons," holding that it was not shown that the safe in question was such fixture or furniture as is usual to saloons. *Moriarty vs. U. S. Fire Insurance Company*, 49 S. W., 1327. Another Texas case held that an iron safe in a bank was furniture within the meaning of an insurance policy covering the "bank furniture and fixtures, adding machines and books." *Mecca Fire Insurance Company vs. First State Bank*, 135 S. W., 1083.

Standing alone, and in some connections, the word "furniture" might be broad enough to include anything with which a house, office, room or the like is furnished. That it does not always have this broad meaning, however, is made apparent by a reference to the cases cited in *Words and Phrases*, Volume 4, page 3013 et seq., and Volume 2, Second Series, page 687. Thus it will be seen that it has been held in various cases as follows: That "furniture" ordinarily means "that with which anything is supplied, the equipment or outfit of a trade or business, whatever may be supplied to a stock of goods, or to business to make it convenient, useful or gainful, and therefore would include machinery, tools, apparatus, appliances, implements, and such like articles used in carrying on a business." That where furniture or products are exempted from execution, two barber chairs, a mirror and a table used and necessary to a barber in carrying on his trade, is included. That within the meaning of a statute exempting from execution certain designated articles and "all other household furniture not exceeding in value \$500 means everything with which the residence of the debtor is furnished." That "furniture" includes all personal chattels which may contribute to the use or convenience of the household or ornament the house. That "furniture" includes whatever is added to the interior of a house or apartment for use or convenience. That "furniture" comprehends only such furniture as is intended for the use and ornament of apartments but not libraries which happen to be there, nor plate. That the term may include billiard tables, pictures, piano, etc. That the term "furniture" does not include a library of books, although it be a small library. That the term includes carpets, stoves, ranges, rugs and dishes. That it includes plate, china, linen, bronzes, statuary, and pictures. That china and glassware are "furniture." That under a will the word "linen" might be included in the term "furniture." That within the meaning of a statute exempting from sale or execution certain specified articles of household furniture and "all other household furniture not herein enumerated," a piano was not included, "on the theory that a piano is a thing so peculiar and distinct in character that it is clear from the manner in which this statute is drawn that if the Legislature had designed to exempt it, they would have specifically mentioned it." That within the meaning of a statute exempting from attachment or execution household and kitchen furniture a piano is household furniture and therefore exempt (this being a Texas case, 6 S. W., 831). That a piano kept in a hotel parlor for the use of guests is "furniture" within the meaning of a contract of sale of all the furniture in the hotel used in

the business of innkeeping. That "furniture" and other household effects includes a piano within a statute requiring contracts for conditional sales of furniture and other household effects to be in writing. That books, wines, curiosities, mineralogical or other specimens, and even pictures and statues as well as plate, come under the designation of "household furniture." That pictures are included in the term "furniture." That in its ordinary signification the word has not been understood to include silver, china, glassware, books or portraits attached to the wall that are not generally essential to the comfort of housekeepers; that as used in a devise of furniture, the term "must be always construed by taking the surrounding circumstances into consideration." That a will wherein testator directed that his entire estate, real, personal and mixed, including the "furniture," should be occupied by his wife for her natural life, meant everything about the house that had usually been enjoyed and that it includes plate, linen, china and pictures. That "furniture" as used in a conveyance of household goods and furniture includes plate used in the family. That "furniture" was held to include plate in four different cases, citing them. That "furniture" cannot be construed to include coffee, sugar and apples. That a bequest of the use of the house with all the furniture should be construed to include plate, but does not include wine and books. That within the meaning of a will devising a dwelling house, the furniture and all contents thereof, the word "furniture" does not include a safe containing money. That "furniture" includes a stove and ranges. That within the meaning of an act authorizing school trustees to buy furniture for schoolhouses the word embraces such articles as are generally understood to be in general use in schoolhouses as a part of the furniture of the house as distinguished from apparatus and appliances that may be used in instructing the scholars. That the word "furniture" as used in an insurance policy on a ship and its furniture includes provisions sent out for the use of the crew and includes everything with which a ship requires to be furnished or equipped to make her seaworthy. That the word "furniture" relates ordinarily to movable personal chattels, but is very general both in meaning and application, and its meaning changes so as to take the color of or be in accord with the subject to which it is applied. That as used in a contract for the sale of a dry goods store, its fixtures and furniture, it includes movable furnishings in addition to fixtures. That a chattel mortgage on the furniture of a boot and shoe store includes a wooden elephant kept in the store at night but standing in front thereof in daytime decorated with shoes and used for a sign. That show cases are "furniture" within the ordinary meaning of the word which governs in the construction of tariff schedules published for the information of the public. That an iron safe contained in a bank was "furniture" within the meaning of a policy insuring the bank's furniture and fixtures. That "household goods" is a wider term than "furniture," including everything about the house that is usually held and enjoyed therewith that tends to the comfort and accommodation of the household. That notice to an insurer's agent that insured had other insurance on his furniture was notice of other insurance on a piano. That a heating plant comes within the meaning of the term "furniture" in a

statute authorizing bonds to be issued "for the purpose of erecting schoolhouses and furnishing the same."

The case of McGee vs. Franklin Publishing Company, 39 S. W., 335, is directly in point. A Texas statute passed in 1893 conferred authority upon school trustees to purchase furniture for schoolhouses. The school trustees involved in the above cited case purchased a "Normal Series Grammar Chart" and the county treasurer refused to pay the warrant for the amount of the purchase price thereof and suit was brought to mandamus him to do so, the position of the treasurer being that the school trustees exceeded their authority in purchasing the chart since the same was not "furniture" for the schoolhouse. The Court of Civil Appeals sustained the county treasurer's contention, holding that apparatus of this kind would not constitute "furniture," using this language:

"The statutes in question, which authorize the purchase of furniture, clearly indicate that it was furniture for the house or building that was intended, so as to make it habitable and comfortable, and not appurtenances and appliances and supplies that may be useful to the school as a part of its system of instruction, or as an aid thereto. The grammar chart may be useful in furtherance of the system of instruction that prevails in the schools where used, but it serves no necessary or useful purpose as an article of furniture to a schoolhouse in order that it may with comfort be used and occupied as a schoolhouse. The term 'furniture' used in the statute, was evidently intended to embrace only such articles as were generally understood to be in general use in schoolhouses as a part of the furniture of the house, as distinguished from appliances and apparatus that may be used in instructing the scholars. With this view of the statute, we do not think that the purchase of the chart in question was authorized. Therefore the judgment below is reversed, and judgment here rendered that appellee take nothing by its suit, and that all the costs of the court below and of the court be taxed against it."

As before stated, the word "furniture" if taken literally might include anything furnished, and under such an interpretation of the word it would include everything necessary to be placed in a house or office for the use and convenience of those occupying and using it. That the Legislature did not use the word in this broad sense, however, is apparent from the statute itself, for in addition to the word "furniture" the words "books," "stationery," "blank bail bonds" and "blank complaints" are used. It would not have been necessary to employ these words had the Legislature intended that the word "furniture" was to be understood in the broad sense above mentioned. Therefore, it is reasonable to conclude that the word "furniture" was used in its ordinary and popular sense and would include furniture such as desks, tables, chairs and similar articles, but would not include all kinds of apparatus and equipment necessary to be used in an office.

You are therefore respectfully advised that the word "furniture" as used in Article 3905 is not broad enough to include typewriters.

It follows from what we have said that no authority is conferred by Article 3905 to purchase typewriters for the officers therein mentioned.

We know of no other statute authorizing the purchase of a typewriter out of general county funds for the district clerk. Hence we answer your first question in the negative.

Second: The next question is relative to the county tax collector. If there is any authority under which this officer may have a typewriter

furnished save and except out of his own funds, it is to be found in Article 3897, Revised Civil Statutes of 1911, as amended by Section 1, of Chapter 158, Acts of 1919. This article reads as follows:

"Monthly report; statement of expenses; audit, etc.—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 expense. If such expense be incurred in connection with any particular case, such statement shall name such case. Such expense account shall be subject to the audit of the county auditor, and if it appear that any item of such expense was not incurred by such officer or that such item was not necessary thereto, such item may be by such auditor or court rejected. In which case the correctness of such item may be adjudicated in any court of competent jurisdiction. The amount of such expense, 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 each such report, from the amount, if any, due by him to the county under the provisions of this act."

This Department has recently held that the rule of *ejusdem generis* applies to this article of the statutes, and also that the expenses incurred by any officer affected can only be allowed out of excess fees due the county, and if there are no such excess fees the expenses contemplated by the statute cannot be paid at all except by the officer himself. (See Opinion No. . . . , of date May 11, 1921, addressed to O. H. Howard, County Auditor, Palo Pinto, Texas.)

It will be noted that the only expenses allowable under Article 3897 are "actual and necessary expenses incurred by him in the conduct of his said office, such as stationery, stamps, telephone, traveling expenses and other necessary expense." Under the rule of *ejusdem generis*, just referred to, the general words "and other necessary expense" have reference only to expenses of a like or similar kind to those already enumerated; that is, like or similar to "stationery, stamps, telephone, and traveling expenses." The opinion referred to holds that expenses for gasoline, oil, repairs, and tires, etc., in connection with an automobile *owned by the county attorney himself*, or an expense incurred by said officer for clerical hire in transferring cases from the justice docket, cannot be allowed under Article 3897, since these expenses are not included in the words "such as stationery, stamps, telephone, traveling expenses, and other necessary expense."

It becomes necessary now to decide whether an expense incurred in the purchase of a typewriter is allowable under Article 3897. We have seen that the word "stationery" is not broad enough in itself to include typewriters. But under the rule of *ejusdem generis* the words "other necessary expense" must include something, and according to such rule must include expenses of a like or similar nature to those enumerated. We think it means something in addition to those things enumerated, though such additional things must be similar to those enumerated. It is the opinion of this Department that an expense incurred in the purchase of a typewriter is similar to an expense for stationery and therefore allowable under this statute. According to Webster's definition of "stationery," as we have observed, the word includes ink, quills and pens which are instruments used for writing purposes. Typewriters are also

used as instruments for writing, or recording, words, figures, etc., and in this sense are similar to pens, pencils and ink.

As an illustration of the application of the rule, we cite the case of *State vs. Major*, 97 Pac., 249; 50 Wash., 355, in which it was held that, under an act of the Legislature providing that the county surveyor shall be furnished "with all necessary cases and other suitable articles," the county commissioners were bound to procure for the surveyor a surveyor's transit, which was held to be within the words "other suitable articles."

And in *State vs. Dunkle*, 84 Atl., 40, 76; N. H., 439, Am. Cas., 1913b, page 754, it was held that a municipal ordinance providing that no person shall set up, employ, or use any hackney coach, cab or "other vehicle" for the conveyance of passengers for hire without a license, though passed before the advent of automobiles, included taxicabs used for hire.

It is our opinion that typewriters are similar to certain articles included within the meaning of the word "stationery," and that, therefore, Article 3897 authorizes the purchase of typewriters necessary in the conduct of the offices affected by said article, and that the purchase price thereof may be deducted from the amount of excess fees, if any, due the county by the officer making the purchase, provided the expense was actually and necessarily incurred in the opinion of the county auditor and the commissioners court.

We answer your second question by stating that in our opinion the county tax collector could purchase a typewriter or typewriters for use in official business of his office, and if in the opinion of the county auditor and the commissioners court such expense was actually and necessarily incurred the amount of the expense may be deducted from the amount of fees, if any, due the county by the tax collector. But the commissioners court would be without authority to use county funds to make such purchase and afterwards deduct the expense from excess fees of the tax collector due the county as suggested in your inquiry.

Third: Article 1466, Revised Civil Statutes, provides as follows:

"The auditor shall at the expense of the county, provide himself with all necessary ledgers, books, records, blanks and stationery."

We have already determined that the word "stationery" is not broad enough to include typewriters. You are, therefore, respectfully advised that Article 1466 does not authorize the commissioners court to purchase out of the general fund of the county a typewriter for the use of the county auditor's office, neither do we find any other statute conferring such authority upon the commissioners court.

Fourth: The law provides 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 salaries and expenses of the office of the county superintendent of public instruction," and also that "the county board of trustees may make such further provision as it deems necessary for office and traveling expenses for the county superintendent of public instruction and any assistant he may have; provided, that expenditures for office and traveling expense shall not exceed \$300."

This is the only statute we find authorizing public funds to be used to defray the expenses of the county school superintendent. Therefore,

if there is any authority to purchase an adding machine for the county superintendent it must be purchased out of the \$300 allowance for office and traveling expenses of the county superintendent which, of course, means that it must come out of the State and county available school funds.

We, therefore, advise you that there is no authority to purchase an adding machine for the county superintendent of public instruction out of the general county fund.

Yours very truly,
L. C. SUTTON,
Assistant Attorney General.

Op. No. 2309, Bk. 55, P. 277.

OFFICERS—COUNTY COMMISSIONERS—COMPENSATION.

1. Act of Fourth Called Session of Thirty-fifth Legislature as amended fixes compensation of county commissioners for their services in connection with roads as well as all other services, and commissioners court is not authorized to allow them additional compensation.

2. Articles 3893 and 3897, Vernon's 1920 Statutes, relative to allowance of ex-officio compensation and expenses, have no reference to county commissioners, and compensation or expenses cannot be allowed to county commissioners thereunder.

Art. 3893, Vernon's Complete Statutes, 1920.

Art. 3897, Vernon's Complete Statutes, 1920.

Art. 6901, Vernon's Complete Statutes, 1920.

Art. 6901a, Vernon's Complete Statutes, 1920.

Acts Fourth Called Session, Thirty-fifth Legislature, page 52. Chapter 29.

AUSTIN, TEXAS, March 9, 1921.

Hon. H. S. Calaway, County Attorney of Montague County, Montague, Texas.

DEAR SIR: I have yours of February 24th, addressed to the Attorney General, requesting an opinion upon the following questions:

1. Whether the compensation of county commissioners provided for in Article 6901a, Vernon's Complete Statutes of 1920, in counties containing less than twenty-nine thousand inhabitants, covers the services of county commissioners required to be performed by them under Article 6901.

2. Whether under Article 3893, Revised Civil Statutes, as it now exists, the commissioners court has authority to provide compensation and expenses for the performance of duties provided for in said Article 6901.

You call attention to the fact that in the first part of Article 6901a, that is, that portion of the article relating to counties containing a population of one hundred thousand and over, said article provides as follows:

"And this salary shall be in lieu of all other fees and per diem of all kinds now allowed by law."

On the other hand, the latter portion of said article relating to counties containing a population of less than twenty-nine thousand does not contain the quoted language. You seem to infer from this that the compensation provided for in counties having less than twenty-nine thousand population is not to be regarded as the total compen-

sation of county commissioners for all purposes and that under this theory there would be authority, under Articles 3893 and 3897, to provide for additional compensation, and expenses of county commissioners.

We do not think the point is well taken. Whether the term "ex-officio road supervisor" used in Article 6901 is sufficient to include all the services of a county commissioner in connection with the public roads of his county or not, it is our opinion that the statute referred to provides the total compensation of county commissioners for all purposes. Such officer performs his duties either as county commissioner or ex-officio road supervisor so far as his compensation is concerned. If you say he has other duties relative to roads than as ex-officio road supervisor, then the answer is he performs such other duties as commissioner. In either event his entire compensation is provided for in said statute. By reason of this statute it is the opinion of this Department that the total amount a county commissioner in counties of less than twenty-nine thousand population is entitled to receive for all purposes is one thousand dollars in any one year and he is not entitled to that much unless he actually serves a sufficient number of days so that his compensation at four dollars a day will amount to that much.

The above is sufficient reason to hold that the commissioners court is not authorized to grant additional compensation to county commissioners as suggested in your letter.

There is an additional reason, however, why there is no authority to grant the same under Article 3893. Article 3893 refers only to those officers mentioned and provided for in Chapter 4 of Title 58 of the Revised Civil Statutes, as amended. At no place in said chapter are county commissioners mentioned or provided for. Article 3893 is in the following language:

"Compensation for ex-officio services, when may be allowed by commissioners court proviso.—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."

Note the reference to "county officials when the compensation and excess fees which they are allowed to retain shall reach the maximum provided for in this chapter," etc.

The same may be said as to Article 3897 relative to expenses. Said Article 3897 does not relate to county commissioners.

Summarizing what we have said beg to advise that it is the opinion of this Department that the Legislature in passing the act of the Fourth Called Session of the Thirty-fifth Legislature, relative to the compensation of county commissioners, and amendments thereto, intended to provide for the compensation of county commissioners for their services in county affairs generally and also for their services in connection

with the public roads, and Articles 3893 and 3897 have no application whatever to compensation or expenses of county commissioners.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2326, Bk. 55, P. 406.

COUNTY FINANCES—SCRIP OR WARRANTS ORDER OF PAYMENT—
COUNTY TAXES.

Article 1437, Revised Civil Statutes of 1911, requiring claims against the county to be paid off in the order of registration, does not apply to county scrip accepted by the county in payment of county taxes, and therefore the order of registration need not be considered by the tax collector in accepting such scrip or by the collector or county treasurer in the collector's settlement with the county treasurer.

The collector is, however, required by statute to list the registration number of each claim accepted and he cannot accept for taxes unregistered claims.

April 8, 1921.

Hon. Louis D. Johnston, County Attorney, Shelby County, Center, Texas.

DEAR SIR: This is in answer to that portion of your letter of February 28, 1921, addressed to the Attorney General, reading as follows:

"Please advise me, through your department if in case the tax collector, in collecting taxes, should take as much as one-third of the county's ad valorem taxes in county scrip, issued by the county, and the county treasurer had a large amount of county scrip registered in his office, would he be justified in taking this scrip as a cash settlement, not knowing how the registration runs?"

There appears to be no law requiring payment of scrip or warrants in the order of registration save Article 1437, Revised Civil Statutes of 1911, which reads as follows:

"The treasurer (meaning the county treasurer) shall pay off the claims in each class in the order in which they are registered."

Article 7358, Revised Civil Statutes of 1911, provides that:

"The taxes herein levied by this chapter are hereby made payable in the currency or coin of the United States; provided, that persons holding scrip issued to themselves for services rendered the county may pay their county ad valorem taxes in such scrip."

Article 5220 of the same code has reference to what is commonly known as "jury scrip," and reads as follows:

"All certificates issued under the provisions of the foregoing article shall, without further action by any authority, be receivable at par for all county taxes. The same may be transferred by delivery, and no rule or regulation made by the commissioners court or other officer or officers of a county shall defeat the right of the holder of any such certificate to pay county taxes therewith."

If the county treasurer could be said to "pay off" claims in instances where county scrip is accepted in payment of county taxes, then there would be doubt as to whether the above articles, authorizing acceptance of scrip for county taxes, would constitute an exception to the

provisions of the statutes relative to registration and priority of payment. However, we do not believe the county treasurer "pays off" such claims. The Supreme Court of this State has held that the county treasurer neither receives nor pays out county funds within the meaning of the fee statute when county scrip is taken in by the tax collector in payment of county taxes and the scrip is turned over to the county treasurer and by him surrendered to the commissioners court for cancellation.

Wharton County vs. Ahldag, 19 S. W., 291.

McKinney vs. Robinson, 19 S. W., 699.

It may be that as between the taxpayer and the county tax collector the acceptance of scrip for county taxes is tantamount to a cash transaction and that the scrip in such an instance is "paid off."

Ostrum vs. City of San Antonio, 71 S. W., 304.

Thorpe vs. Cochran, 7 Kan. A., 726, 52 Pac., 107.

However, this is not sufficient. The only instances in which claims against the county must be settled in the order of registration are where the county treasurer pays them off. When the tax collector receives scrip in payment of county taxes, the county treasurer receives no money and pays out none, and the statute does not require the tax collector to look to the order of registration and accept scrip only when the same can be paid as registered. Since the statutes simply provide that persons holding scrip issued to themselves for services rendered the county may pay their county ad valorem taxes in such scrip, and that jury scrip shall be receivable at par for all county taxes, saying nothing as to order of registration except as to the treasurer, it follows that the tax collector may accept such scrip indiscriminately so far as registration is concerned. It is true that Article 1444 requires him to keep a descriptive list and file with his report a list showing, among other things, the registered number of each claim, and that Article 1432 precludes him from accepting claims in payment of taxes until the same have been registered in accordance with the statutes; but the statutes do not provide that he shall not accept scrip for taxes in any other manner than in the order of registration.

Nor is the collector or county treasurer required to take into consideration the order of registration of scrip in the collector's settlement with the county treasurer, for, as was said in the Supreme Court decisions above cited, the county treasurer neither receives nor pays out funds in a transaction of this kind. Since he does not "pay off" these claims, the statute requiring payment in registration order does not apply.

In support of our view we mention the fact that the probable intention of the Legislature in passing a statute permitting payment of taxes in county scrip was to allow the scrip to be paid off, even though there might be no funds in the county treasury to meet the payment of the scrip. There would be no special purpose to be served in paying taxes with scrip when the scrip could be paid in cash.

We are merely construing the statutes and are not passing upon any constitutional question in this opinion.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2308, Bk. 55, P. 261.

ANIMALS—SLAUGHTER AND SALE REPORTS TO THE COMMISSIONERS COURT.

The word "animals" used in Article 7173 of the Revised Civil Statutes of Texas requiring reports to be made to the commissioners court of animals slaughtered for sale, includes sheep, goats and hogs.

AUSTIN, TEXAS, March 5, 1921.

Hon. W. K. Jones, County Attorney, Del Rio, Texas.

DEAR SIR: I have yours of February 8th requesting an opinion as to whether Article 7173, relating to butchers' reports to the commissioners court applies with reference to sheep, goats and hogs. Said article reads as follows:

"Every person in this State engaged in the slaughter and sale of animals for market shall make a regular report, under oath, to the county commissioners court of the county, giving the number, color, age, marks and brands of every animal slaughtered, which report shall be made to each regular meeting of the court, and be filed with and kept on file by the county clerk for the inspection of anyone interested. Each report shall be accompanied by the bill of sale or written conveyance to the butcher for every animal that he has purchased for slaughter, and, if any of the animals slaughtered have been raised by himself, it shall be so stated in the report. Said butcher's report so made to the commissioners court may be destroyed within the discretion of the county clerk after a period of five years."

It will be noted that this article requires every person in this State engaged in the slaughter and sale of *animals* for market to make a regular report, etc., to the commissioners court. We are of the opinion that sheep, goats and hogs are animals within the meaning of the article and that a report must be made according to the terms of the act as to sheep, goats and hogs in the same manner and to the same extent as if cattle had been slaughtered.

The mere fact that Article 7170 enumerates certain animals not including sheep, goats and hogs does not, in our opinion, restrict the provisions of Article 7173 so as to make such provisions apply only to those animals mentioned in Article 7170. Article 7170 makes a different requirement entirely from the requirement made in Article 7173. Article 7170 requires that actual delivery of the animals mentioned shall be accompanied by a written transfer from the vendor, or party selling to the purchaser, giving the number, marks and brands of each animal sold and delivered; whereas, Article 7173 makes it the duty of persons slaughtering "animals" for market to make a report thereof to the commissioners court, accompanied by the bill of sale or written conveyance to the butcher for every animal purchased for slaughter. The two requirements being different there is no reason why we should hold the word "animals" does not include sheep, goats and hogs. If the requirements were the same and the word "animals" followed the enumeration of particular animals the rule of *ejusdem generis* might apply; but the requirements in said article being separate and distinct the reason for the rule no longer exists.

We have examined all the decisions of the court of this State construing the articles included in Chapter 2 of Title 124 of the Revised

Civil Statutes, and do not find that any of such decisions hold to the contrary. In fact, although there have been prosecutions under this article, or to be accurate, Article 1363 of the Penal Code of Texas, which contains the same language, and in no case so far as we can find was it contended that the article requiring reports to be made to the commissioners court does not apply to sheep, goats and hogs.

Another reason why the term "animals" should not be held to exclude sheep, goats and hogs is that the provisions relative to making reports to the commissioners court are included in the Penal Code of the State (see Article 1363), without any reference whatever to Article 7170 of the Revised Civil Statutes. In other words, failure to make the report required by Article 7173 of the Revised Civil Statutes is a penal offense, whereas, the Penal Code defines no offense in connection with the provisions of Article 7170.

Our holding is that there exists no reason why the word "animals" used in Article 7173 should not be taken in its usual and ordinary sense and that such word when so understood includes sheep, goats and hogs.

We have examined the original enactments of the Legislature and do not find that the caption, body of the act or emergency clause in any instance discloses a contrary intention upon the part of the Legislature to that stated by us in this opinion.

Very truly yours,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2305, Bk. 55, P. 281.

COUNTY FINANCES—COUNTY WARRANTS—SIGNATURE OF COUNTY
JUDGE.

It is not necessary under the law for the county judge to approve claims allowed by the commissioners court, and the fact that the county judge refuses to place his signature on any such claim would not prevent the issuance of a warrant to pay such claim. Revised Civil Statutes, Article 1459.

AUSTIN, TEXAS, March 10, 1921.

Hon. Will M. Martin, County Attorney, Hill County, Hillsboro, Texas.

DEAR SIR: I have yours of February 24th, addressed to the Attorney General, asking the following question:

"If the county judge refuses to approve claim or claims allowed by the commissioners court and will not endorse his signature on claim, can the county clerk legally issue warrant to cover account, and what will be the county clerk's responsibility if he issues warrant without said approval of county judge?"

The county clerk is not precluded from issuing a warrant to pay a claim allowed by the commissioners court by reason of the fact that the county judge refuses to sign or approve such claim, unless Article 1459, Revised Civil Statutes of 1911, inhibits him from doing so.

Said Article 1459 is as follows:

"All warrants or scrip issued against the county treasurer by any judge or court shall be signed and attested by the clerk or judge of the court issuing the same, under his official seal; and no justice of the peace shall have authority

to issue warrants against the treasury for any purpose whatever, except as provided in Article 1117 (1170) of the Code of Criminal Procedure."

It is the opinion of this Department that this statute does not make the approval or signing of claims allowed by the commissioners court by the county judge a condition precedent to the issuance of warrants upon such claims, even if the expression "warrants or scrip" should be held to include approved claims, because:

First: Warrants issued upon such claims allowed according to law by the commissioners court are not warrants issued by *any judge or court* within the meaning of Article 1459.

Second: Even if it should be held that warrants of this kind are warrants issued by *any judge or court*, still the fact that the county judge refuses to approve or sign any account allowed by the commissioners court would not prevent the issuance of a warrant or the payment of same because the statute prescribes that the warrant shall be signed and attested by the *clerk or judge*. So that even under this view the statute would be complied with if the clerk alone should sign and attest the warrant.

The commissioners court has authority to direct the payment of accounts, and I assume the account or accounts you have in mind were allowed under this authority.

The Constitution provides in Article 5, Section 18, that the county commissioners with the county judge as presiding officer shall compose the county commissioners court, which shall exercise such powers and jurisdiction over all county business as is conferred by the Constitution and the laws of the State or as may be "hereafter" prescribed.

Article 2241, subdivision 8, of the Revised Civil Statutes of 1911, confers upon the commissioners court the power and said article makes it the duty of the court "to audit and settle all accounts against the county and direct their payment."

It is the opinion of this Department that claims allowed by the commissioners court under this authority are not required to be approved, endorsed or signed by the county judge, and it necessarily follows that the county clerk will not be prevented from issuing a warrant upon any such claim by reason of the fact that the county judge fails to approve or place his signature on same.

The Court of Civil Appeals had occasion in 1893 to construe the statute now constituting Article 1459, above quoted. In the case of Callaghan, County Judge, vs. Salliway, 23 S. W., 837, the said court held that it was not necessary for the county judge to sign a warrant before the county treasurer should pay a claim allowed by the commissioners court. Salliway had presented and the commissioners court had allowed his claim for one hundred (\$100) dollars for services as superintendent of construction of the county courthouse in Bexar County. After the order approving said account was made a warrant was drawn under authority of said order by the clerk and presented to the county judge for his signature. The county judge refused to sign same. The Court of Civil Appeals held that the law did not require the county judge to sign the warrant. The statute as it now exists, that is, Article 1459, which we have quoted above, was before the court and was in the same language as it now exists. The court said:

"It is contended by the appellee that the duty of signing warrants upon claims against a county which are audited and allowed by the commissioners court is imposed by Article 986, Rev. St., which provides that 'all warrants or scrip issued against the county treasurer by any judge or court shall be signed and attested by the clerk or judge of the court issuing the same, under his official seal,' etc. To give such effect to the statute, it is argued by appellee's counsel that the word 'or' between the words 'clerk' and 'judge' should be construed to mean 'and.' This statute must be so construed, if practicable, as to harmonize with other statutes in relation to the payment of demands or claims against a county. Upon examination of these statutes it will be seen that the payment of certain demands against counties are required to be paid out of the county treasury upon the certificate of the judge, as in Article 983, Rev. St., and Article 1070, Code Crim. Proc. Others are required to be paid upon the certificate of the clerk, as in Article 3105, Rev. St., and Article 1085, Code Crim. Proc. There are many other statutory provisions of the same character, but those referred to are sufficient to show that some claims are required to be paid on the certificate of the judge, and others on the certificate of the clerk, which show that, to give the word 'or' the meaning contended for by appellee, the statute quoted would be inconsistent with other statutes on the same subject. If the words in the statute are given their usual, ordinary, and accepted meaning, it is not ambiguous nor inconsistent with other statutes relating to the same subject. Other statutes are found that provide that certain accounts shall be examined by the commissioners court, and, if allowed, it shall order a draft to be issued for the amount upon the treasurer and others, that are silent as to what shall be issued on the treasurer. The statute under which appellee's claim was allowed simply provided that the commissioners court should direct its payment. The order of the court directed the county clerk to draw a warrant of the county for the amount in favor of the appellee. There is no statute requiring the county judge to sign warrants issued upon claims audited and allowed by the county commissioners court, and we do not think that it is necessary to the validity of such a warrant that he should sign it. The county clerk is the ex-officio clerk of the county commissioners court, and keeps a record of its proceedings; and, when a claim is allowed against a county, a certified copy of the order from the minutes of the court, attested and signed by the county clerk under the seal of the county commissioners court, is all that is required or necessary to authorize the county treasurer to register and pay the claim. From this it follows that appellee has the right to apply to and demand from the county clerk such certified copy of the allowance of his claim; and it not appearing that he had made such application or demand on the clerk, or that the clerk refused to issue such certificate to him, it is clear that he has not exhausted his remedy, and is not, therefore, entitled to a mandamus against the appellant. The judgment of the district court is reversed, and judgment here rendered for appellant."

There may be a shade of difference in the question decided by the court in the above mentioned case and the question you present. However, it is our opinion that the county clerk is not debarred from issuing a warrant upon a claim allowed by the commissioners court simply because the county judge refuses to approve, endorse or sign such claim, since the law does not require the county judge to place his signature upon such a claim.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2306, Bk. 55, P. 267.

OFFICERS—COMMISSIONERS COURT—BOUNTIES ON RAT TAILS.

The commissioners court is without authority to use county funds to pay bounties on rat tails, since the Legislature has prescribed a method by which the commissioners court may provide for the eradication of rats and other predatory animals.

The method prescribed by the statute is by the purchase of poisons for said purpose.

Chapter 62, General Laws, Fourth Called Session, Thirty-fifth Legislature.

AUSTIN, TEXAS, March 8, 1921.

Hon. R. D. Oswald, County Attorney, Hardeman County, Quanah, Texas.

DEAR SIR: I have yours of February 22, addressed to the Attorney General, reading as follows:

"Please advise whether or not the commissioners court would be authorized to pay a bounty on rat tails."

We have carefully examined the Constitution and statutes, and are of the opinion that the commissioners court is without authority to use county funds for such a purpose.

The rule of *expressio unius est exclusio alterius* applies. The Legislature has prescribed the method by which effort shall be made to exterminate rats in so far as the use of county funds is concerned. I refer to an act passed by the Thirty-fifth Legislature at its Fourth Called Session, being Chapter 62, and to be found at page 143 of the General Laws of said session. This statute provides that the commissioners court of each and every county in this State shall have the power and authority to purchase the necessary poisons and all accessories required by the citizens of such counties for the purpose of destroying prairie dogs, rats, etc., and authorizes the commissioners court to pay for the same out of the general funds of the county. Having authorized the commissioners court to use this method of exterminating rats, no other method is authorized.

In Lewis' Sutherland Statutory Construction, Second Edition, Vol. 2, paragraph 627, we find the following language:

"Where legislation points out specifically how an act is to be done, although without it the court or officials, under their general powers would have been able to perform the act, yet, as the Legislature imposed a special limitation, it must be strictly pursued."

Under the above principle, we hold that the commissioners court is not authorized to pay bounties on rat tails out of county funds.

Very truly yours,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2362, Bk. 56, P. 186.

COUNTIES—COMMISSIONERS COURT PURCHASE OF AN AUTOMOBILE FOR ROAD WORK.

It cannot be said as a matter of law that the commissioners court is without authority to purchase out of the county road and bridge fund a Ford roadster

equipped with a slip-on body to be used as a motor truck to convey men and supplies to the place where road work is being done by the county.

AUSTIN, TEXAS, June 13, 1921.

Hon. Marvin Scurlock, County Attorney, Beaumont, Texas.

DEAR SIR: This is in answer to your inquiry as to the authority of the commissioners court to expend a portion of the county road and bridge fund to purchase a Ford roadster equipped with a slip-on body to be used in precinct No. 2 in connection with the public roads.

From your communications and one from your county auditor I am assuming for the purpose of this opinion the facts to be substantially as follows: The commissioners court of Jefferson County authorized one of the county commissioners to purchase a motor truck to be used in precinct No. 2 in the construction, repairing, etc., of the county roads in said precinct. Pursuant to this authority a Ford roadster was purchased by the commissioner equipped with a slip-on body, the total cost being about \$616.20. After the purchase the commissioners court passed an order approving the bill therefor. The county auditor has refused to approve the bill for the motor truck, and bases his action in doing so upon an opinion of this Department rendered to Hon. F. A. Tompkins, county auditor, Nueces County, on March 31, 1921. It seems there is a little difference of opinion between the county auditor and the commissioner purchasing the car as to the purpose for which the truck is being used, the commissioner contending that it is used "exclusively for road work" and the county auditor alleging that the car is used to carry gasoline to be used in running the large road graders and for the purpose of transporting men to and from the place where the road work is being done.

We, of course, cannot know the facts except as they are presented to us, and we must presume that the commissioners court acted in good faith in authorizing this purchase to be made. This being true, we are not in a position to say as a matter of law that the commissioners court and the county commissioner acted beyond the scope of their authority in making this purchase. It must have been the opinion of the commissioners court that it was necessary to have this truck in order to perform its duties in the construction of the county roads in precinct No. 2. It being the duty of the commissioners court to construct and maintain the roads, we are not prepared to say that a car or truck of this kind is not an appropriate means to that end. It is undoubtedly necessary to transport gasoline to operate gasoline-propelled road machinery, and it might under certain circumstances be necessary to transport men employed in road work to the place where the road construction and repairs are being carried on.

This purchase is to be distinguished from the one passed upon in our opinion to the county auditor of Nueces County, referred to by your county auditor, in this, that in that case the question was whether the county was authorized to expend county funds to purchase an automobile for the county judge and each of the county commissioners, among others. It was held that the county was without this authority by reason of the fact that the statutes had fixed the compensation of the county officials involved and had not authorized the payment out of county funds of expenses such as the purchase of an automobile for these county officials. The rule of law is that where a statute pro-

vides compensation for a county official without allowing expenses, the official is not entitled to the expenses. This Department reached the conclusion that neither Article 3897, authorizing expenses of certain kinds, nor any other article of the statutes authorized the purchase out of county funds, of an automobile for the officers involved in that opinion.

Here we have an entirely different question. The facts as we have them do not indicate that an automobile has been purchased for the use of an officer or an employee whose salary or compensation is fixed by statute. It is simply a question in the instant case whether the road and bridge fund can lawfully be used in the purchase of a motor truck or motor car to transport men and supplies necessary in the construction and repairing of county roads, and this Department is of the opinion that the purchase under consideration was within the law. The commissioners court was in possession of all the facts, and it would seem that said court was in a most favorable position to determine as a matter of fact whether the motor truck was needed in the proper exercise of its duties in constructing and maintaining the roads in precinct No. 2. That body having the authority to build and repair roads and having determined the necessity of making the purchase of this piece of equipment as a proper instrument of road construction and repair, we are unable to reach the conclusion that the transaction was unlawful.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2326, Bk. 56, P. 406.

COUNTY FINANCES—SCRIP OR WARRANTS—ORDER OF PAYMENT—
COUNTY TAXES.

Article 1437, Revised Civil Statutes of 1911, requiring claims against the county to be paid off in the order of registration, does not apply to county scrip accepted by the county in payment of county taxes, and therefore the order of registration need not be considered by the tax collector in accepting such scrip or by the collector or county treasurer in the collector's settlement with the county treasurer.

The collector is, however, required by statute to list the registration number of each claim accepted and he cannot accept for taxes unregistered claims.

April 8, 1921.

Hon. Louis D. Johnston, County Attorney, Shelby County, Center, Texas.

DEAR SIR: This is in answer to that portion of your letter of February 28, 1921, addressed to the Attorney General, reading as follows:

"Please advise me, through your department if in case the tax collector, in collecting taxes, should take as much as one-third of the county's ad valorem taxes in county scrip, issued by the county, and the county treasurer had a large amount of county scrip registered in his office, would he be justified in taking this scrip as a cash settlement, not knowing how the registration runs?"

There appears to be no law requiring payment of scrip or warrants

in the order of registration save Article 1437, Revised Civil Statutes of 1911, which reads as follows:

"The treasurer (meaning the county treasurer) shall pay off the claims in each class in the order in which they are registered."

Article 7358, Revised Civil Statutes of 1911, provides that:

"The taxes herein levied by this chapter are hereby made payable in the currency or coin of the United States; provided, that persons holding scrip issued to themselves for services rendered the county may pay their county ad valorem taxes in such scrip."

Article 5220 of the same code has reference to what is commonly known as "jury scrip," and reads as follows:

"All certificates issued under the provisions of the foregoing article shall, without further action by any authority, be receivable at par for all county taxes. The same may be transferred by delivery, and no rule or regulation made by the commissioners court or other officer or officers of a county shall defeat the right of the holder of any such certificate to pay county taxes there-with."

If the county treasurer could be said to "pay off" claims in instances where county scrip is accepted in payment of county taxes, then there would be doubt as to whether the above articles, authorizing acceptance of scrip for county taxes, would constitute an exception to the provisions of the statutes relative to registration and priority of payment. However, we do not believe the county treasurer "pays off" such claims. The Supreme Court of this State has held that the county treasurer neither receives nor pays out county funds within the meaning of the fee statute when county scrip is taken in by the tax collector in payment of county taxes and the scrip is turned over to the county treasurer and by him surrendered to the commissioners court for cancellation.

Wharton County vs. Ahldag, 19 S. W., 291.

McKinney vs. Robinson, 19 S. W., 699.

It may be that as between the taxpayer and the county tax collector the acceptance of scrip for county taxes is tantamount to a cash transaction and that the scrip in such an instance is "paid off."

Ostrum vs. City of San Antonio, 71 S. W., 304.

Thorpe vs. Cochran, 7 Kan. A., 726, 52 Pac., 107.

However, this is not sufficient. The only instances in which claims against the county must be settled in the order of registration are where the county treasurer pays them off. When the tax collector receives scrip in payment of county taxes, the county treasurer receives no money and pays out none, and the statute does not require the tax collector to look to the order of registration and accept scrip only when the same can be paid as registered. Since the statutes simply provide that persons holding scrip issued to themselves for services rendered the county may pay their county ad valorem taxes in such scrip, and that jury scrip shall be receivable at par for all county taxes, saying nothing as to order of registration except as to the treasurer, it follows that the tax collector may accept such scrip indiscriminately so far as registration is concerned. It is true that Article 1444 requires him to keep a descriptive list and file with his report a list showing, among other things, the registered number of each claim,

and that Article 1432 precludes him from accepting claims in payment of taxes until the same have been registered in accordance with the statutes; but the statutes do not provide that he shall not accept scrip for taxes in any other manner than in the order of registration.

Nor is the collector or county treasurer required to take into consideration the order of registration of scrip in the collector's settlement with the county treasurer, for, as was said in the Supreme Court decisions above cited, the county treasurer neither receives nor pays out funds in a transaction of this kind. Since he does not "pay off" these claims, the statute requiring payment in registration order does not apply.

In support of our view we mention the fact that the probable intention of the Legislature in passing a statute permitting payment of taxes in county scrip was to allow the scrip to be paid off, even though there might be no funds in the county treasury to meet the payment of the scrip. There would be no special purpose to be served in paying taxes with scrip when the scrip could be paid in cash.

We are merely construing the statutes and are not passing upon any constitutional question in this opinion.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

OPINIONS ON CONSTITUTIONAL LAW.

Op. No. 2283, Bk. 55, P. 131.

CONSTITUTIONAL LAW—PENALTIES—WORDS AND PHRASES.

The Legislature cannot release penalties against taxpayers incurred by failure to pay taxes prior to January 31, 1921.

The Legislature may not enact a bill which contravenes or directly conflicts with the provisions of the Constitution.

"Obligation and liability," as used in Section 55, Article 3 of the Constitution, includes "penalty" due State for failure to pay taxes prior to January 31, 1921.

Section 10, Article 3, of the Constitution, withdraws from the Legislature the power to release payment of taxes, and penalties incident thereto.

AUSTIN, TEXAS, February 7, 1921.

Hon. J. M. Melson, Member of the House of Representatives, Capitol.

DEAR SIR: Your letter addressed to the Attorney General of February 3rd was placed on my desk for investigation and reply. The question propounded therein is well set out in the following paragraphs:

"I find the people over the State, relying upon the fact that the bill had taken immediate effect, failing to pay their taxes on February 1st, and are therefore under the penalty of 10 per cent imposed by law for the non-payment of taxes by February 1st.

"The question is whether or not the Legislature will have power to relieve the people from the payment of this penalty, and it is my idea that the Legislature has such power to introduce and pass a law relieving them from the payment of this penalty."

Unless there is direct inhibition contained in the Constitution prohibiting the Legislature from passing acts, then an act of the Legislature would be valid since such an act would not be in direct conflict with the Constitution. *Moore vs. Alexander*, 107 S. W., 395.

It has been suggested that such legislation would be in conflict and contravene the following quoted portions of the Constitution:

Article 3, Section 55. "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."

Article 8, Section 10. "The Legislature shall have no power to release the inhabitants of or property in any county, city or town from the payment of taxes levied for State or county purposes, unless in case of a great public calamity in any such county, city or town when such release may be made by a vote of two-thirds of each House of the Legislature."

Article 1, Section 16. "No bill of attainder, ex post facto law, retroactive law or any other law impairing the obligation of contract shall be made."

In respect to Section 55 of Article 3 of the Constitution, we are called upon to determine what liabilities and obligations the people intended to withdraw from the control of the Legislature.

The language of the section is broad, general and complete. The words therein show no well marked prepossession in the mind of the convention as to the particular character of evil which this section was designed to destroy. It simply prohibits the releasing or extinguishing of any indebtedness, liability or obligation on the part of

any incorporation or individual to the State, to the county or municipal corporation.

We are to determine whether or not the Legislature is deprived of the authority to repeal a statute which requires the payment of a penalty already incurred for failure to make payment of taxes prior to January 31, 1920.

We can think of no broader language to express the relationship of a duty owed by an individual to the State than the words "indebtedness, liability or obligation." Indebtedness is more restricted in its meaning than either the term "liability" or "obligation." The enumeration of the various obligations and liabilities due by a citizen to the State would be of little avail in determining whether or not the penalty to pay taxes at the proper time come within the meaning of such words. Too, it might be said that the evils designed to be remedied by the constitutional convention would shed some light on what should be properly included in those terms and it has been argued that such a criterion for arriving at the meaning of the Constitution is conclusive. At the time of the writing of this section one evil at least sought to be corrected was that of withdrawing from the hands of the Legislature the power to extend a remedy to the various State, county and local officials who had defaulted or failed to properly collect, account for, and disburse tax money. But there is no substantial reflection in the words of Section 55 that this evil was the sole and exclusive purpose for including such section in the Constitution.

As a means to a further and proper understanding of the terms used in Section 55, we resort to the various cases which have been decided and which involve this section.

In the case of *Calter et al. vs. Castile*, 37 S. W., 791, in which case a writ of error was later refused, we find that the city of Galveston required each bid for a street paving contract to be accompanied by a deposit of \$2000 to be forfeited if the bidder failed to qualify after the awarding of the contract, and it was material for a proper decision of the case to ascertain whether or not a city would be authorized to release the \$2000 deposit to the bidder. Judge Pleasants used the following significant language:

"and if on the other hand the appellants by refusing to comply with the demand of the city to execute the contract and bond submitted to them thereby incurred a liability whether in the form of legal damages or a penalty. The city could not release the appellant from such liability because the exercise of such power is plainly prohibited by Section 55 of Article 3 of the Constitution of this State, and it would be the duty of the city council to hold the money and apply it towards the discharge of the liability by this appellant."

In the case of *P. M. Olliver et al. vs. The City of Houston*, 93 Texas, 201, on a certified question to the Supreme Court, it was necessary to decide whether or not Section 55 of Article 3 of the Constitution prohibited the Legislature from extinguishing an obligation to a State or municipality by enacting a law which allowed the defendants to plead four years limitations to tax suits brought in the name of the City of Houston.

In answer to the question we find that the liability for the payment of taxes is included within the meaning of the words in Section 55 of Article 3.

"By that provision of the Constitution the Legislature is forbidden to pass

any law which would 'extinguish any liability, indebtedness, or obligation to the State or any county or city,' and thereby power to extinguish liability for taxes was denied. * * * For the prevention of these evils this provision was inserted (that is, governmental favoritism). *Its terms are broad enough to cover every conceivable obligation or liability, the remission of which would diminish the public revenue and thereby either directly or indirectly impose a heavier tax upon those not affected by the exemption.*"

Also the contention was considered that the law fixing the limitation on actions for taxes was a major interest to the Legislature in passing the act and that its incidental effect would not have any bearing upon its validity. The court said:

"The effect of the act is to relinquish liability. The purpose to accomplish that end is manifest. *The result was the effectual exemption of the property of appellants from taxation for the years named.*"

The question was certified to the Supreme Court and Judge Williams in an opinion agreed with the majority finding of the court below.

In the case of Delta County vs. W. A. Blackburn et al. the question arose whether or not the order of a commissioners court reducing the rate of interest on a note for the purchase price of school land from seven per cent to three per cent was beyond the power of the court. Such action was held to be in direct contravention of Article 3, Section 55, of the Constitution.

In the case of Lindsey vs. The State, 95 Texas, 587, it was held that the action of the commissioners court in selling judgments against insolvent debtors was valid under Article 3, Section 55 of the Constitution. In defining the words of this section Judge Williams used the following language:

"But we are not authorized to import into the Constitution language which it does not use. * * * It is one thing to release debtors or to extinguish their debts, liabilities or obligations without payment or performance, and quite another to obtain by sale under fair and prudent management, the value of such assets."

We have, therefore, seen that the statute of limitation in effect releasing liabilities for taxes; municipal taxes levied but uncollected; reduction of rate of interest on notes payable to a county as purchase money of school lands; the receiving of a less sum for a settlement of accounts in favor of a county as against its officers; the return of a deposit made by a bidder on a paving contract in the nature of a penalty; and a compromise settlement by the grantee of county school land in the commissioners court whereby a deed was made upon no consideration, all have been found to come within the meaning of the words "debt, obligation or liability."

The penalty for failure to pay taxes prior to January 31, 1920, has already accrued and such penalty together with the taxes are secured by a special lien against all property as is provided in Article 8, Section 15, of the Constitution. This lien, on the obligation and liability to pay taxes and penalties thereon "attaches and becomes an incumbrance on the land from the date liability is fixed on the owner, which is the first day of January of the year, although the amount of said tax is not fixed and determined until some time subsequent thereto." C. B. Caswell & Co. vs. Halbertzette, 87 S. W., 911.

The obligation and liability both for the taxes and penalty is designated as an *incumbrance* in the case last mentioned above.

In a certified question the Supreme Court considering penalties said:

"But we are of the opinion that the penalty and costs which accrued upon the failure of the grantor in the deed to pay the taxes stand upon the same footing as the taxes themselves. It is the duty of the latter to remove the incumbrance. * * * Therefore, we think that if the *debt* of the covenantor which constitutes an incumbrance on the land is annexed either by law or by contract from a condition the happening of which the *debt may be increased and the condition happens the increment is as much a part of the indebtedness as the original debt, so in this case by reason of the default by the grantor in the deed in failing to pay the taxes assessed, the debts are by operation of law increased by penalties and costs which increase it was the duty of the covenantor and not the duty of the covenantee to prevent. Clearly, the State, county and city has a lien upon the land as well for the penalty and cost as for the taxes themselves and we fail to see any principle upon which it could be claimed that any duty would devolve upon the covenantee to discharge at any stage the obligation which the covenantor had undertaken to be performed.*"

Under the above decisions and the various expressions of the Supreme Court indicating the nature of the obligations and liability which are contained within Section 55 of the Constitution, we are irresistibly led to the conclusion that a penalty for the failure to pay a tax prior to January 31st is a liability or obligation within the meaning of the Constitution and the releasing and extinguishing of which is withdrawn from the hands of the Legislature.

We shall not pass without noticing the case of Adams, Revenue Agent, vs. Fragiscoma, 15 S. R., 798, decided by the Supreme Court of Mississippi, interpreting a similar clause of the Mississippi Constitution in which it was held that a penalty incurred for the selling of liquors without a license would not come within the meaning of the particular wording of the Mississippi Constitution.

The decision seeks to determine whether or not a penalty arising as above disclosed came within the meaning of the words "obligation and liability" as used in the Constitution, and it was said "a careful scrutiny of the language of the entire section shows that the use of the word 'liability' was intended to be restricted or perhaps it is more accurate to say that the word cannot be read in its full sense without doing violence to the purpose of the section as a whole."

Thereafter the opinion calls attention to the words "liability held and owned by the State" and the answer by payment thereof "into the *proper treasury*" and the further limitation "nor shall such liability or obligation be exchanged or transferred except on payment of its face value."

But the argument and rules of interpretation applicable to the Mississippi Constitution and its language are in nowise applicable to the general, broad and sweeping provisions of Section 55 of the Texas Constitution. And, furthermore, the courts have shown a general tendency to give the general words used in this section their ordinary meaning.

By reason of the broad language in this Section 55, the construction thereof by the courts giving full effect to such words, we conclude that the penalty provided creates a liability within the meaning of our Constitution. 37 Pac., 1017.

Section 10, Article 8, of the Constitution prohibits the Legislature from releasing the payment of taxes levied for State and county purposes and the penalties herein discussed being so closely allied to the

taxes and are considered by the adjudicated cases as an incident thereof, would subject them to the restriction mentioned in the foregoing article and section of the Constitution. *City of San Antonio vs. Toepferwin*, 133 S. W., 416.

Article 1, Section 16, would not be violated by the passage of such act releasing the penalties, for it is well understood that the remedy for the collection of taxes is subject to change, and modifications by the Legislature. *De Cordova vs. City of Galveston*, 4 Texas, 470. And, furthermore, a penalty is always executory as between individuals and no person can claim as against another a vested right in a penalty, but such construction placed upon the nature of a penalty does not militate against the holding that the Legislature is without power to release or relinquish penalties, for the reason that the Legislature, under Section 55, Article 3, of the Constitution, may not release any liability or obligation which an individual owes the State or municipal corporation. This constitutional clause applies to liabilities and obligations as between the States, lesser political subdivisions, and citizens, and the holding that releasing and relinquishing penalties already incurred, is not retroactive, is in nowise in conflict with the holding that such a penalty is a liability or obligation within the meaning of Section 55, Article 3, of the Constitution.

Therefore it is the opinion of this Department, and you are so advised, that the proposed legislation releasing and relinquishing "penalties" already incurred by taxpayers for failure to pay taxes prior to January 31, 1921, would be void because it contravenes Section 55, Article 3, and Article 8, Section 10, of the Constitution of Texas; however, a postponement of the payment of penalties already incurred would not be a "releasing or relinquishing" of an "obligation or liability" which is inhibited by the Constitution.

Yours very truly,

WALACE HAWKINS,
Assistant Attorney General.

Op. No. 2421, Bk. 57, P. 51.

CONSTITUTIONAL LAW—PARDONING POWER—FURLOUGHES.

A ninety-day furlough granted by the Governor to a convict in writing is not, in the absence of language expressing a contrary intention, to be construed as merely suspending the execution of the prison sentence so as to make it necessary for the convict to serve the ninety-day period in addition to what would otherwise be his entire prison term. On the other hand such a furlough evidences a gift of that much time to the convict, or an amelioration of the nature of the punishment for that period of time, allowing him to serve that much of his sentence outside the confines of the penitentiary under leave of absence.

The following words and phrases defined: "Reprieve," "Commutation of Punishment," "Pardon," "Full or Absolute Pardon," "Conditional Pardon," "Partial Pardon," "Parole," "Furlough."

AUSTIN, TEXAS, March 16, 1922.

Hon. R. B. Walthall, Secretary to the Governor, Capitol.

DEAR SIR: Attorney General W. A. Keeling has received from you an inquiry dated March 8, 1922, in the following language:

"A party was sentenced to the penitentiary for two years. He had served all but ninety days of his sentence, when the Governor granted him a ninety-day furlough. At the expiration of this furlough will the party be entitled to a discharge, or will it be necessary that he return to the penitentiary and serve the rest of his sentence?"

At my request you have handed me a copy of a furlough in the usual form as granted by Governor Neff, though it would seem that it is not precisely the same as the one about which you inquire. I am assuming, however, that the only difference between the two is that one is for thirty days while the other is a ninety-day furlough. The form of furlough furnished is as follows:

"Whereas, At the.....Term, A. D. 1921, of the District Court of Cherokee County, State of Texas,

J. D. DRAPER

was convicted of a felony, towit: Manufacturing intoxicating liquors, and his punishment assessed at one year confinement in the State Penitentiary; and

"Whereas, Application is now made asking that the said J. D. Draper be granted a furlough of thirty days in order that he may go to the bedside of his sister who is seriously ill at Texas City, Texas, as appears from one Dr. Dainforth of Texas City, Texas, in telegram received by the Board of Prison Commissioners at Huntsville, Texas, where said J. D. Draper is confined; and

"Whereas, It now being made known to me by the Board of Prison Commissioners that the said J. D. Draper has and is now serving his term of sentence with a clear record; and

"Whereas, The Board of Prison Commissioners have recommended that the said J. D. Draper be granted a furlough of thirty days in order that he may go to see his sister who is ill at Texas City, Texas;

"Now, Therefore, I, Pat M. Neff, Governor of Texas, do for the reasons above specified, by virtue of the authority vested in me under the Constitution and laws of this State, hereby grant the said J. D. Draper a furlough of thirty (30) days, during which time he shall be released on his honor, and at the expiration of which time he shall return to the place of his present incarceration without expense to the State.

"In testimony whereof, I have hereunto signed my name officially, and caused the seal of State to be hereon impressed at the city of Austin, Texas, this the 27th day of February, A. D. 1922.

.....
"Governor of Texas.

"By the Governor:

.....
"Secretary of State."

Having concluded that the time the convict is out on furlough should be deducted from the term of his sentence, that he should not be held for such time beyond what would otherwise be the end of his prison term, it is proper to examine into the subject of the pardoning power at sufficient length to indicate the basis for our opinion, and no further.

The Constitution of 1876 delegates to the Governor of Texas the pardoning power (Sec. 11, Art. 4) in these words:

"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. With the advice and consent of the Senate, he may grant pardons in cases of treason, and to this end he may respite a sentence therefor, until the close of the succeeding session of the Legislature; provided, that in all cases of remission of fines and forfeitures, or grants of reprieve, commutation of punishment or pardon, he shall file in the office of the Secretary of State his reasons therefor."

It will be seen that he has power, among other things, to grant reprieves, commutations of punishment, and pardons.

A reprieve is the withdrawing of a sentence for an interval of time, whereby the execution is suspended. It is merely a postponement of the execution of the sentence as pronounced by the court. 24 A. & E. Ency. of Law, p. 522.

A commutation of punishment is a substitution of a less for a greater punishment by authority of law. Id.

A pardon has been defined to be an act of grace which proceeds from the power intrusted with the execution of the laws, and exempts the individual on whom it is bestowed from the punishment which the law inflicts for a crime that he has committed. It is full and absolute when it freely and unconditionally absolves the party from all the legal consequences of his crime and his conviction, direct and collateral; including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided. A pardon is conditional either where it does not become operative until its recipient has performed some specified act, or where it becomes void when some specified event occurs. A pardon is partial where it remits only a portion of the punishment, or absolves from only a part of the legal consequences of the crime. A parole is the release of a convict from imprisonment upon certain conditions to be observed by him, and a suspension of his sentence during his liberty thus granted. 24 A. & E. Ency. of Law, pp. 551-552.

The authority cited distinguishes between a pardon and a commutation of sentence as follows:

"A pardon is to be distinguished from a commutation of sentence in that the former does, while the latter does not, relieve the person convicted from the consequences which the law attaches to his conviction. As will be shown in another part of this title, a pardon not only entirely remits the punishment, but creates in the offender a new credit and capacity; whereas, a commutation of sentence in effect reaffirms the offender's adjudged guilt, and simply mitigates the severity of the penalty."

And between a parole and a pardon, thus:

"A parole, whereby a prisoner is given his liberty subject to conditions, but remains in the legal custody and control of the proper authorities, is to be distinguished from a pardon upon the ground that it does not exempt the prisoner from the entire punishment inflicted by law, the prisoner still remaining under sentence."

A parole and commutation of sentence are also distinguished:

"The release of a prisoner on parole does not amount to a commutation of his sentence, since it does not change his punishment into a less severe one; the sentence remaining in force, and the prisoner, while enjoying his liberty, being liable to be reimprisoned at any time."

As well as a reprieve and commutation of sentence:

"A reprieve may be distinguished from a commutation of sentence by the fact that the effect of a reprieve is to suspend the sentence temporarily, but otherwise to leave it in full force; whereas, the effect of a commutation is to abrogate and set aside the sentence by substituting a new and different punishment."

According to the authorities it is safe to assume that the power conferred upon our Governor includes every character of executive clem-

ency, after conviction, except as to treason and impeachment. *Id.*, p. 556.

One of the lowest, if not the lowest, forms of executive clemency is the furlough, which is nothing more than a leave of absence. See Webster's Dictionary.

From what has been said it is apparent that the Governor has power to pardon a convict outright, to postpone the punishment, or to change the punishment to a less severe one. In short, he has the full pardoning power, after conviction, except as to treason and impeachment, which includes all lesser powers of executive clemency.

The question is, did the furlough amount to an interruption and postponement of the execution of the sentence, or was it a gift of that much time to the convict? The question is one of intention, for the Governor has ample power to either grant a postponement or relieve the convict of the necessity of serving a portion of his sentence within the penitentiary. The one would be analogous to a reprieve, the latter either a commutation or a gift well within the pardoning power.

It has been the practice in this State to grant paroles to convicts with the understanding and upon the condition that they are subject to the rules of the prison authorities, which require them to make reports, and stipulate that they may be taken back into the prison at any time. Under these paroles the convict is not entirely a free man. This character of executive clemency is usually made subject to our parole statute, which seems to contemplate that upon violation of paroles the convict must serve the remainder of his sentence dating from the time of the delinquency. (Art. 1057j, C. C. P.) It is well and generally known that the furlough is a still lower form of executive clemency than the parole, and, therefore, we do not believe that we are warranted in inferring that the Governor intended to grant greater freedom in granting a simple furlough for a given period than he does in granting a parole. If anything the inference would be that the furloughed convict is less free than the paroled convict. If so, he is, during the time of the furlough, still suffering the legal consequences of his crime and conviction, though not within the physical confines of the penitentiary. So that to hold that there was an intention to require the convict to serve the full term in addition to the furlough period would be to hold in a limited sense that there was an intention to prolong the term and increase it beyond that included in the sentence of the court. It could be argued with some plausibility that the punishment would be increased. It is not necessary to pass on whether this could be done (on the theory that the convict agrees to it when he accepts the furlough), but we are inclined to the opinion that there was no intention to do it in the instant case. In the absence of clear language to the contrary we believe the presumption should be indulged that a benefit in the way of executive clemency was intended, and to hold to the contrary would render it doubtful indeed whether a beneficial grant was made within the meaning of the pardoning power. For while on furlough the convict would be under legal disabilities, if not restraints, and if he then, in addition to that period, had to serve his entire term there would be room for arguing that his punishment would be increased. The presumption is against any intention to effect such a result.

It seems that the weight of authority supports the doctrine that where a convict violates the conditions of his pardon or parole, the time during which he is at large under the parole or conditional pardon is not to be treated as time served on the sentence. 20 R. C. L., p. 570; 5 L. R. A. (N. S.), 1064; 16 L. R. A. (N. S.), 304. But some authorities are to the contrary. *Scott vs. Chichester*, 107 Va., 933, 60 S. E., 95, 16 L. R. A. (N. S.), 304; *Ex parte Prout*, 12 Idaho, 494, 5 L. R. A. (N. S.), 1064, 86 Pac., 275; *Woodward vs. Murdock*, 124 Ind., 439, 24 N. E., 1047.

The doctrine appears to have grown up under decisions where conditions of conditional pardons and paroles had been violated, the theory being that the convict under such circumstances by his own wrongdoing renders the conditional pardon or parole void. Moreover, in most, if not all, of the cases it would seem that either the pardon or parole itself or the law applicable thereto made it clear that the time during which the convict was at large was not to be credited on the term of his sentence in case of violation of the conditions. The convict, under these circumstances, accepts the executive clemency knowing what will be the consequences if he violates the conditions.

Such is not our case here. In the case you submit no conditions have been broken, nor is there any express provision or understanding that the time of the furlough is not to be counted as time served. Therefore, even if we should agree with the weight of authority, our question would still remain undecided. No adjudicated case has been discovered by us passing upon a similar state of facts.

Upon principle, however, we are of the opinion that the furlough does not disclose an intention on the part of the Governor to suspend the execution of the sentence for the period of the furlough so as to require that the convict serve such time in the penitentiary in addition to what would otherwise be the end of his prison term, but on the other hand that the instrument is to be construed as a gift of that much time to the convict, or that it was intended that he should be permitted to serve that much of his sentence on furlough outside the confines of the penitentiary. The one would be to shorten his prison term, the other to ameliorate the nature of the punishment. The question as to which was intended as between these two would be more academic than real so far as your inquiry is concerned. The Governor could grant either under his constitutional authority, and in either event the convict gets the benefit of the time of the furlough. As between the two, however, the furlough should probably be treated as allowing the convict limited freedom while still serving his term.

It being a question of intention, the writer suggests that these furloughs or paroles could be drawn so as to make clear just what is intended.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2299, Bk. 55, P. 226.

CONSTITUTIONAL LAW—PARDON POWER—DISBARMENT PROCEEDINGS.

1. The Governor has no power or authority to grant pardons except in criminal cases.
2. A disbarment proceeding under the Revised Civil Statutes as they existed in 1904 was not and is not a criminal case within the meaning of the Constitution granting the pardon power, and hence the Governor has no power or authority to grant a pardon to the defendant in such a case.
3. Cause No. 4944, *The State of Texas vs. J. B. Newsome*, in the District Court of Gonzales County, which was a disbarment proceeding, held not to be a criminal case and, therefore, that a pardon cannot be issued by the Governor to the defendant.

AUSTIN, TEXAS, February 26, 1921.

Hon. Pat M. Neff, Governor of the State of Texas, Capitol.

DEAR SIR: We acknowledge receipt of your verbal request for an opinion as to whether you, as Governor, have power and authority to issue a pardon in favor of an attorney who has been disbarred by proceedings in the district court.

The case you submit is styled "*The State of Texas vs. J. B. Newsome, No. 4944, in the District Court of Gonzales County, Texas.*"

In the above mentioned case, upon the 25th day of January, 1904, judgment was entered reciting that the above case came on to be heard and "came the State of Texas by its attorney, Wm. Atkinson, and announced ready for trial, and comes also the defendant, J. B. Newsome, and announced ready for trial, when a jury of twelve good and lawful men, etc. * * * and said jury, after having heard the complaint and the answer of defendant, read the evidence adduced and argument of counsel and received the law in charge by the court, retired to consider of this verdict and returned into court the following verdict, to wit:

"We, the jury, find the defendant guilty as charged in the complaint. J. B. Jones, foreman.

"Wherefore, it is ordered, adjudged and decreed by the court that the defendant, J. B. Newsome, has been found by the jury to be guilty of fraudulent and dishonorable conduct and malpractice as found by the jury in their verdict.

"Wherefore, it is further ordered, adjudged and decreed by the court that the license of the defendant, J. B. Newsome, as an attorney at law in the State of Texas be and the same is hereby revoked and he is hereby disbarred from hereafter appearing as an attorney at law in any court of the State of Texas.

"It is further ordered, adjudged and decreed that all costs herein be charged against the defendant for which let execution issue."

The case seems to have been tried upon a pleading signed by three practicing attorneys in Gonzales County, which pleading is indorsed: "Sworn Complaint of Fraudulent and Dishonorable Conduct." And upon an answer filed by the defendant in the following language:

"Now comes J. B. Newsome in the above numbered cause and for answer says that all the allegations in plaintiff's *petition* are untrue and pleads not guilty and requires of plaintiff strict proof of all the allegations charged in the plaintiff's *petition*." This latter document is indorsed: "Original Answer."

The statute under which this action was brought was evidently Articles 264 et seq. of the Revised Civil Statutes of Texas of 1895.

Article 264 provides, in substance, that if any district court observes any fraudulent or dishonorable conduct or malpractice by any attorney at law, or if complaint be made to the district court of such conduct or malpractice by a judge of any court, a practicing attorney, a county commissioner or justice of the peace, such court shall order the attorney to be cited to show cause why his license shall not be suspended or revoked.

Article 265 requires such complaint to be made in writing and subscribed and sworn to by the prosecutor and filed with the clerk of the court.

Article 266 provides that the citation shall be issued in the name of the State and in like manner and form as in other cases and the same shall be served upon the defendant at least five days before the trial day.

Article 267 provides that the defendant may appear and deny the charge and that the trial shall be in the name of the State against the defendant, and the State shall be represented by the county or district attorney, and that a jury of twelve men shall be impaneled unless waived by the defendant and the cause shall be tried in like manner as in other cases.

Article 268 provides that if the attorney be found guilty or if he fail to appear and deny the charge after being cited as aforesaid, the court, by proper order, may suspend his license for a time or revoke it entirely and may also give proper judgment for costs.

DISBARMENT PROCEEDINGS NOT A CRIMINAL CASE.

Unless the proceeding under consideration is a criminal case, the Governor is without power or authority to issue a pardon to the person disbarred. The Governor has the power of pardon only by reason of the grant of such power in the State Constitution. All the powers delegated to him by or in accordance with that instrument he is entitled to exercise and no others. The Constitution is a limitation upon the powers of the legislative department of the government, but it is to be regarded as a grant of powers to the other departments. The executive, therefore, can exercise no authority or power except such as is clearly granted by the Constitution. Cooley's Constitutional Limitations, p. 160, note 1.

The grant of power relative to pardons by our State Constitution is to be found in Section 11 of Article 4 in the following language:

"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. With the advice and consent of the Senate, he may grant pardons in cases of treason, and to this end he may respite a sentence therefor, until the close of the succeeding session of the Legislature; provided, that in all cases of remissions of fines and forfeitures, or grants of reprieve, commutation of punishment or pardon, he shall file in the office of the Secretary of State his reasons therefor."

It will be seen that it is only in criminal cases that the Governor has power and authority to issue pardons. *Jetter vs. State*, 86 Texas, 559, 26 S. W., 49.

We are of the opinion that the disbarment proceeding in the case submitted by you was not and is not a criminal case within the meaning of our Constitution conferring upon the Governor the pardon power. The proceeding is authorized and provided for, and was at the time this case was tried, in the Revised Civil Statutes of this State and was not and is not mentioned or provided for in our Penal Code or Code of Criminal Procedure. The prosecution is substantially by petition and answer as in civil cases. It is not by indictment or information. It is true that the defendant may plead not guilty but the same might be said in cases in trespass to try title.

It may be admitted that a proceeding of this kind has some features resembling a criminal case, but that is not sufficient. It must be a criminal case before the Governor can grant a pardon.

The office of an attorney at law is similar to that of a public officer. He is in a sense an officer of the court in which he practices.

The right to practice law is a privilege or franchise granted and regulated by law. 4 Texas Cr. App., 312; 2 R. C. L., 940; 16 Wall., 130; 154 U. S., 116.

If it could be said that the Governor could grant a pardon in favor of a person disbarred under proceedings of this kind, it could with equal force be said that he could grant a pardon to a person removed from any office within this State for misconduct, since the position of a public officer and that of a licensed attorney at law in this State are analogous.

There are authorities upon both sides of the question as to whether a disbarment proceeding is a criminal case or not, but we believe those decisions holding that such a proceeding is not a criminal case are controlling and are consistent with reason and legal principles.

State vs. Tunstall, 51 Texas, 81, decided by our State Supreme Court in 1879, holds a proceeding to disbar an attorney for fraudulent or dishonorable conduct not to be a civil case within the meaning of the Constitution of 1876 conferring upon the Supreme Court appellate jurisdiction in civil suits of which the district courts have original or appellate jurisdiction, and the court in its opinion stated that,

“* * * it certainly is not a civil one, but is unquestionably a criminal or quasi-criminal one, of which we have no jurisdiction.”

This case was not followed by the Supreme Court later, however, in a similar case which was decided in the year 1894, and which will now be discussed.

In the case of Scott vs. State, 86 Texas, 321, 24 S. W., 789, the Supreme Court of Texas expressly held that a disbarment proceeding under our statute is not a criminal case, being a civil case, and that the Court of Civil Appeals had jurisdiction over such a case upon its merits. The proceeding in that case was originally instituted in the District Court of Bosque County in the name of the State against an attorney, Scott, to revoke his license to practice law and to strike his name from the roll of attorneys. There was judgment against him from which he sued out a writ of error to the Court of Civil Appeals for the Second District. Upon motion of the Attorney General, the cause was there dismissed and the correctness of the court's ruling in dismissing the case was taken to the Supreme Court. The Supreme

Court held that the Court of Civil Appeals erred in dismissing the case on the ground that it was a criminal one, and held that it was not a criminal case and remanded the case to the Court of Civil Appeals for hearing and determination upon its merits. The Supreme Court said that

"A criminal case is defined to be an action, suit or cause instituted to secure conviction and punishment for crime."

The court reviews the authorities upon the question and points out that the Revised Penal Code and Code of Criminal Procedure expressly declare it to be the purpose of the Legislature in the one to define every offense against the laws of the State and in the other to make rules of procedure in respect to punishment for offenses in this State and that these codes do not define the acts for which an attorney may be disbarred nor do they define the procedure; that the regulations in regard to disbarment proceedings are embodied in the Revised Civil Statutes. In the course of its opinion the court said:

"It invariably follows that the present proceeding is not in its nature a criminal case."

The court intimates that the case might be distinguished from the Tunstall case in that the latter was

"Based upon the language of the old statute, which was repealed by the Revised Statutes now in force."

Be that as it may, it remains that the latest expression of our Supreme Court is to the effect that a disbarment proceeding of this kind is a civil case and not a criminal one. It might be added that the statutes in 1904 were the same as to proceedings of this nature as they were in 1894 when the Supreme Court decided the Scott case.

The Scott case, before mentioned, was in obedience to the decree of the Supreme Court remanded to the Court of Civil Appeals, and while the Court of Civil Appeals was of the opinion that the Supreme Court was in error in holding that the disbarment proceeding was not a criminal case, it recognized that the decision of the Supreme Court controlled and proceeded to decide the case upon its merits. In deciding the case upon its merits the Court of Civil Appeals held that where a statute authorizes disbarment of an attorney "convicted of a felony," there existed no ground for disbarment after the attorney had been pardoned after conviction of the felony; that the pardon of the felony removed the ground and the attorney could no longer be said to be "convicted of a felony." Such a case is not our case here, since in the instant case there is no reliance upon a former conviction of a felony. The Court of Civil Appeals in the Scott case did not hold a pardon could be granted in a disbarment proceeding, but only that the pardon theretofore granted wiped out the ground relied upon, and in taking jurisdiction had to treat the case as a civil one. *Scott vs. State*, 26 S. W., 337.

The courts hold that the Governor has no power to grant pardons in cases of punishment for contempt of court. *Taylor vs. Goodrich*, 40 S. W., 515; *Casey vs. State*, 25 Texas, 381; *Ex parte Novitt*, 117 Fed., 457.

Upon the proposition that a disbarment proceeding is not a criminal case, see also *Ex parte Wall*, 107 U. S., 265.

And further indicating that cases of this kind are not to be considered criminal cases, attention is called to the fact that the statute does not require the complaint to begin with the language "in the name and by the authority of the State of Texas" or to close with the language "against the peace and dignity of the State," as is the practice in strictly criminal cases. As a matter of fact, in the case submitted by you, the complaint did not begin and end in this manner.

From the foregoing it will be seen that the courts will deny the Governor the power to grant pardons except in the strictly criminal cases and we hold that a disbarment proceeding does not belong to that category.

This Department is of the opinion that the disbarment proceeding in cause No. 4944, in the District Court of Gonzales County, styled *The State of Texas vs. J. B. Newsome*, submitted by you, was not and is not a criminal case within the meaning of the provision of the Constitution granting to the Governor the pardon power, and that, therefore, you, as Governor, have no power or authority to grant a pardon to the defendant in said case.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2398, Bk. 56, P. 37.

CONSTITUTIONAL LAW—PARDONING POWER—REMISSION OF
FORFEITURES.

Forfeiture on bail bond may be remitted by the Governor as soon as the forfeiture takes place as provided in Article 489, Code of Criminal Procedure of 1911, and the forfeiture takes place upon entry of judgment nisi as prescribed in said article of the Code. The making of this judgment final is not a necessary prerequisite to the exercise by the Governor of the power to remit the forfeiture.

Constitution, Art. 4, Sec. 11; Arts. 488 to 504, incl., C. C. P., 1911; Arts. 1051-2, C. C. P., 1911.

AUSTIN, TEXAS, November 3, 1921.

Hon. Pat M. Neff, Governor, Capitol.

DEAR SIR: You request an opinion as to whether it is within your power as Governor of the State of Texas to remit forfeitures of bail bonds before final judgment of forfeiture but after judgment nisi.

The Constitution of Texas delegates to the Governor the power of granting pardons, remitting forfeitures, etc., in Article 4, Section 11, in the following terms:

"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. With the advice and consent of the Senate, he may grant pardons in cases of treason; and to this end he may respite a sentence therefor, until the close of the succeeding session of the Legislature; provided, that in all cases of remissions of fines and forfeitures, or grants of reprieve, commutation of punishment or pardon, he shall file in the office of the Secretary of State his reasons therefor."

The provisions of the statute law upon this subject are contained

in Chapter 4, Title 12, C. C. P. of 1911. Articles 1051 and 1052 thereof read as follows:

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

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

It will thus be seen that the Governor has power to remit *forfeitures* in criminal cases. Judicial proceedings as to forfeitures of bail bonds are criminal cases. *Hodges vs. State*, 165 S. W., 607; *General Bonding & Casualty Co. vs. State*, 165 S. W., 615.

It becomes necessary, then, to determine when the *forfeiture* takes place; for when the forfeiture occurs the Governor has the power to act, pursuant to the express terms of the Constitution and statutes.

The provisions of the Code of Criminal Procedure are clear upon this point. Article 488 prescribes when a forfeiture shall be taken, as follows:

"Whenever a defendant is bound by recognizance or bail bond to appear at any term of a court, and fails to appear on the day set apart for taking up the criminal docket, or any subsequent day when his case comes up for trial, a forfeiture of his recognizance or bail bond shall be taken."

The manner of taking the forfeiture is set forth in Article 489, to wit:

"Recognizances and bail bonds are forfeited in the following manner: The name of the defendant shall be called distinctly at the door of the courthouse, and, if the defendant does not appear within a reasonable time after such call is made, judgment shall be entered that the State of Texas recover of the defendant the amount of money in which he is bound, and of his sureties, the amount of money in which they are respectively bound, which judgment shall state that the same will be made final, unless good cause be shown at the next term of the court why the defendant did not appear."

Article 490 provides for issuance of citation notifying the sureties "that the recognizance or bond *has been forfeited*" and requiring them to appear at the next term and show cause why the same should not be made final.

Article 499 provides that the judgment declaring the forfeiture *shall not be set aside* because of any defect of form.

Articles 503 and 504 provide for the remission and *setting aside of the forfeiture* by the court before final judgment under certain circumstances.

The provisions of these statutes make it reasonably clear that the forfeiture has taken place when the judgment nisi has been entered according to law. The forfeiture *remains a forfeiture* until set aside or remitted in the manner prescribed by law. As was said by our State Supreme Court, through Justice Wheeler, in *Taylor vs. State*, 21 Texas, 499, "the failure of the defendant to appear accordingly was a forfeiture of the recognizance. The judgment nisi was but a declaration of record of the forfeiture. It had no other effect than simply to ascertain the fact."

There is no requirement in the Constitution or statutes that *final judgment* of the forfeiture is a condition precedent to the power of the Governor to remit. The Governor, it is true, cannot grant re-

prieves, commutations of punishment or pardons until *after conviction*, but this is by virtue of express constitutional provision. Where the Constitution confers the pardoning power without restriction as to the time when it may be exercised, a pardon may be granted before as well as after conviction. 24 A. & E. Ency. of Law, p. 571.

The expression "after conviction" in the Constitution evidently relates to reprieves, commutations of punishment and pardons only. In fact, it is a term scarcely applicable to the forfeiture of a bail bond, since in such forfeitures there is no "conviction" as that word is generally understood in criminal jurisprudence.

Formerly, the Code of Criminal Procedure contained a provision to the effect that the Governor should have "after conviction" power to "remit fines and forfeitures of a pecuniary character." *State vs. Dyches*, 28 Texas, 535, 540. In the case cited the Supreme Court overruled the contention that there was no power to remit a forfeiture on a bail bond until after conviction of the accused in the criminal action. The court held that, there having been a final judgment of forfeiture against the sureties on the bond, the Governor had power to remit the forfeiture. The court said it was unnecessary to decide whether the Governor would have such power "before conviction," evidently meaning before final judgment.

Our present statute, however, does not, as we have seen, use the expression "after conviction" in connection with the power of the Governor to remit forfeitures of recognizances and bail bonds (see Art. 1052, C. C. P. of 1911), and since the language of the Constitution as well as that of the statutes confers power to *remit forfeitures* without any requirement that it be after final judgment only, we reach the conclusion that the power of the Governor to remit arises upon the forfeiture taking place, and that at and after the time judgment nisi is entered according to law, the forfeiture has taken place within the meaning of the Constitution and statutes conferring upon the Governor the power to remit. It is unnecessary to decide whether the power to remit exists before judgment nisi is entered.

The writer is unable to find any court decisions directly in point. In *Harbin vs. State*, 43 N. W., 210, the Supreme Court of Iowa held that the Governor had authority to remit a forfeiture after final judgment under a statute conferring upon the Governor power "to remit fines and forfeitures upon such conditions * * * as he may think proper," and under the usual constitutional provision, it being contended in the case that "after judgment, there is no forfeiture within the meaning of the law, but a judgment over which the Governor has no control or right of remission." The court, in its opinion, stated that,

"The power of the Governor to make such remission after the entry of the breach of the conditions of the bond by the justice, and before judgment, is not questioned in the case."

The following excerpts from the court's opinion may also be quoted as showing the court's idea of when the power of remission may be exercised:

"The proceeding or judgment does not set aside the forfeiture, but confirms or establishes between the parties the fact of its existence, and is, in effect, an order or direction of the court for its payment; and, if not paid, the law affords

a means of enforcement. Whether paid before or after judgment, it is the payment of a forfeiture.

"The law contemplates facts and circumstances under which the payment should not be required, even where it could be legally enforced, and we think it the spirit of the law that this large discretion with which the Governor is invested extends to the time of payment of the forfeiture, whether after judgment or before."

It is the opinion of this Department that the Governor has power to remit forfeitures of bail bonds after lawful entry of judgment nisi, and that he may remit such forfeitures before final judgment.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2397, Bk. 56, P. 43.

CONSTITUTIONAL LAW—EX POST FACTO LAW—DEAN LAW—SUSPENDED SENTENCE LAW.

The provision of the statute amending the Dean Law denying to offenders over twenty-five years of age the benefit of the Suspended Sentence Law has no application to offenders as to acts committed prior to the taking effect of the amendment.

To hold otherwise, would be to convict the Legislature of passing an ex post facto law in violation of the State, as well as the Federal Constitution.

AUSTIN, TEXAS, November 15, 1921.

Hon. C. O. James, District Attorney, Eighth Judicial District, Sulphur Springs, Texas.

DEAR SIR: I have yours of the 5th instant addressed to the Attorney General, reading as follows:

"Judge Hall and myself are not quite agreed about the status of our new liquor law which goes into effect the 14th of November. The question which I would have you answer is this: The amended Dean Law denies a suspended sentence to a defendant 25 years of age or over. Will this be the law as to violations of the Dean Law committed before the 14th and still pending for trial? I would thank you to write me at Greenville, Texas, care of J. G. Burt, District Clerk, this week, as I will be there."

The Dean Law was amended by the Thirty-seventh Legislature at its First Called Session, Chapter 61, page 233, General Laws of said session, so as to contain the following provision:

"Section 2d. No person over twenty-five years of age convicted of any of the provisions of this act shall have the benefit of the Suspended Sentence Law."

This act is effective on and after November 15, 1921. Prior to its enactment any person convicted under the Dean Prohibition Statute, who had never before been convicted of a felony in this State or any other State, was entitled to the privilege of having submitted to the jury the question as to whether his sentence should be suspended. The Suspended Sentence Law is included in Vernon's Complete Texas Statutes of 1920, as Articles 865b to 865h, inclusive, of the Code of Criminal Procedure, reading as follows:

Art. 865b. Suspended sentence.—When there is a conviction of any felony in any district court of this State, except murder, perjury, burglary of a private

residence, robbery, arson, incest, bigamy and abortion, the court shall suspend sentence upon application made thereof in writing by the defendant, which shall be sworn to and filed before the trial begins, *when the punishment assessed by the jury shall not exceed five years confinement in the penitentiary*; and in all cases where defendant is charged with felonies other than those named in Section 1 hereof (this article), when the defendant has no counsel, it shall be the duty of the court to inform the defendant of his right to make such application. and the court shall appoint counsel to prepare and present same if desired by defendant; provided, that in no case shall sentence be suspended except when the proof shall show and the jury shall find in their verdict that the defendant has never *before been convicted of a felony in this State or any other State*. This act is not to be construed as preventing the jury from passing on the guilt or innocence of the defendant, but he may enter his plea of not guilty at the same time with said affidavit. (Acts 1911, p. 67, superseded; Acts 1913, p. 8, Sec. 1.)

As to the constitutionality of this article see *Snodgrass vs. State*, 150 S. W., 162, 178; *Baker vs. State*, 158 S. W., 998; *King vs. State*, 162 S. W., 890; *Cook vs. State*, 165 S. W., 573.

Art. 865c. Testimony as to defendant's reputation and criminal history.—The court shall permit testimony and submit the question as to the general reputation of defendant to enable the jury to determine whether to recommend the suspension of sentence, and as to whether the defendant has ever before been convicted of a felony; such testimony shall be heard and such question submitted only upon the request in writing by the defendant; provided, that in all cases sentence shall be suspended if the jury recommends it in their verdict. Provided further, that in such cases, neither the verdict of conviction nor the judgment entered thereon shall become final, except under the conditions and in the manner and at the time provided for by Section 4 of this act (Art. 865c). (Id., Sec. 2.)

Art. 865d. Form of judgment; "good behavior" defined.—When sentence is suspended the judgment of the court on that subject shall be that sentence of the judgment of conviction shall be suspended during the good behavior of the defendant. By the term "good behavior" is meant that the defendant shall not be convicted of any felony during the time of such suspension. (Id., Sec. 3.)

Art. 865e. Conviction of other felony; pronouncement of sentence.—Upon the final conviction of the defendant of any other felony, pending the suspension of sentence, the court granting such suspension shall cause a *capias* to issue for the arrest of the defendant, if he is not then in the custody of such court, and upon the execution of a *capias*, and during the term of the court shall pronounce sentence upon the original judgment of conviction, and shall cumulate the punishment of the first with the punishment of any subsequent conviction or convictions, and in such cases no new trial shall be granted in the first conviction. (Id., Sec. 4.)

Art. 865f. Expiration of suspension period; disposition of cause; effect of judgment of conviction.—In any case of suspended sentence, as provided herein, upon the expiration of the time assessed as punishment by the jury, the defendant may make his written and sworn application for a new trial and dismissal of such case, stating therein that since such former trial and conviction, he has not been convicted of any felony, and that there is not now pending against him any felony charge, which application shall be heard by the court during the first term after the same is filed, and, if it shall appear to the court, upon the hearing of such application, that the defendant has not been convicted of any other felony and that there is not then pending against him any other charge of felony, the court shall enter an order reciting the fact, and shall grant the defendant a new trial and shall then dismiss said cause; provided further, that if the defendant is prevented from physical disability or other good cause from applying to the court to have the judgment of conviction set aside at the time provided for, he may make such application at the first term when such physical disability or other good cause no longer exists. After the setting aside and dismissal of any judgment of conviction as herein provided for, the fact of such conviction shall not be shown or inquired into for any purpose, except in

cases where the defendant has been again indicted for a felony and invokes the benefit of this act. (Id., Sec. 5).

Art. 865g. Pendency of other charge; extension of suspension period.—If at the expiration of the time assessed by the jury as punishment, there be pending against the defendant any other charge of felony, the court, shall, upon application of the defendant (which shall be in writing, and shall state under his oath that he is not guilty of such charge), further suspend the sentence to await the final disposition of such other prosecution. (Id., Sec. 6.)

Art. 865h. Release on recognizance.—When sentence is suspended the defendant shall be released upon his recognizance in such sum as may be fixed by the court during such suspension. (Id., Sec. 7.)

It will be seen that by virtue of the Suspended Sentence Law any person convicted under the Dean Prohibition Statute prior to its amendment as above indicated had the privilege of having the question as to whether his sentence should be suspended submitted to the jury, and that it was entirely possible, by reason of the Suspended Sentence Law, as it then existed, for the convict to escape any actual confinement in the penitentiary.

The Dean Law amendment before mentioned, takes away this privilege as to persons "over twenty-five years of age convicted under any of the provisions of this act," meaning the Dean Law.

The question is whether this amendment has the effect of depriving any person over twenty-five years of age of the benefit of the Suspended Sentence Law, who violated the Dean Law before the amendment went into effect.

The Federal (Section 10, Article 1), as well as the State (Section 16, Article 1) Constitution inhibits the Legislature from passing any ex post facto law. It will not be presumed, unless such a presumption is unavoidable, that the Legislature intended to enact a statute in violation of the Constitution. Would the act be unconstitutional if its purpose and intent was to deprive offenders under the old law of the benefit of the Suspended Sentence Law? Would it, in that event, be an ex post facto law and was such its purpose and intent?

We are inclined to the opinion that the amendment does not deprive offenders under the original act of the benefit of the Suspended Sentence Law, and that such offenders should be tried as the law existed at the time of the commission of the offense, in so far as the Suspended Sentence Law is concerned.

Article 15 of the Penal Code of 1911 furnishes a rule of construction as to statutes altering the penalty attached to a crime under a prior law. This article is in the following language:

"Art. 15. (15) Effect of modification by subsequent law.—When the penalty for an offense is prescribed by one law, and altered by a subsequent law, the penalty of such second law shall not be inflicted for a breach of the law committed before the second shall have taken effect. In every such case the offender shall be tried under the law in force when the offense was committed, and if convicted, punished under that law; except that when by the provisions of the second law the punishment of the offense is ameliorated, the defendant shall be punished under such last enactment, unless he elect to receive the penalty prescribed by the law in force when the offense was committed. (O. C., 14.)

"See post, Art. 19; Sandeloski vs. State, 143 S. W., 151; Hill vs. State, 161 S. W., 118; Ybarra vs. State, 164 S. W., 10; Robbins vs. State, 166 S. W., 528; Herrera vs. State, 170 S. W., 719; Gibbs vs. State, 180 S. W., 612."

The evident purpose of this and related articles of the code is to

furnish rules of construction in cases changing in certain respects the criminal statutes, in view of the constitutional inhibition against the passage of ex post facto laws. The rules laid down as far as they go are in substantial compliance with the common law definition of ex post facto laws.

The Legislature, in enacting the amendment to the Dean Law depriving certain offenders of the benefit of the Suspended Sentence Law, had in view the above quoted statute, as well as the provisions of the Constitution relative to ex post facto laws. The statute provides that offenders shall be tried under the law in force when the offense was committed except when by the provisions of the second law, the punishment of the offense is ameliorated, and in the latter event the defendant is to be punished under the last enactment, unless he elects to receive the penalty prescribed by the law in force when the offense was committed.

Now it might be argued that, strictly speaking, the amendment to the Dean Law does not alter "the penalty," but it is very closely connected with the penalty. A defendant having the benefit of the Suspended Sentence Law may escape entirely any actual confinement in the penitentiary, and in that way the new law has the effect of enhancing the legal consequences of the criminal acts, and, therefore, in a sense, increases the penalty. To say the least, the provisions of the new law do not ameliorate the punishment, and it is only when the punishment is ameliorated that the offender may be tried under the new law, and not even then if he elects to be tried under the old law.

But, whether the statute furnishes a rule or not, it will be supplied by the Constitution itself. The Constitution, as hereinbefore stated, inhibits the passage of any ex post facto law. It will not be lightly presumed, therefore, that the Legislature intended to pass such a law.

That the amendment to the Dean Law would be an ex post facto law if construed to deprive offenders of the benefits of the Suspended Sentence Law as to acts committed before the law went into effect, is not in our opinion, susceptible of reasonable doubt. A definition of ex post facto law often quoted is that of Mr. Justice Chase in *Calden vs. Bull*, 3 Dal., 386, 390, 391, which is in the following language:

"(1) Every law that makes an act done before the passing of the law and which was innocent when done criminal, and punishes such action. (2) Every law that aggravates a crime or makes it greater than it was when committed. (3) Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. (4) Every law that alters the legal rules of evidence and receives less or different testimony when the law required at the time of the commission of the offense, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. * * * But I do not consider any law ex post facto within the prohibition that mollifies the rigor of the criminal law; but only those that create or aggravate the crime, or increase the punishment or change the rules of evidence for the purpose of conviction."

Mallory vs. State of S. C., 237 U. S., 180.

In the case just cited the case of *Mallett vs. N. C.*, 181 U. S., 589, 597, is cited and quoted from, in which Mr. Justice Shiras speaking for the Supreme Court of the United States, after reviewing former opinions applied the established principles and concluded that the

legislation under consideration was not *ex post facto*, since it "did not make that a criminal act which was innocent when done; did not aggravate an offense or change the punishment and make it greater than when it was committed; did not alter the rules of evidence and require less or different evidence than the law required at the time of the commission of the offense, and did not deprive the accused of any substantial right or immunity possessed by them at the time of the commission of the offense charged."

Mr. Bishop, in his work on criminal law, 8th edition, Section 279, says:

"Any statute is *ex post facto* which after a criminal act is done alters, not simply in a manner formal, part of the procedure or evidence, but in a substantial right the situation of the doer relating thereto prejudicially to him."

In Volume 5 of American Digest, 2nd Decennial Edition, Section 197, under constitutional law cases are cited from the States of Iowa, Kansas, Louisiana, Massachusetts, Missouri, Nebraska, North Carolina, Oklahoma and South Carolina in support of the following proposition:

"An *ex post facto* law is one which makes that criminal which was not so when the act was performed, or which increases the punishment, or, in relation to the offense or its consequences alters the situation of a party to his disadvantage."

The cases cited under the quoted language seem to substantially support the proposition stated.

The usual definition of *ex post facto* law has been approved by the courts of this State. *Holt vs. State*, 2 Texas, 363; *Dawson vs. State*, 6 Texas, 347; *Calloway vs. State*, 7 Crim. App., 585; *McInturf vs. State*, 20 Crim. App., 335.

It is the law, of course, that laws which affect the remedy merely are not within the inhibition against *ex post facto* or retroactive laws, unless the remedy be entirely taken away or be encumbered with conditions which would render it impracticable. *Harris' Constitution*, p. 140, and cases cited.

It has been held that the provision of the Code of Criminal Procedure providing that objections to the qualifications of a grand juror must be made by challenge while the grand jury is being impaneled is not applicable to an indictment found prior to the passage of the code. *Martin vs. State*, 28 Texas, 214; *Reed vs. State*, 1 Crim. App., 3.

Also, that all remedies are subjects of legislative control, subjects in criminal prosecutions that they be equally speedy and efficacious, and not more burdensome than those existing at the date of the commission of the alleged offense. *March vs. State*, 44 Texas, 65.

It is our opinion that a law which would deprive the defendant of the benefit of the Suspended Sentence Law as to acts committed at a time when the law afforded him such benefit, would be within the reason of the rule against *ex post facto* laws, and hence within the rule itself. The right to have submitted to the jury the question as to suspension of sentence is a substantial right, affecting, as it does, the very liberty of the defendant. A law which would take away this right would render the criminal law more rigorous, would aggravate the crime, if not directly increase the penalty. At all events,

it would with reference to the offense committed and its consequences, materially alter the situation of the defendant to his detriment.

It is our opinion that the legislative intent was that the provision of the new law depriving offenders over twenty-five years of age of the benefit of the Suspended Sentence Law should apply to those who committed offenses after the taking effect of the new law, and not to those who committed offenses prior thereto.

Answering your inquiry, therefore, beg to advise that in the opinion of this Department, the provision of the new law as to suspended sentences does not apply to offenders as to acts committed prior to its taking effect.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2366, Bk. 56, P. 152.

CONSTITUTIONAL LAW—APPORTIONMENT—SENATORIAL DISTRICTS.

Although the Constitution declares that the Legislature shall apportion the State into senatorial and representative districts at its first session after the publication of each United States decennial census, this is a continuing duty and if not performed at the first session it would still be the constitutional duty of the Legislature to perform it at a subsequent session, and hence it has power and authority to do this at this time.

After the Legislature reapportions the State into senatorial districts, as provided by the Constitution, it would be powerless to prevent the election of a new Senate according to such reapportionment, as the Constitution contemplates that a new Senate shall be elected according to the new apportionment.

However, the new apportionment is not made until the act becomes effective; and since there is no inhibition in the Constitution against the Legislature making a statute effective in future and no power to compel it to enact a law immediately or make it effective immediately, it cannot be said that an apportionment passed now effective in 1924 would be invalid.

AUSTIN, TEXAS, July 18, 1921.

Hon. H. B. Hill, Member of the House, Austin, Texas.

DEAR SIR: We have your request for an opinion upon the power of the Thirty-seventh Legislature at its First Called Session convening today to reapportion the State into senatorial districts pursuant to Section 28 of Article 3 of the State Constitution, but postponing the election of a Senate under such reapportionment until the general election in November, 1924, or some similar plan.

In reply, you are respectfully advised that in the opinion of this Department—

1. Although the Constitution declares that the Legislature shall apportion the State into senatorial and representative districts at its first session after the publication of each United States decennial census, this is a continuing duty and if not performed at the first session it would still be the constitutional duty of the Legislature to perform it at a subsequent session, and hence it has power and authority to do this at this time.

2. After the Legislature reapportions the State into senatorial districts, as provided by the Constitution, it would be powerless to pre-

vent the election of a new Senate according to such reapportionment, as the Constitution contemplates that a new Senate shall be elected according to the new apportionment.

3. However, the new apportionment is not made until the act becomes effective; and since there is no inhibition in the Constitution against the Legislature making a statute effective in future and no power to compel it to enact a law immediately or make it effective immediately, it cannot be said that an apportionment passed now, effective in 1924, would be invalid.

We shall now proceed to state our reasons for arriving at the conclusion above announced.

I.

The State Constitution (Section 28 of Article 3) provides 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; and until the next decennial census, when the first apportionment shall be made by the Legislature, the State shall be and it is hereby divided into senatorial and representative districts as provided by an ordinance of the convention on that subject."

Sections 25 and 26, referred to in the sections just quoted, read as follows:

"Sec. 25. The State shall be divided into senatorial districts of contiguous territory according to the number of qualified electors, as nearly as may be, and each district shall be entitled to elect one senator; and no single county shall be entitled to more than one senator.

"Sec. 26. 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; provided, that whenever a single county has sufficient population to be entitled to a representative, such county shall be formed into a separate representative district; and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more representatives, such representative or representatives shall be apportioned to such county, and for any surplus of population it may be joined in a representative district with any other contiguous county or counties."

It will be seen that *in form* the provision of the Constitution directing that the apportionment shall be made at the first session after the publication of each United States decennial census is mandatory. That it is in fact mandatory has been stated by good authority; but there is neither penalty prescribed for non-performance of the duty imposed nor way provided to enforce performance. Upon a failure, therefore, of the Legislature to reapportion the State at the first session it is not relieved of the duty to pass an apportionment act thereafter, and an act subsequently passed will not be invalid.

Upon the question of the duty of the Legislature to obey constitutional mandate, 12 Corpus Juris, page 721, summarizes the authorities as follows:

"The Legislature is in duty bound to perform all duties imposed upon it by the Constitution, but if it fails to do so and neglects or refuses to pass legislation as required by a mandatory constitutional provision, there is no remedy."

In the case of *In Re State Census*, 6 S. D., 540, 62 N. W., 129, it was held that, in the event a mandatory constitutional provision requiring the enactment of a law for the enumeration of the State census in the year 1895 and at the first session after each United States census, for the apportionment of senators and representatives, should not be obeyed and a law should not be passed providing for an enumeration in the year 1895, there would be no remedy since the enactment of laws is wholly within the discretion of the Legislature.

The court in that case pointed out that there are three classes of provisions in the Constitution, viz: (1) those negative and prohibitory in their nature, which are self-executing; (2) those which require certain proceedings to be had in order to render valid the enactment of law for the accomplishment of the purposes of the Legislature; (3) those requiring the Legislature to enact certain laws but prescribing no penalty for a failure to perform the duty. The court in its written opinion said:

"The section under consideration comes within the latter class. The provisions of this section are in their nature mandatory to the Legislature to enact the specified legislation. But under our system of government there is no power to compel the legislative department to enact laws. Constitutions may restrict legislative powers, and declare what laws shall not be valid; but, from the very nature of legislative power, its exercise in a particular case must depend upon the volition of the Legislature. Responsibility to their constituents and a sense of public duty are the only incentives that can prompt legislative action under this class of constitutional provisions. It will, therefore, be readily perceived that a categorical answer to the question propounded cannot with safety be given. We may say, however, that, if the Legislature should fail at this session to enact any law as required by the section of the Constitution under consideration, the present apportionment law would undoubtedly remain in force, and subsequent legislation would be valid."

In the case of *In Re Veto Power*, 9 Colo., 642, 21 Pac., 477, the Supreme Court of Colorado was called upon to decide whether an act of the Legislature providing for an apportionment, pursuant to constitutional mandate that such apportionment shall be made at the first session after an enumeration of the inhabitants of the State, which had been vetoed by the Governor, was a valid law. The court held that it was, saying:

"Whether Section 45, Art. 5, of the Constitution, is mandatory or not, the Legislature having treated it as mandatory, and passed a bill in compliance with its provisions, it was, like any other bill, subject to the veto power lodged in the executive. The bill having been vetoed by the Governor, and the legislative assembly having failed to pass it notwithstanding the veto, the existing legislation upon the subject matter of the bill remains undisturbed and in force."

An excellent statement of the law upon this point, based upon the decisions of the courts, will be found at page 845 of 36 Cyc., reading as follows:

"The State Constitutions generally provide for the apportionment of the State into districts for the election of members of the Legislature, and require the Legislature to provide for the enumeration of the inhabitants of the State at stated intervals as a basis for the apportionment; and prescribe the time of apportionment, usually providing that it shall be made at the first or next session of the Legislature after an enumeration of the inhabitants of the State; and such a provision prescribing the time of making an apportionment impliedly prohibits an apportionment at any other time; and when a valid apportionment has been made, no new apportionment can be made until the expiration of the

prescribed period. The Legislature cannot be compelled to make such enumeration, and, when it fails at the proper time to do so, this duty falls on each succeeding Legislature until performed; but during the interval between the return of an enumeration and the making of a new apportionment the former apportionment remains in force; and so also when the time for a reapportionment arrives, the old apportionment remains in force until the new act takes effect, or until a valid new apportionment is made, in case if for any reason a *valid* apportionment act is not passed at the appointed time. Where representation is based upon the number of inhabitants exclusive of certain designated classes, the enumeration should specify the numbers of the excepted classes."

In a New York case cited under this text (*People vs. Rice*, 65 Hun. (N. Y.), 236, 20 N. Y. Supp., 293 (affirmed in 135 N. Y., 473, 31 N. E., 921, 16 L. R. A., 836), we find this language:

"Because the duty has been omitted for one year we think it rests with accumulated force upon the next and each subsequent Legislature until it has been performed. It is of a nature which requires performance and it is to the interests of the whole people that it should be performed as directed, and if not at that time, then at the earliest possible moment thereafter. We are of opinion that the objection made has no color of validity."

The following may also be quoted from *City of Belton vs. Head*, 137 S. W., 417:

"Our present Constitution required the first Legislature held thereunder to pass laws on certain subjects, to wit: Article 3, Section 43, providing for revising, digesting, and publishing the laws; Section 46, Art. 3, for the enactment of effective vagrant laws; Section 20, Art. 16, for the passage of local option laws; Article 16, Section 36, for laws providing for the payment of past-due indebtedness to public school teachers, etc. Certainly the failure on the part of the First Legislature to pass laws upon the subjects enumerated would not prevent subsequent Legislatures from carrying out the commands of the Constitution in these respects; but they would still have power to legislate upon the subjects indicated."

From these considerations we conclude that since the Legislature did not apportion the State into senatorial districts at the Regular Session of the Thirty-seventh Legislature it is still authorized and in duty bound to do so at this time.

No question arises as to the authority of the Legislature to enact such law at a special session without the question being submitted by the Governor, because, as the writer understands, the Governor has submitted this question for consideration at the present special session.

II.

Section 3 of Article 3 of the State Constitution declares that a new Senate shall be chosen after every apportionment. This section reads as follows:

"The senators shall be chosen by the qualified electors for the term of four years; but a new Senate shall be chosen after every apportionment, and the senators elected after each apportionment shall be divided by lot into two classes. The seats of the senators of the first class shall be vacated at the expiration of the first two years, and those of the second class at the expiration of four years, so that one-half of the senators shall be chosen biennially thereafter."

This evidently means that at the next regular election, at which State senators are elected after a reapportionment is made, an entirely new Senate shall be elected under and according to the new apportion-

ment. So that after the apportionment is made, the Legislature would be without authority to defer until 1924 the election of a new Senate. The Legislature has power to pass a reapportionment act, but the Constitution itself directs that a new Senate shall be elected after the apportionment is made, and this would inhibit the Legislature from providing otherwise. We do not believe that the Constitution contemplates that the Legislature shall provide for the election of a new Senate immediately, before the next general election for State senators, but it is clear to our minds that at the latter mentioned time an entirely new Senate must be elected if the reapportionment shall have been made at that time.

III.

As stated, however, there is no inhibition in the Constitution against the Legislature enacting a law and providing that it shall take effect in the future and no method of compelling it to enact a law now or make one effective immediately. Moreover, in the event the Legislature should pass an act redistricting the State into senatorial districts effective some time in 1924, it could not be said that the State has been apportioned until the act takes effect. It follows that in that event a new Senate would not be elected under the new apportionment until after the taking effect of the act. The only provision to be found in our State Constitution relative to the time of the taking effect of legislative enactments is to be found in Article 3, Section 39. This section provides that no law passed by the Legislature, except the general apportion act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted unless, in case of an emergency, which emergency must be expressed in a preamble or in the body of the act, the Legislature shall by a vote of two-thirds of all the members elected to each house otherwise direct, said vote to be taken by yeas and nays and entered upon the journal.

It will be seen that the inhibition is against the taking effect of an act sooner than ninety days after adjournment except in case of emergency, etc., there being no inhibition against the postponing of the taking effect of a statute longer than ninety days after adjournment.

An act of the Legislature speaks from the time it goes into operation rather than from the time of its passage. The rule is accurately stated upon the court decisions in 26 A. & E. Ency. of Law, p. 565, as follows:

"A statute passed to take effect at a future day must be understood as speaking from the time it goes into operation and not from the time of its passage. Thus, the words 'heretofore,' 'hereafter' and the like, have reference to the time the statute becomes effective as a law and not to the time of passage. Before that time no rights may be acquired under it and no one is bound to regulate his conduct according to its terms; it is equivalent to a legislative declaration that the statute shall have no effect until the designated day."

So that the situation is simply this: the purpose, intent and spirit of the Constitution would not be complied with by passing an apportionment act at this time with a proviso that it shall not take effect until a certain time in 1924; but as there is no power to compel the Legislature to enact a law at a particular time or to enact one at all,

and there being no inhibition against the passage of laws to take effect in the future, it cannot be said that an act reapportioning the State into senatorial districts effective some time in 1924 would be invalid. The apportionment now existing would continue to exist until a reapportionment is made, and as above shown, the new apportionment is not made until the reapportionment act takes effect.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2331, Bk. 55, P. 366.

CONSTITUTIONAL LAW—LOCAL AND SPECIAL LAWS—FEES AND COMPENSATION—COUNTY ATTORNEY.

A provision in an act reorganizing three judicial districts and creating a fourth, fixing the fees and compensation of the county attorney of a particular county in conflict with general law upon this subject, is void as an attempt to regulate the affairs of a county contrary to the Constitution.

AUSTIN, TEXAS, April 2, 1921.

Hon. A. A. Dawson, County Attorney, Canton, Texas.

DEAR SIR: I am in receipt of your two letters of February 15th and March 24th. It appears that Chapter 70 of the General Laws of the Regular Session of the Thirty-fifth Legislature, being an act reorganizing the Seventh, Fourteenth and Fortieth Judicial Districts and creating the Eighty-sixth Judicial District, contains the following provision:

"And the county attorney of Van Zandt County shall represent the State in criminal cases in said county, and receive the same fees and compensation as is now provided by law for the county attorney of Kaufman County."

If the county attorney of Van Zandt County should receive the same fees as the county attorney of Kaufman County, he would not receive fees and compensation as provided by general law, for the reason that such fees and compensation are based upon population and, in certain instances, upon the number of votes cast at the last presidential election. You state as a fact that your fees in homicide cases, ordinary felony cases and habeas corpus proceedings would be more in your county under general law than those fees would be under general law in Kaufman County.

If this provision is constitutional, it undoubtedly means that your fees and compensation will be governed by the population, etc., of Kaufman County; whereas, the general law provides that your fees and compensation shall be based upon the population, etc., of your county.

We think this provision in the statute is clearly invalid as an attempt to regulate the affairs of a county by local law.

There is no doubt that act of this kind is a local law. *Lytle et al. vs. Halff et al.*, 75 Texas, 128; 12 S. W., 610.

In the case cited, the Supreme Court of this State said:

"Every law fixing the territory which shall constitute a judicial district is necessarily local in its character, but the power of the Legislature to do this is expressly recognized."

The Constitution, in Section 7 of Article 5, says that "the State shall be divided into as many judicial districts as may now or hereafter be provided by law, which may be increased or diminished by law." The power to "increase or diminish" includes the power to pass a local law creating a judicial district or, as is often done, of reorganizing several judicial districts. An express authority carries with it implied authority to do all things necessary to carry into effect the express authority, so that the Legislature would have the power in a local law to enact all necessary incidental provisions in the creation of a judicial district or districts.

We do not believe, however, that under the present state of our laws to fix and regulate the fees of the county attorney is necessarily incident to the creation or reorganization of four judicial districts, and we are of the opinion therefore that this cannot be done in a local law of this kind.

The regulation of the fees of a county attorney is the regulation of the affairs of a county within the meaning of Section 56, of Article 3, of the State Constitution, which inhibits the regulation of the affairs of counties by local or special law. The fees and compensation of county attorneys are fixed by general law, and to a large extent are paid by counties. The amount of fees and compensation varies in different counties in the State, so that to provide that the fees and compensation of the county attorney in a particular county shall be the same as those in another particular county is to change the general law relative to such fees and compensation, and we are of the opinion that this cannot be done in a local law of this nature. To do this would be to regulate the affairs of a county.

As before stated, there is no doubt in the mind of the writer that an act reorganizing three judicial districts and creating another is a local or special law; but if it should be argued that such a law is not local or special in its nature, then we say that the statute under consideration is at least local or special in so far as it attempts to fix the fees and compensation of the county attorney of Van Zandt County different from such fees and compensation under general law.

You are, therefore, advised that it is the opinion of this Department that the provision of Chapter 70, General Laws, Regular Session of the Thirty-fifth Legislature, fixing the fees and compensation of the county attorney of Van Zandt County, is void, and that your fees and compensation as county attorney are controlled by general law.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2661, Bk. 54, P. 52.

THE RELOCATING OF THE MEDICAL BRANCH OF THE UNIVERSITY
OF TEXAS.

The Legislature, Board of Regents of the State University or other governmental agency are without authority to change or relocate the University of Texas or any branch or department thereof, since the same has been fixed and

located by a vote of the people as prescribed by the Constitution of this State, and such relocation may be made only by vote of the people.

AUSTIN, TEXAS, November 22, 1920.

Hon. Leonard Tillotson, Sealy, Texas.

DEAR SIR: Your letter of the 8th instant addressed to the Attorney General has been placed with me for attention. In your letter of the above date, you submit the following question:

"Has the Legislature of the State of Texas a power to relocate the Medical Department of the University of Texas heretofore and now located in the city of Galveston?"

After an extensive investigation of this matter, you are advised as follows:

First: Section 10, Article 7, of the Constitution of the State of Texas, provides that "the Legislature shall, as soon as practicable, establish, organize and provide for the maintenance, support and direction of a University of first class, to be located by the vote of the people of this State and styled the University of Texas, for the promotion of literature, arts and sciences, including an Agricultural and Mechanical Department."

Second: We find that the Medical Department of the University of Texas, pursuant to Article 7, Section 10, of the Constitution, was established under appropriation made by the Legislature in the year 1886. The Seventeenth Legislature, at its regular session, Chapter 75, established the University of Texas and provided for the location of the University of Texas and Medical Department thereof, to be determined by a vote of the people at an election to be held on the first Tuesday of September, 1881. The Governor was authorized and instructed to issue the necessary proclamation ordering the election to be held on the date above mentioned, and further providing the manner of nominating the names, or that is to say the places, of different localities in this State.

On July 27, 1881, the Governor issued a proclamation calling for an election on September 6, 1881, in which appeared the names or places prepared to be voted upon, with special and particular reference for the location of a Medical Department of the University of Texas. After said election was held in the manner and on the date above mentioned, the vote was canvassed on October 18th, and as a result of such canvass it was shown that there was cast at such election for locating the Medical Department of the University of Texas at Galveston, 29,734 votes; for locating the Medical Department of the University of Texas at Houston, 12,745 votes, with a scattering vote of 1307; and on October 19, 1881, the Secretary of State and the Governor declared the result of the election in favor of the establishment of the Medical Department of the University of Texas at Galveston, Texas, and further, that the Main University be located at Austin, Texas, that place having received the necessary votes as prescribed by statute.

Third: In providing for the establishment, organization, maintenance and location of a University, as indicated in Article 7, Section 10, of the Constitution, the convention was speaking of the University in the ordinary interpretation of that word, being an institution organized for the purpose of imparting instruction, promoting education in the higher

branches of literature, science and art, etc., which may or may not consist of colleges connected therewith, or may comprise an assemblage of colleges established or located in any place for the purposes mentioned.

Fourth: The power to establish, organize and provide for the maintenance, support and erection of a university of a first class is vested (Article 7, Section 10, of the Constitution) in the Legislature. That includes a power to found, create, regulate and to form such an institution. However, the power to locate geographically the university as such, or any of its units, departments or colleges thereof, was vested in the people of the State by express provisions of the Constitution as heretofore indicated, and to be exercised by a vote cast at an election held at a time and in the manner as was authorized by the Legislature.

Fifth: There is no agency or arm of the government vested with the power of location of the University or any branches or departments thereof, nor has the Board of Regents established by law any such power. The Executive Department of the government is not vested with such power, and the Legislature is deprived of that power, for the reason that the Constitution expressly declares that the locating power shall be in the people of this State, and their will to be exercised and indicated by their votes at an election held for such purpose, and this constitutional provision serves as a specific restriction upon the Legislature or other governmental agencies from prescribing or providing for the location of the University of Texas, or any of the branches thereof.

The language of the Constitution is plain, simple, unambiguous and easily understood, and specifically and expressly preserves to the people the right and power to determine such location, and "being of this character, it is a provision authorizing the doing of the prescribed things in the way defined and not otherwise." When the Constitution defines the circumstances under which a right may be exercised, it is a specification and an implied prohibition against legislative interference to add to the condition, and it is an accepted rule of construction that where a power is expressly given by the Constitution and the manner in which it is to be exercised is prescribed, such mode or manner is exclusive of all others. (105 Texas, 198, and other authorities.)

Sixth: The contention that the people having once voted and established a Medical Branch of the University at Galveston, and that having done so in the absence of any provision of the Constitution with reference to a change or relocation of the University or any branches or departments thereof, exhausts the power of the people and deprives them of the right to again vote and locate the institution or any of its branches or departments, finds, in our opinion, but slight support. The people are vested with a locating power to be exercised by and through a vote expressed at an election, and such power, in our opinion, is a continuing power, and may be used and exercised at the discretion of the people. This is supposed by the absence of a prohibition in the Constitution against relocation or change of any situs once selected. (2 N. E., 544; 6 Wheat., 507.) The words "as soon as practicable," found in Article 7, Section 10, of the Constitution, do not, in our opinion, bring that provision of the Constitution into that class of constitutional provisions which contemplate one specific time for an action, and restricts the performance of such provisions to that time only.

Since it is necessary for a vote of the people to locate an institution, it then becomes a duty of the Legislature to provide for an election in which such vote may be taken. The Legislature in paragraph 3, Section 42, of the Constitution, "shall pass such laws as may be necessary to carry into effect the provisions of this Constitution." The Governor is authorized by our election laws to issue proclamations in such a manner as to provide for the submission of such questions as the location of the University or any of the branches thereof.

Further, it is difficult to reach a conclusion that the people of the State, having once located an institution, has thereby rendered itself incapable and helpless to relocate or change the institution whenever circumstances and exigencies create a necessity for such change. These and many other considerations are indicative that the power of locating the University and any of its departments is a continuing power, which the people may use in the manner prescribed by the Constitution.

The conclusion necessarily reached is that the University or any of its branches or departments cannot be changed or relocated by legislative enactment, but if there does exist a power and authority to so relocate or change the location of such institution or any of its branches, it is vested in the people of the State of Texas, to be exercised by a vote of such people cast at an election legally and properly called for such purpose, and you are therefore so advised.

Yours very truly,
C. L. STONE,
Assistant Attorney General.

Op. No. 2274, Bk. 55, P. 57.

UNIVERSITY OF TEXAS—RELOCATION.

Construing Articles 3, 7 and 16, Sections 10, 48 and 38 of the Constitution of Texas. Such constitutional provision pertaining to the location, establishment and maintenance of the University of Texas, and construing Chapter 75, page 79, General Laws of Texas, Regular Session, Seventeenth Legislature, which was an act to establish the University of Texas.

The Board of Regents of the University of Texas enjoy only such powers, privileges and authority as are conferred upon them by statute.

The voters of this State in selecting Austin as the place for the location of the Main University of Texas, had in mind a mere place of geographical location and not the corporate limits of such city, and had in mind such city as designating the aggregate body of people living in such considerable collection of dwelling houses and in such close proximity as to constitute a town or city as distinguished from the country.

The ballot used by the voters of Texas at an election held for the purpose of locating the Main University of Texas, had written or printed upon it at.....

The preposition "at" as defined by leading dictionaries and as defined by the courts, is used to denote location on or near by, adjacent to, contiguous to, nearness of place, in close proximity, etc., and to be considered with the circumstances calling for the application to any given subject.

AUSTIN, TEXAS, January 20, 1921.

Dr. Robert E. Vinson, President, University of Texas, Austin, Texas.

DEAR SIR: Your letter of recent date addressed to the Hon. C. M.

Cureton, Attorney General of Texas, has been referred to me for attention.

In the letter above mentioned you submit the following questions:

"What are the legal restrictions with regard to the matter of the location of the Main University in the city of Austin, and in the event the Board of Regents should deem it wise to change the location within the limits or the immediate vicinity of the city of Austin, what steps would it be necessary for the Board of Regents to take to effect such change? Specifically, would the Board of Regents itself have the power to change the location, or would such change require the approval of the Legislature or a vote of the people of Texas?"

The Constitution of this State, Article 7, Section 10, provides: "The Legislature shall as soon as practicable establish, organize and provide for the maintenance, support and direction of a university of the first class, to be located by a vote of the people of this State and styled 'The University of Texas,' for the promotion of literature, and the arts and sciences, including an agricultural and mechanical department."

Article 3, Section 49, of the Constitution of this State provides that "The Legislature shall not have the right to levy taxes or impose burdens upon the people except to raise revenue sufficient for the economical administration of the government, in which may be included the following purposes * * * the support of public schools in which shall be included colleges and universities established by the State, and the maintenance and support of the Agricultural and Mechanical College of Texas."

Article 16, Section 30a, provides "That the Legislature may provide by law that the members of the Board of Regents of the State University, and Board of Trustees or managers of the educational, eleemosynary and penal institutions of the State, and such boards as have been or may hereafter be established by law, may hold their respective offices for the term of six years, one-third of the members of such boards to be elected or appointed every two years in such manner as the Legislature may determine; vacancies in such offices to be filled as may be provided by law, and the Legislature shall enact suitable laws to give effect to this section.

Revised Statutes, Article 2639, provides that "The Regents shall elect a chairman of the Board of Regents from their own number, who shall hold his office during the pleasure of the Board. They shall establish the departments of a first class university, determine the offices and professorship, appoint a president, who shall, if they think it advisable, also discharge the duties of a professor, appoint the professors and other officers, fix their respective salaries, and they shall enact such by-laws, rules and regulations as may be necessary for the success, management and government of the University. They shall have the power to regulate the course of instruction and prescribe, buy and with the advice of the professors, the books and authorities used in the several departments, and to confer such degrees and grant such diplomas as are usually conferred and granted by universities." There are other statutory provisions that give to the Board of Regents additional powers and authority, making it their duty to establish the departments of the University, to define the general plan of the University buildings, to advertise for plans and specifications of the same, to purchase the necessary furniture, library

apparatus, museum and other appliances, to expend the interest which has heretofore accrued and may hereafter accrue on the permanent University fund for such purposes as are authorized by legislative enactment, and for the maintenance of the branches of the University.

A thorough investigation of the constitutional and statutory provisions that deal with and pertain to the duties of the Board of Regents of the University of Texas, fail to disclose the fact that they have any authority to remove, relocate or re-establish the Main University of Texas.

The Board of Regents of the University of Texas only enjoy such powers as are conferred upon them by legislative enactment, and since the Legislature has not conferred upon the Board of Regents the power or authority to remove, relocate or re-establish the Main University in the city of Austin or elsewhere, you are advised that they could not exercise such powers or authority until the same have been duly and properly conferred upon them by the Legislature.

Since you are advised that the Board of Regents itself would not have the power to in any way change the location of the Main University of Texas, without the approval of the Legislature, the next question that arises is, has the Legislature the power to authorize the Board of Regents to change the location of the Main University within the limits or the immediate vicinity of the said city of Austin? That provision of the Constitution to be found in Article 7, Section 10, which makes it "the duty of the Legislature as soon as practicable to establish, organize and provide for the maintenance, support and direction of a university of the first class to be located by a vote of the people of this State, and styled the University of Texas, for the promotion of literature, and the arts and sciences, including an agricultural and mechanical department."

In the interpretation or construing of the Constitution, the history of the times of the adoption of the Constitution and the state of affairs in existence at that time should be looked to and considered in determining the intention of the framers of the Constitution and the will of the people in adopting the same. "It is settled by very high authority that in placing a construction on the Constitution or any clause or part thereof, a court should look to the history of the times and examine the state of things existing when the Constitution was framed and adopted. Constitutions, like statutes, are proper to be expounded in the light of conditions existing at the time of their adoption and the general spirit of the times and the prevailing sentiment among the people. Reference may be had to historical facts relating to the original or historical Constitution. (6th Ruling Case Law, Sec. 46, 12 Corpus Juris, p. 710, Sec. 63.) Bearing in mind the foregoing rules, an examination of Sections 10 to 15 of Article 7 of the Constitution discloses a desire, purpose and intention on the part of the framers of the Constitution and of the will of the people as appeared in the adoption of the same, that a university of the first class should be established, operated and maintained in the State of Texas, the location to be determined by a vote of the people.

The Constitution creates the University and establishes a permanent fund for the benefit thereof, with appropriate directions for the administration of said fund, but it expressly reserves unto the people

the right of location of said University. Since, as heretofore mentioned, the rule is in construing the constitutional phrase "to be located by a vote of the people of this State," is if possible to determine the intent and purpose of the voters of this State when they cast their ballot for the purpose of locating the University of Texas.

Chapter 75, page 79, General Laws of Texas, Regular Session of the Seventeenth Legislature, which is an act to establish the University of Texas, reads as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas, that there be established in this State, at such locality as may be determined by a vote of the people, an institution of learning, which shall be called and known as the University of Texas. The Medical Department of the University shall be located, if so determined by a vote of the people, at a different point from the University proper, and as a branch thereof; and the question of the location of said department shall be submitted to the people and voted on separately from the propositions for the location of the Main University. The nominations and election for the location of the Medical Department shall be subject to the other provisions of this act, with respect to the time and manner of determining the location of the University.

"Sec. 2. An election shall be held on the first Tuesday of September, 1881, for the purpose of locating the University of Texas, and the Governor is hereby authorized and instructed to issue his proclamation ordering an election on said day for said purpose, and returns of said election shall be made in the manner prescribed in the general election law.

"Sec. 3. All localities put in nomination for the location of the University shall be forwarded to the Governor at least forty days anterior to the holding of said election, and the Governor shall embrace in his proclamation ordering said election, the names of said localities; provided, that any citizen may vote for any locality not named in said proclamation.

"Sec. 4. The locality receiving the largest number of votes shall be declared selected, and the University shall be established at such locality; provided, that the vote cast for said locality shall amount to one-third of the vote cast; but if no place shall receive one-third of the entire vote cast, another election shall be ordered within ninety days of the first election, between the two places receiving the highest number of votes, and the one receiving the highest number at said second election shall be declared to be selected by the people as the location of the University of Texas."

On July 27, 1881, the Governor issued a proclamation calling the election for Tuesday, September 6, 1881, that portion of the proclamation referring to the University being as follows:

"In accordance with the provisions of the law requiring the Governor to embrace in the election proclamation the names of all localities put in nomination for the location of the State University and for the location of the Medical Department thereof, I am submitting herein the names of all places presented to me up to this date as follows:

"For the location of entire University of Texas: Austin, Waco, Albany, Graham, Williams Ranch and Matagorda.

"For location of Main University without Medical Department: Lampasas, Caddo, Grove and Peak, Thorp Springs and Tyler.

"For the location of Medical Department of University of Texas: Galveston and Houston.

"Electors may, under the law, vote for any other places than those herein named. Persons voting for the location of the entire University at one place must have written or printed upon their tickets against location of the Medical Department at a different place from the Main University; for the location of the entire University at....., the returns of this election to be made to the Secretary of State, according to provisions governing general elections."

On September 6, 1881, the election was held throughout the State. On October 18, 1881, the Secretary of State canvassed the returns and found that the majority of the votes cast had been in favor of locating the Main University at Austin, that city receiving 14,621 votes. Austin also received 16,204 votes for the Medical Department, and there was cast 29,734 votes in favor of locating the Medical Department of the University of Texas at Galveston, Texas.

Whereupon, the Secretary of State and the Governor on October 19, 1881, declared the result of the election to be in favor of the establishment of the Medical Department of the University at Galveston, Texas, that place having received more than one-third of the votes cast, as well as a majority in favor of the proposition that the Main University be located at Austin, Texas, that place having received more than one-third of the votes cast, by adding the votes cast in favor of Austin for the entire University and the number of votes cast in favor of Austin for the Medical Department of the University of Texas.

On October 20, 1881, Governor Roberts issued a proclamation establishing the Board of Regents as provided for in Chapter 75, pages 79, 80, 81 and 82, Acts of the Regular Session of the Seventeenth Legislature of Texas.

In our minds, the controlling power or factor should be and is just what the voters of this State had in mind when they voted to locate the Main University at Austin, Texas; that is to say, whether or not they intended to locate this institution within the corporate limits of such city or whether they intended that such institution should be located nearby, adjacent or contiguous to such city. Since such vote was cast in compliance with a demand made by the framers of the Constitution for the establishment, organization, maintenance, support and direction of a university of the first class, to be located by a vote of the people of this State, it is plainly obvious to our minds that the controlling intent, purpose and desire of the voters was for the best welfare of the University of Texas, regardless of whether such institution be located within or adjacent to the corporate limits of the city of Austin.

It is to be remembered that upon the ballots used in deciding the location of the University of Texas more than one-third of such ballots contained the following language: "For the location of the entire University at Austin, Texas," thus it necessarily shows that we must undertake to determine the meaning, purpose and intent conveyed by the language used on the official ballot in this election.

In the case of Frey et al. vs. The Fort Worth & R. G. Ry. Co., where the railroad company agreed or contracted to establish a depot at Stephenville, Texas, Judge Head, speaking for the Court of Civil Appeals of Texas, used this language: "We think to establish a depot at a town, within the meaning of a contract of this kind, would be complied with by locating it at a convenient distance from the business portion of the town (William vs. Railway Co., 18 S. W., 206), and would be controlled more by the buildings composing the town than by the corporate limits as defined in the charter." Thus a case may be supposed where a town or city has overgrown its corporate limits, so that one may dwell within the town and still be outside the corporate limits, and if this be true, then it would plainly follow

that the University of Texas could be located beyond the corporate limits of the city of Austin and still be located at Austin, Texas.

In the case of *Rogers vs. Galloway Female College*, decided by the Supreme Court of Arkansas, and the basis of the suit was to recover of one T. J. Rogers \$2500, the amount of subscription to the Methodist Episcopal Church, South, alleged to have been given for the purpose of locating, building and maintaining a female college at the town of Searcy, one of the defenses being that the promise made was on the condition that the college should be located within the then corporate limits of the town of Searcy. The first question inquired into by the Supreme Court of Arkansas is shown by the following language, to wit: "Was the subscription upon condition that the college should be located within the corporate limits of Searcy?" At a meeting held by the citizens of Searcy for the purpose of raising funds to secure the location of said female college at Searcy, the secretary of the meeting was instructed to compose a caption for the subscription list descriptive of the list and its purposes, which caption read as follows: "Following is a list of those who have subscribed for the purpose of securing the location of the Methodist State Female College at Searcy, the amounts by them respectively subscribed being set opposite their names." The defendant, Rogers, was present and subscribed \$2500 for the purpose of securing the location of such female college at the town of Searcy, but as before stated, after the institution of suits, he defended upon the ground that such college was to be located within the corporate limits as it then existed, of the town of Searcy, and it was argued that Rogers subscribed upon this condition and that such was the contract even if "at" instead of "in" was employed to express it.

In discussing and defining the word "at," the court uses this language: "The preposition 'at' when used to denote location, possibly may mean in, on, nearby, etc., according to the context denoting usually a place conceived of as a mere point * * * as with names of towns, at Stafford, at Lexington, * * * but if the city is of a great size, 'in' is commonly used, as in London, * * * unless again the city is conceived of as a mere geographical point, as our financial interests center at New York.

Century Dictionary, at, "with the names of cities and towns the use of 'at' or 'in' depends, not chiefly upon the size of the place, but upon the point of view. When we think merely of the location or geographical point, we use 'at.' When we think of inclusive space, we employ 'in,' as we arrived at Liverpool: there are a few rich men in this village."

Standard Dictionary, at, "Primarily the word 'at' expresses the relation of presence, nearness and place. It is less definite than in or on. At the house may be in or near the house."

Webster's Dictionary, at, "To determine the true sense and which words are used, we must consider the subject matter concerning which they are used, and the circumstances calling for their application to any given subject. (*State vs. Old Town Bridge Corporation*, 26 Atl., 947; *Harris vs. State*, 18 So., 387.)

It might be contended, however, there is nothing to justify such contention, that the voter in casting his ballot to locate the University of Texas at Austin meant to locate this University in Austin, and

that the word "at" was used in the sense of "in," denoting acts to be performed within definite limits, by conceding that "at" was intended by the voters of this State in the sense of "in," but as before stated, there is no fact, condition, circumstance or proof to indicate that the voter had such intent, and yet it would not necessarily mean within the corporate limits of Austin.

In *Banks vs. Wilson*, 34 S. W., 544, the court said: "There may be towns that have overgrown their corporate limits." Generally in speaking of a town as a mere place of geographical location, we have no reference whatever to the corporate limits but simply use the name of the town as designating the aggregate body of people living in such considerable collection of dwelling houses and in such proximity as to constitute a town or city as distinguished from the country. (Standard Dictionary.)

In the case of the town of Waynesville vs. Satterthwait, the court in defining the meaning of the word "at" used this language: "The word 'at' when used to designate a place, may and often must mean near to. It is less definite than in or on; at the house may be in or near the house. (Webster's Int. Dict., 95th Century Dict., Vol. 1.)

In the case of *Murdoch vs. Klamath*, county court, this was a suit to enjoin the officers of Klamath County from erecting a courthouse outside the county seat, and from a verdict in favor of the defendants the plaintiffs appealed. The county seat was located by a majority of the vote of electors at the town of Linkville, the town of Linkville being incorporated under the laws of the State of Oregon. At some time afterwards, the town of Klamath Falls was incorporated by the Legislature, and the act incorporating the town of Linkville was repealed, and the name of the county seat was changed and the boundary limits perfected. After the location of the county seat, first one building and then another was used for courthouse purposes, the various buildings being situated in different parts of the town, and the county seat was then known as Klamath Falls, and the present courthouse being dilapidated and unsuitable for the required purposes, the county officers obtained title to and it was alleged would, unless restrained, erect a courthouse at a distance of about 1000 feet outside of the limits of the original corporate limits of Linkville and about 150 rods from the present location of the courthouse, the proposed site, however, being within the now existing limits of the city of Klamath Falls. It is to be observed that the county seat of Klamath County had been located at Linkville by the voters of such county, and the Supreme Court of Oregon uses this language: "The Century Dictionary and Encyclopedia defines the word 'at' as follows: 'A preposition of extremely various use, primarily meaning 'to,' and hence contact, contiguity or coincidence, actual or approximate, in or time; being less restricted as to relative position than other prepositions, it may in different constructions assume their office and so become equivalent according to the context to in, on, near, by, about, under, over, through, from, towards, etc.

Upon this question, we notice the following authorities: the significance of the word "at" depends largely upon the subject matter in relation to which it is used and the circumstances which it becomes necessary to apply it to surrounding objects. When used in reference to place "at" frequently means in or within, but sometimes denotes

nearness or proximity, which is its primary significance, and it is less definite than in or on. Its significance is generally controlled by the context and attending circumstances, and when used in a contract requiring a railroad company to construct its road so as to intersect another line at a certain city, means an intersection near the city and not necessarily within the corporate limits. (*Williams vs. Fort Worth & N. O. Ry. Co.*, 18 S. W., 206, *supra*.)

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 a town. (*Frey vs. Fort Worth & R. G. Ry. Co.*, 24 S. W., 950-951, *supra*; 1 Words and Phrases, 598.)

In the case of *Rogers vs. Galloway Female College*, *supra*, 44 S. W., 454, attention is again directed that a subscription for the establishment of a college stipulated that it should be located at a certain incorporated town. At the time the subscription was made and accepted, no question was raised as to whether the college would be located within or without the corporate limits of such town. The location beyond the corporate limits but not beyond the aggregation of dwelling houses composing the town as distinguished from the adjacent country, was held to be a sufficient compliance with the conditions of the subscription. The court further says, as indicative of the usual meaning of the language employed, prior to 1908, when it was amended, Article 14, Section 3, of the Constitution of this State (Oregon) provided that "all the public institutions of the State hereafter provided for by the Legislative Assembly, shall be located at the seat of government." The city of Salem is the seat of government of the State of Oregon, yet the penitentiary, insane asylum and other State institutions were under this organic law erected outside the corporate limits of the capital city. We are of the opinion that the same rule and line of reasoning applies to the location of various institutions in this State, and in sustaining such contention we here make reference to the location of the Tuberculosis Sanitarium at Carlsbad, the Sul Ross Normal at Alpine, School of Mines at El Paso, and A. and M. near Arlington, which is conclusive to our minds that the people in locating the University of Texas, nor did the Legislature in locating other State institutions at various places within this State, have in mind any particular site with reference to in or out of the corporate limits of such town or city where such institutions have been located.

In the case of *Matkin et al. vs. Marengo County*, this was a case for the removal of the county courthouse outside of the corporate limits of Linden, as such limits existed at the time of the establishment of Linden as the county seat of Marengo County, Section 41 of the Constitution of the State of Alabama provided that no courthouse or county seat should be removed except by a majority vote of the qualified electors of said county voting at an election held for such purpose, and it was the contention of the plaintiff that under said section of the Constitution the court of county commissioners had no right to remove the courthouse from the present site to the lot where it was proposed to build a new courthouse. In this case, the Supreme Court of Alabama made use of the following language: "The terms courthouse site and county site in their ordinary use mean the same thing and are taken and understood to signify the seat of gov-

ernment of the county, and in this sense cannot be restricted and confined to the particular lot or ground by measurement upon which the necessary public buildings are erected, and the contention that the courthouse site should be held to mean the particular lot upon which the building is erected, is too narrow and unsupported by sound reason, and if attempted, would likely lead to greater public detriment in possibly more cases than mere inconvenience. Our conclusion is, and we so decide, that it was and is intended by Section 41 of the Constitution, that no courthouse should be removed from the town or city where located at the time of the adoption of the Constitution, except as provided in said section, and that a new courthouse may be erected within such town or city on a lot other than that upon which the old is located whenever determined necessary by the court of county commissioners, without first having submitted such question to a vote of the people."

There is no provision to be found in our Constitution or our statutes with reference to a removal nor a re-establishment of the University of Texas, and since our State Constitution is a limitation upon legislative power, and unless legislation duly passed be clearly contrary to some expressed or implied prohibition contained in the Constitution, the courts would have no occasion or authority to pronounce such legislation invalid. While constitutional prohibition upon the Legislature need not always be expressed but may arise from implications, yet the implied prohibition must result from the insertion of some expressed provision, as mere silence of the Constitution cannot be construed as a prohibition. The rule is that nothing shall be regarded as prohibited which is not so either by express or by fair and reasonable implications. (Supreme Court of Florida, 39 So. Rep., 829.)

Fully realizing that the relocating or re-establishing the Main University of Texas upon a different site within the corporate limits of the city of Austin, or adjacent thereto, is not a slight undertaking, but that is a matter of serious import to the people of the State and far reaching in its effects both upon the people and upon the institution itself, we have endeavored to apply that rule of construction to our Constitution that would give effect to the intent of its framers and the people adopting it, which intention is embodied and expressed by words or terms used and understood in the sense most obvious to common understanding and words appearing in the provisions of our Constitution now under consideration are presumed to have been used according to their plain, natural and usual significance of their import, and after having made a careful and exhaustive investigation of the holdings of the courts of this State, as well as the courts of other States, we are of the opinion that the Board of Regents of the University of Texas, when duly authorized so to do by the Legislature of Texas, have the lawful right and authority to move the Main University of Texas from its present site to some other location within or adjacent to the corporate limits of the city of Austin, and you are so advised.

Yours very truly,

C. L. STONE,
Assistant Attorney General.

Op. No. 2451, Bk. 57, P. —.

MILITIA—DEFICIENCY CLAIM.

1. The power of the Legislature over appropriations is plenary, if the Constitution is not violated.
2. The appropriation made by the First Called Session of the Thirty-seventh Legislature for the pay, transportation and sustenance of the militia for the fiscal year 1922 is valid.
3. The authority for establishing a claim for deficiency and the method provided by statute for the same.
4. The provision of Article 4342 that the head of a department must present a sworn estimate to the Governor at least thirty days before the deficiency occurs construed.
5. The Governor may immediately approve or disapprove a sworn estimate filed by the head of a department and when the same has been filed in the office of the Comptroller, the Comptroller may immediately issue a deficiency warrant in the manner provided by Article 4342.

AUSTIN, TEXAS, August 17, 1922.

Hon. Thos. D. Barton, Adjutant General of Texas, Austin, Texas.

DEAR SIR: You have stated to us that the appropriation made for your department for the fiscal year ending August 31, 1922, by the First Called Session of the Thirty-seventh Legislature, the same being Chapter 53 of the General Laws of said session, or rather the item thereof, "for pay, transportation, sustenance and all other expenses of military forces of the State when ordered on duty, etc.," is about exhausted and you wish to know whether the Governor may grant a deficiency therefor.

In passing upon this question it should first be borne in mind that the power of the Legislature over appropriations is plenary; that it is subject only to the provisions and inhibitions of the Constitution; and cannot be interfered with by the courts, if the Constitution is not violated. In *Re Continuing Appropriations*, 18 Colo., 192; 32 Pac., 272.

One of the constitutional provisions that must be looked to is the following, contained in Section 6, of Article 8:

"No money shall be drawn from the Treasury, but in pursuance of specific appropriations made by law. * * *"

The appropriation under discussion complies with this provision in that it is specific and is made by an act of the Legislature duly and properly passed.

Another constitutional provision that must be considered is that contained in Section 44 of Article 3 to the effect that the Legislature shall not "grant by appropriation, or otherwise, any amount of money out of the treasury of the State, to any individual on a claim, real or pretended, when the same shall not have been provided for by pre-existing laws."

The said Appropriation Act and the item thereof under discussion do not conflict with this provision of the Constitution. Section 46 of Article 16 of the Constitution is as follows:

"The Legislature shall provide by law for organizing and disciplining the militia of the State, in such manner as they shall deem expedient, not incompatible with the Constitution and the laws of the United States."

In obedience to this constitutional command and authority, the Legislature has passed the laws comprising Title 91 of our Revised Stat-

utes, which provide for the organization, maintenance and support of the active and reserve militia and the National Guard of this State, and has particularly provided for the sustenance and pay of such military forces of the State by Articles 5800, 5847, 5814, 5839 and 5840 of the Revised Statutes, and other articles thereof. These are the pre-existing laws which authorized the Thirty-seventh Legislature to make the appropriation for the pay, transportation and sustenance of the military forces of the State, and the Appropriation Act and the item thereof under discussion are valid and legal.

But you advise that the appropriation made by the Legislature for the pay, transportation, subsistence, etc., of the military forces of the State is now almost exhausted, and that further funds must be had for the pay and subsistence of the military forces of the State now on duty at Denison, Texas; that a short while ago conditions became such at Denison, Texas, because of a general strike of certain railway employees, that it was necessary to place certain territory in that vicinity under martial law, and to maintain several hundred of the militia on duty at said point and that the necessity of maintaining such force at said place will no doubt exist throughout the month of August; and that the maintenance and pay of so many of the militia called into duty at that point has caused such exhaustion of the appropriation made for the military forces by the Legislature and it remains for us now to determine whether the next Legislature might legally care for any deficiency that may be allowed by the Governor to provide pay and sustenance for the militia on duty at said place until the end of the present fiscal year, August 31, 1922.

This brings us to a consideration of another article of the Constitution and of certain laws passed in pursuance of the same.

Section 49 of Article 3 of the Constitution is 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 debt; and the debt created to supply deficiencies in the revenue, shall never exceed in the aggregate at any one time two hundred thousand dollars."

The term "casual deficiency" as used in said article has received the following meaning and construction in well considered cases:

"'Casual' means that which happens by accident, or is brought about by an unknown cause, and as used in the Constitution, forbidding any county to incur a debt without first submitting the matter to a popular vote, 'except for a temporary loan or loans to supply casual deficiencies of revenue,' means some unforeseen and unexpected deficiency, and does not include a debt incurred for the building of a courthouse." *Lewis vs. Lofley*, 19 S. E., 57, 59; 92 Ga., 804.

"A casual deficiency of a State's revenue is one that happens by chance or accident, and without any design or intention to evade the constitutional inhibition of such State against increasing the authorized expenditures of such State above a certain amount." *In re Appropriations by General Assembly*, 22 Pac., 464, 13 Colo., 316.

The deficiency in revenues now existing in the Adjutant General's Department is one that could not have been foreseen and provided for by the Legislature. It is an unforeseen and unexpected deficiency, arising without design or intention on the part of the Governor or Adjutant General, or anyone else, to evade the constitutional inhibition against

increasing the expenditure of the government to a point that would amount to a debt on behalf of the State.

In pursuance of the provisions of the last quoted article of the Constitution, the Legislature passed an act which is now Article 4342 of the Revised Statutes of Texas. This act provides in substance that whenever it shall appear to the head of any department that a deficiency will occur in appropriations made for his department, he shall, at least thirty days before the deficiency shall occur, make out a sworn estimate of the amount necessary to cover such deficiency until the meeting of the next Legislature, which estimate he shall file with the Governor. It further provides that if the Governor approves the claim, then he shall endorse his approval thereon and file the same with the Comptroller, and this shall be authority for the Comptroller to draw a deficiency warrant for the amount so approved.

While, as stated, this article provides that the sworn estimate of the amount necessary to cover the deficiency shall be made out "at least thirty days before such deficiency shall occur," yet, said article also contains the following proviso:

"Provided, further, when any injury or damage shall occur to any public property from flood, storm, or any unavoidable cause, the estimate may be filed at once, but must be approved by the Governor, as provided in this section (article)."

Construing the provisions to which your attention has been last directed, it is the opinion of this Department that it was provided that the sworn estimate should be filed at least thirty days before the deficiency shall occur in order that the Governor might have sufficient time to carefully examine the items of such estimate and determine whether each of such items was actually necessary or whether some should not, by him, be approved. He is the only one whose duty it is to pass upon such items and the only one who, by statute, is authorized to be advised by the heads of departments of the condition of appropriations made for the department. There is nothing in the statute which prevents him from immediately approving any sworn estimate that may be presented to him; and after he has approved such estimate and filed the same with the Comptroller there is nothing in the statute inhibiting the Comptroller from drawing his deficiency warrant for so much of such estimate as may be approved. This view is strengthened by the last provision quoted above which directs that in case of an emergency of the kind described, "the estimate may be filed at once, but must be approved by the Governor." An emergency could not be cared for in any other manner. The Adjutant General, thirty days ago, did not know that a condition had arisen which would call for martial law in any portion of the State; nor did he know after such condition did arise how long it would be necessary to maintain martial law at any point, or the number of troops that would be required. Therefore, it was impossible for him to literally comply with the first provision of this article under discussion and receive funds in time to provide pay and sustenance for the militia placed and kept on duty to enforce martial law at points where the Governor had declared such to be necessary.

We think that when the Governor has approved the sworn estimate presented to him by the Adjutant General, and has filed the same with

the Comptroller, nothing remains to be done to validate the claim for deficiency thus made; that no one can question the same and that the Comptroller can, at once, "draw his deficiency warrant for so much thereof" as the Governor has approved.

When these things have been done, we think the law in respect to creating deficiencies has been fully complied with, and that the claim for deficiencies for your department has been properly established and in such a manner that the Legislature will care for the same.

Very truly yours,
JNO. C. WALL,
First Assistant Attorney General.

Op. No. 2285, Bk. 55, P. 152.

STATUTES—SPECIAL LAWS—OFFICES AND OFFICERS—COMMISSIONERS COURT.

(1) The Legislature cannot increase the compensation of a county commissioner by special law; the compensation of such officers is controlled by the general statute. (Chap. 29, Acts Fourth Called Session, Thirty-fifth Legislature; Chap. 98, Acts Regular Session, Thirty-sixth Legislature.)

(2) The Legislature cannot create the office of county road supervisor by special law, nor can it pass a special law providing extra compensation for county commissioners where such officials perform the duties of road supervisors. Where the office of road supervisor has been created by general law, a county commissioner can draw extra compensation for performing the duties of ex-officio road supervisor, but such compensation should be authorized by general law.

(3) The Legislature, in the passage of local road laws, is not authorized by the Constitution to provide in such laws for the levy of a local road tax.

AUSTIN, TEXAS, February 11, 1921.

*Hon. W. M. Fly, Chairman Committee on Roads, Bridges and Ferries,
House of Representatives.*

DEAR SIR: In your communication of the 10th instant you state:

"Mr. Patman, a member of the Committee on Roads, Bridges, and Ferries, and a sub-committeeman, to consider all local bills referred to our committee, has been instructed by said committee to secure your official opinion upon questions which he will present to you in person, and this is a request that you please let us have your written opinion answering such questions at your earliest convenience."

The following questions were submitted by Mr. Patman:

- (1) Can you increase the pay of county commissioners by special law?
- (2) Can you by a special law create the office of road supervisor?
- (3) If the office of road supervisor can be created by special law, can the county commissioners draw extra compensation for performing the duties of that office?
- (4) Where the office of road supervisor has been created by general law, can a county commissioner draw extra compensation for performing the duties of that office?
- (5) Can the Legislature by special law provide a sum to be paid in

lieu of all road work, which amount is in conflict with the sum prescribed by the general law?

We will reply to above inquiries in the order propounded as follows:

(1) The Legislature cannot increase the compensation of a county commissioner by special law.

Section 56, Article 3, of the Constitution, among other things, provides:

"The Legislature shall not, except as otherwise provided for in this Constitution, pass any local or special law. * * *

"Regulating the affairs of counties, cities, towns, wards or school districts.
* * *

"And in all other cases where a general law can be made applicable, no local or special law shall be enacted."

In *Altgelt vs. Gutzeit*, 201 S. W., 400, the Supreme Court of this State (opinion by Chief Justice Phillips) held that the provision in the special road law for Bexar County fixing a salary of \$2400 a year for each commissioner of Bexar County "in lieu of all other fees and per diem of all kinds now payable or that may hereafter be allowed by general law" was an attempt to regulate the affairs of the county and the section was therefore unconstitutional. This opinion was rendered on March 13, 1918, and as the Legislature was then in session, a general law was passed fixing the compensation of county commissioners in all counties throughout the State. This act was approved by the Governor on March 22, 1918, and, inasmuch as the bill had received the necessary favorable vote in both houses of the Legislature, it became a law on the date of its approval. (See Chapter 29, Acts Fourth Called Session, Thirty-fifth Legislature, and the amendments thereto, the same being Chapter 98, Acts of 1919, Regular Session.)

The compensation of county commissioners is fixed by general law as follows:

(a) In all counties containing a population of 100,000 and over the county commissioners of the several counties shall each receive a salary of \$2400 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."

(b) In all counties containing a population of less than 29,000 the county commissioners of the several counties "shall each receive \$4.00 per day for each day served as commissioner and when acting as ex officio road supervisors of their precincts they shall each receive \$4.00 for each day actually served in supervising the construction or repair of the public roads in their respective precincts; provided that each commissioner shall in no event receive more than \$1000 in any one year for such services." (Acts 1919, Chapter 98, Section 1.)

(c) In all counties containing a population of 50,000 and not more than 100,000, the county commissioners shall each receive a salary of \$1800 per annum, payable in equal monthly installments, "and this salary shall be in lieu of all other fees and per diem now allowed by law." (Acts 1918, Fourth Called Session, Chapter 29.)

(d) In all counties containing a population of 40,000 and not more than 50,000, the county commissioners shall each receive a salary of \$1500 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."

(e) In all counties containing a population of "not less than 29,000" and "not more than 40,000," the county commissioners shall each receive a salary of \$1200 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." (Acts 1919, Chapter 91, Section 1.)

The statute declares that the last United States census shall govern as to population in determining the compensation therein provided.

The act above referred to was passed for the purpose of fixing the compensation of county commissioners in conformity with the decision of the Supreme Court in *Altgelt vs. Gutzeit*, above. This intention is clearly shown by the emergency clause, which reads, in part, as follows:

"The fact that the various counties of the State are attempting to operate under special road laws enacted from time to time by the Legislature provided for difference and varied compensations and salaries for county commissioners, and the fact that there is some question as to the validity of such provisions of said road laws fixing salaries thereby creating uncertainty and confusion in the enforcement of the road laws of the State, creates an emergency and an imperative public necessity. * * *"

(2) The Legislature cannot create the office of county road supervisor by special law. By Section 56, of Article 3, of the Constitution, it is declared:

"The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, * * *

"Creating offices or prescribing the powers and duties of officers in counties, cities, towns, election or school districts. * * *"

It will thus be seen that the Legislature is inhibited from passing the special law for such a purpose, unless such power is conferred by some other part of the Constitution. An examination of that instrument will show that no such power is therein conferred upon the Legislature.

(3) The third question is partially answered in the reply to the second question; that is, the office of county road supervisor cannot be created by special statute.

The Legislature is without authority to pass a special law providing extra compensation for county commissioners where such officials perform the duties of road supervisors. In *Altgelt vs. Gutzeit*, above, the court said:

"No doubt the Legislature, in the passage of local road laws, may, *within proper bounds*, provide compensation for extra services to be performed by those officials *where uncontrolled by general laws* and required by such local laws and directly connected with the maintenance of the public roads. *We are not called upon to determine that question here.* But under the guise of such a law it has no authority to legislate upon the subject of their general compensation or to alter the general laws governing it. We think that is what this act plainly attempted to do. We therefore hold the section in question to be unconstitutional." (Italics ours.)

At the time the above opinion was written the Legislature had not passed the Act of March 22, 1918, but, as above stated, almost immediately after this opinion was written, it passed the general statute fixing the compensation of county commissioners. It cannot now, in the passage of a local road law, provide compensation for extra services to

be performed by county commissioners *because such compensation is controlled by the general statute*. Such an act would be altering the general statutes governing the subject and would, therefore, be unconstitutional and void.

(4) In reply to the fourth question, attention is directed to Article 6901, Vernon's Complete Texas Statutes (Civil), 1920, reading in part as follows:

"The county commissioners of the several counties are hereby constituted supervisors of public roads in their respective counties, and each commissioner shall supervise the public roads within his commissioner's precinct once each month, and shall receive as compensation therefor three dollars per day for the time actually employed in the discharge of his duties, to be paid out of the road and bridge fund of the county; provided, that no commissioner shall receive pay for more than ten days in any one month."

This article in respect to compensation was superseded and in effect repealed by the Act of March 22, 1918, but it was not repealed in so far as it relates to the supervision of the public roads by county commissioners.

By Chapter 5, of Title 119, the commissioners court is authorized to employ road commissioners (Articles 6946 et seq.); and by Chapter 6 of the same title the commissioners courts of certain counties may appoint "one road superintendent for such county, or one superintendent in each commissioner precinct." (Articles 6953 et seq.)

The articles above referred to are the only provisions of the general law we find relating to road supervisors, road commissioners and road superintendents. There is a chapter providing for road overseers, but the same is not material in this instance.

In our opinion, the Legislature, in the creation of the office of county road supervisor *by general law*, will not be inhibited from allowing extra compensation to county commissioners for performing services as ex-officio road supervisors. Since repeals by implication are never favored, a general act creating the office of county road supervisor and providing compensation therefor will not repeal the provisions of the present general statute with reference to compensation or per diem of county commissioners in the absence of conflicting provisions. "One statute is not repugnant to another, unless they relate to the same subject and are enacted for the same purpose." (Sutherland on Statutory Construction, Section 138.) Therefore, an act creating the office of county road supervisor will not repeal the provisions of the law fixing the compensation of county commissioners, unless there is a clear conflict between the two statutes, and, in that event, the new act will prevail over the old statute; and as long as the Legislature confers upon the commissioners court the right "to exercise general control and superintendence over all roads, highways, ferries and bridges in their counties" (Article 2241, Subdivision 6), it may provide extra compensation for county commissioners in respect to the superintendence and control over roads, bridges and ferries. Such compensation should be authorized by general statute, as was done in the Act of March 22, 1918, above referred to. If there were no general statute on the subject, such extra compensation could be allowed by special law, but not otherwise. (Altgelt vs. Gutzeit, above.)

(5) We assume that the fifth question relates to the authority of the

Legislature to provide for the levy of a per capita road tax by special law. Your attention is directed to Section 3, of Article 8, of the Constitution, which declares—

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

In the recent case of Meyenberg vs. Ehlinger, 224 S. W., 312 (Advance Sheet No. 1), the Galveston Court of Civil Appeals held that Section 9, of Article 8, authorizing the Legislature to pass special laws for the maintenance of public roads did not carry with it authority to levy a local tax in one county for road purposes contrary to other provisions of the Constitution which limit the power of the Legislature in levying taxes. The opinion in this case declares:

“We are further of opinion that the act in question is void because it violates Sections 1 and 3 of Article 8 of the Constitution of this State, *which provides that taxation be equal and uniform*, and that taxes shall be levied and collected for public purposes only. These provisions of the Constitution limit the power of the Legislature to levy any tax upon the citizen *which does not bear equally upon all citizens of the State, or to levy any tax except by general law* and for public purposes.

“There are other provisions of the Constitution which authorize the Legislature to give to counties, cities, and other political subdivisions of the State the right to levy taxes of specified amounts for local purposes, but the Legislature is not authorized to make such levy.

“We do not think that the right conferred upon the Legislature by Section 9 of Article 8 of the Constitution to ‘pass local laws for the maintenance of the public roads and highways, without the local notice required for special or local laws,’ authorizes the Legislature to levy a local tax for road purposes contrary to other provisions of the Constitution limiting the power of the Legislature in levying taxes, and we are not cited to any case which has so construed this provision of the Constitution.”

The act declared void in the above case was a special road law for Fayette County enacted by the Thirty-sixth Legislature, and which provided, in part, as follows:

“Every able-bodied person between the ages of twenty-one and sixty years shall be liable for road duty in Fayette County, and every such person shall on, or before, the first day of February of each year pay to the tax collector of Fayette County the sum of five dollars, and every person making such payment shall be exempt from road duty for one year next succeeding such first day of February. The county tax collector shall receive and receipt for all moneys so paid him and shall pay same over to the county treasurer by deposit warrant, retaining one of said warrants as his receipt therefor; the same to be placed to the credit of the road and bridge fund and a separate account shall be kept for each precinct from which said money is received by the tax collector.” (Special Laws, 1919, Chap. 2, Sec. 1.)

From the above it will be seen that the Legislature, in the passage of local road laws, is not authorized to provide therein for the levy of a local tax.

Yours very truly,
W. P. DUMAS,
Assistant Attorney General.

Op. No. 2288, Bk. 55, P. 159.

APPROPRIATIONS—UNIVERSITY AVAILABLE FUND—CONSTITUTIONAL
LAW.

The legislative power to appropriate money is only limited as to purpose and amount by inhibitions in the Constitution.

No power exists in the Legislature to do indirectly what it cannot do directly.

Appropriations may be made out of funds derived from the general revenue of the State to organize, maintain, support, and direct the University; but the Legislature may not, directly or indirectly, appropriate moneys out of funds derived from the general revenue to establish a university or erect buildings therefor.

February 12, 1921.

Hon. W. O. Wright, Member of the Legislature, Capitol.

DEAR SIR: The Attorney General's Department received your communication of February 8th, and same has been placed upon my desk for consideration and reply. The questions propounded by you are:

First: "Would it be legal for the Legislature to appropriate money out of the general revenue to reimburse the available fund?"

Second: "We desire to know if it will be legal for this Legislature to say that this amount so placed in the available fund can be used only for buildings and buying land?"

In order to facilitate a clear understanding of the question it is deemed proper to catalogue the items comprising the "Permanent Fund" of the University of Texas and also the "Available Fund" and to notice in passing the purposes for which the last mentioned fund may be used. Section 11, Article 7, of the Constitution defines generally the items constituting the University Permanent Fund. Article 2626, Revised Statutes, 1911, sets out these items and enumerates them in five classes, viz: (1) All lands and property set apart and appropriated. (2) One million acres unappropriated public domain set apart by the Constitution of 1876, and one million acres set apart by Act of April 10, 1883. (3) Bonds purchased or to be purchased from the proceeds of the sales of University lands. (4) All proceeds of sales made, or to be made, of University lands. (5) Grants, donations and appropriations made, or to be made, or that may be received from any other source.

The University Available Fund is defined generally in the same section and article of the Constitution, which reads as follows:

"* * * and the same (Permanent Fund), as realized and received into the Treasury of the State, together with such sum, belonging to the fund as may now be in the Treasury shall be invested in bonds of the State of Texas, if the same can be obtained, if any, then in United States bonds and the interest accruing thereon shall be subject to appropriation by the Legislature to accomplish the purpose declared in the foregoing section." (That is, Sec. 10.)

We therefore understand from the above definitions that the University Permanent Fund may not be impaired but must be held in trust by the State for the purpose for which it was created and that the proceeds, interest and increment arising therefrom, known as the University Available Fund, may be used for the purpose mentioned in Section 10, Article 7, of the Constitution. This section reads as follows:

"The Legislature shall, as soon as practicable, *establish, organize* and pro-

vide for the *maintenance, support and direction* of a University of the first class, to be located by a vote of the people of this State, and styled 'The University of Texas,' for the promotion of literature, and the arts and sciences, including an Agricultural and Mechanical Department."

The various Legislatures, beginning in 1879 at the Sixteenth Legislature, convened January 14, 1879, began to appropriate for various purposes the Available Fund. The University was established by Senate bill No. 90, introduced in the Seventeenth Legislature, and approved March 30, 1881, and in Section 18 thereof the regents were authorized to expend the accumulated available funds, as above defined, for the purposes mentioned in said act. These appropriations for the purpose of erecting buildings, maintaining, supporting, and directing University, continued for a long time without assistance from appropriations made from the revenues derived from the General Fund in the State Treasury. At the Twenty-first Legislature, January 8, 1889, we find that the General Revenue Fund was called upon in an appropriation to supplement the University Available Fund in maintaining and carrying on the University. The Twenty-second Legislature contributed five thousand dollars from the General Fund of the State to supplement the University Available Fund and other items. Thus continued, similar appropriations through the different Legislatures, and each year the amounts appropriated from the general revenue of the State for the support and maintenance of the University increased. Originally, the Available Fund was looked to exclusively, both for the purpose of erecting buildings and supporting and maintaining the University. In later years the Legislature undertook to appropriate from the General Fund, coming into the State Treasury, moneys for supporting and maintaining the University, and thereby permitting the University Available Fund to accumulate, but such result did not occur, for at no time have the appropriations from the State Treasury, out of the General Fund, been sufficient and adequate within themselves to maintain and support the University, consequently, the Available Fund has been continuously tapped to supplement the appropriations of the Legislature for the maintenance and support of the University, and from this general statement of the conditions which have existed arose, we presume, the suggestions in your letter that there has been approximately three million dollars used from the Available Fund to support and maintain the University.

No constitutional and statutory complaint (Sec. 7, Art. 8, Constitution, prohibits diversion of a special fund from its purpose only) can be established against these various appropriations of the University Available Fund, for in Section 11, Article 7, of the Constitution, it is stated that the Available Fund "shall be subject to appropriation by the Legislature to accomplish the *purpose* declared in the foregoing section," that is, to establish, organize, maintain, support and direct a university of the first class, nor can there be any complaint of a similar character to the appropriations made out of the general revenue of the State for the support and maintenance of the University (Sec. 48, Art. 3, para. 5, Constitution), since none of the appropriations out of the general revenue have been for the purpose of establishing the University, and erecting University buildings, a power denied the Legislature. (Sec. 14, Art. 7, Constitution.) (See Appendix, IV, p. 51, Vols. 1-10 (A to D) regents' reports, where the Constitution,

that no money out of the general revenue of the State could be used for current expenses, was departed from and appropriation for support and maintenance of the University were supported under authority of Section 48, Article 3, of the Constitution.)

Understanding the above facts, we proceed to the answer of your first inquiry as to whether or not the Legislature may reimburse the University Available Fund out of the general revenue of the State, the moneys expended for the support and maintenance of the University. Would such an act, making such appropriation, be contrary to the letter and spirit of our Constitution? Unless there appears restraints in the Constitution the Legislature may exercise its legislative power to appropriate money without limitation, for the object of the Constitutions of the various States is not a grant of power to the Legislature, but is written to confine and restrain its powers. (Cooley's Con. Lim., Chap. 7, 242.) This limitation on the power of the Texas Legislature appears in Section 48, Article 3, of the Constitution, denying the Legislature the right to levy taxes or impose burdens, except to discharge debts of the State, incurred in the economic administration of the government. A constitutional authority, speaking upon this question, said:

"It must also be stated that the proper authority to determine what should and what should not properly constitute a public burden is a legislative department of the State, and in determining this question the Legislature cannot be held to any narrow or technical rule. There will, therefore, be necessary expenditures and expenditures which rest upon considerations of policy alone, and in regard to the former, as much as to the other, the decision of the department, to which alone questions of State policy are addressed, must be accepted as conclusive." (Cooley's Con. Lim., 608; 59 N. W., 785.)

Other limitations upon the appropriated power of the Legislature appear in the following articles and sections of the Constitution:

Article 1, Section 7; Article 3, Section 35; Article 8, Section 6; Article 16, Section 6; Article 16, Section 56; Article 7, Section 14, hereafter mentioned.

There being no inhibition expressed in the Constitution, but on the contrary an express authorization (Sec. 48, Art. 3, para. 5, Const.), we conclude that the Legislature is not restrained in the exercise of its power to appropriate from the General Revenue Fund of the State funds for the purpose of organizing, maintaining, supporting and directing the University, except for the purpose of the establishment of the University, and of erecting buildings. As to what items of expense constitute organizing, maintaining, supporting and directing the University, we must resort to the interpretation of these various words. They must be taken in their ordinary and general meaning. It would be useless to attempt to enumerate here the various items which could be construed to come within the meaning of such words. Each proposed expenditure for any of these purposes must be considered when it arises.

The peculiar wording of your first question as to whether or not the Legislature may "reimburse the Available School Fund" out of the general revenue, logically brings us to a discussion of the last question. An appropriation by the Legislature, using the words "to reimburse the Available Fund of the University" would amount to an order from the Legislature to the State Treasurer to make an entry

upon his books transferring the appropriated amount from the general revenue to the Available Fund of the University. (81 N. Y., 319.)

The Legislature of this State is directly inhibited (Sec. 14, Art. 7, Const.) in the exercise of its appropriating power as follows:

"* * * provided that no tax shall be levied and no money appropriated out of the general revenue * * * for the *establishment and erection of the buildings of the University of Texas.*"

This quoted portion of the Constitution denies the power to the Legislature to take from the General Fund of the State, by an appropriation, moneys for the purpose of erecting University buildings. The conclusion, above reached, that a direct appropriation may be made out of the general revenue for the support and maintenance of the University is removed from doubt, but it is equally certain that the Legislature cannot appropriate out of the general revenue funds for erection of buildings. Since this cannot be done directly, we must inevitably conclude that it cannot be done indirectly.

It is axiomatic that the Legislature cannot do indirectly what cannot be done directly. (59 S. W., 24; 55 N. Y., 50; 23 Ohio, 22.) By wording an appropriation with the language "to reimburse the Available Fund of the University," and that money having been placed in such fund, could be used, if lawful, for the purposes mentioned in Section 10, Article 7, of the Constitution, but if such fund so appropriated, or any part thereof, should be devoted to the purpose of erecting buildings, such would be unconstitutional in that it would be doing indirectly what is prohibited to be done directly.

This would be true should the language of the appropriation specify that the funds should be used for buildings, or should the appropriation be silent as to the purposes for which it should be used, for it is a rule well established, and the courts not only have the authority, but it is their duty to scrutinize the application of appropriated funds in order that they should be devoted to a lawful purpose. (23 Ohio, 22.)

Therefore, it is our conclusion, and you are so advised, that the Legislature may appropriate directly out of the General Revenue Fund of the State an amount within their discretion to accomplish all of the purposes mentioned in Section 10, Article 7, of the Constitution, limited, however, in that no appropriation, or any part thereof, coming directly or indirectly out of the general revenue of the State can be used for the purpose of establishing a university and erecting buildings therefor.

Yours very truly,

WALACE HAWKINS,
Assistant Attorney General.

Op. No. 2283, Bk. 55, P. 131.

CONSTITUTIONAL LAW—PENALTIES—WORDS AND PHRASES.

The Legislature cannot release penalties against taxpayers incurred by failure to pay taxes prior to January 31, 1921.

The Legislature may not enact a bill which contravenes or directly conflicts with the provisions of the Constitution.

"Obligation and liability" as used in Section 55, Article 3, of the Constitution, includes "penalty" due State for failure to pay taxes prior to January 31, 1921.

Section 10, Article 8, of the Constitution, withdraws from the Legislature the power to release payment of taxes, and penalties incident thereto.

AUSTIN, TEXAS, February 7, 1921.

Hon. J. M. Melson, Member of the House of Representatives, Capitol.

DEAR SIR: Your letter addressed to the Attorney General of February 3rd was placed on my desk for investigation and reply. The question propounded therein is well set out in the following paragraphs:

"I find the people over the State relying upon the fact that the bill had taken immediate effect, failing to pay their taxes on February 1st, and are therefore under the penalty of 10 per cent imposed by law for the non-payment of taxes by February 1st.

"The question is whether or not the Legislature will have power to relieve the people from the payment of this penalty, and it is my idea that the Legislature has such power to introduce and pass a law relieving them from the payment of this penalty."

Unless there is direct inhibition contained in the Constitution prohibiting the Legislature from passing acts, then an act of the Legislature would be valid since such an act would not be in direct conflict with the Constitution. *Moore vs. Alexander*, 107 S. W., 395.

It has been suggested that such legislation would be in conflict and contravene the following quoted portions of the Constitution:

Article 3, Section 55. "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."

Article 8, Section 10. "The Legislature shall have no power to release the inhabitants of or property in any county, city or town from the payment of taxes levied for State or county purposes, unless in case of a great public calamity in any such county, city or town when such release may be made by a vote of two-thirds of each house of the Legislature."

Article 1, Section 16. "No bill of attainder, ex post facto law, retroactive law or any other law impairing the obligation of contract shall be made."

In respect to Section 55 of Article 3 of the Constitution we are called upon to determine what liabilities and obligations the people intended to withdraw from the control of the Legislature.

The language of the section is broad, general and complete. The words therein show no well marked prepossession in the mind of the convention as to the particular character of evil which this section was designed to destroy. It simply prohibits the releasing or extinguishing of any indebtedness, liability or obligation on the part of any incorporation or individual to the State, to the county or municipal corporation.

We are to determine whether or not the Legislature is deprived of the authority to repeal a statute which requires the payment of a penalty already incurred for failure to make payment of taxes prior to January 31, 1920.

We can think of no broader language to express the relationship of a duty owed by an individual to the State than the words "indebtedness, liability or obligation." Indebtedness is more restricted in its meaning than either the term "liability" or "obligation." The enu-

meration of the various obligations and liabilities due by a citizen to the State would be of little avail in determining whether or not the penalty to pay taxes at the proper time come within the meaning of such words. Too, it might be said that the evils designed to be remedied by the constitutional convention would shed some light on what should be properly included in these terms and it has been argued that such a criterion for arriving at the meaning of the Constitution is conclusive. At the time of the writing of this section one evil at least sought to be corrected was that of withdrawing from the hands of the Legislature the power to extend a remedy to the various State, county and local officials who had defaulted or failed to properly collect, account for, and disburse tax money. But there is no substantial reflection in the words of Section 55 that this evil was the sole and exclusive purpose for including such section in the Constitution.

As a means to a further and proper understanding of the terms used in Section 55, we resort to the various cases which have been decided and which involve this section.

In the case of Culter et al. vs. Castile, 37 S. W., 791, in which case a writ of error was later refused, we find that the city of Galveston required each bid for a street paving contract to be accompanied by a deposit of \$2000 to be forfeited if the bidder failed to qualify after the awarding of the contract and it was material for a proper decision of the case to ascertain whether or not a city would be authorized to release the \$2000 deposit to the bidder. Judge Pleasants used the following significant language:

"and if on the other hand the appellant by refusing to comply with the demand of the city to execute the contract and bond submitted to them thereby incurred a liability whether in the form of legal damages or a penalty. The city could not release the appellant from such liability because the exercise of such power is plainly prohibited by Section 55 of Article 3 of the Constitution of this State, and it would be the duty of the city council to hold the money and apply it towards the discharge of the liability incurred by this appellant."

In the case of P. M. Oliver et al. vs. The City of Houston, 93 Texas, 201, on a certified question to the Supreme Court, it was necessary to decide whether or not Section 55 of Article 3 of the Constitution prohibited the Legislature from extinguishing an obligation to a State or municipality by enacting a law which allowed the defendants to plead four years limitations to tax suits brought in the name of the city of Houston.

In answer to the question we find that the liability for the payment of taxes is included within the meaning of the words in Section 55 of Article 3.

*"By that provision of the Constitution the Legislature is forbidden to pass any law which would 'extinguish any liability, indebtedness, or obligation to the State or any county or city,' and thereby power to extinguish liability for taxes was denied. * * * For the prevention of these evils this provision was inserted. (That is, governmental favoritism.) Its terms are broad enough to cover every conceivable obligation or liability, the remission of which would diminish the public revenue and thereby either directly or indirectly impose a heavier tax upon those not affected by the exemption."*

Also the contention was considered that the law fixing the limitation on actions for taxes was a major interest to the Legislature in passing

the act and that its incidental effect would not have any bearing upon its validity. The court said:

"The effect of the act is to relinquish liability. The purpose to accomplish that end is manifest. The result was the effectual exemption of the property of appellants from taxation for the years named."

The question was certified to the Supreme Court and Judge Williams in an opinion agreed with the majority finding of the court below.

In the case of *Delta County vs. W. A. Blackburn et al.* the question arose whether or not the order of a commissioners court reducing the rate of interest on a note for the purchase price of school land from seven per cent to three per cent was beyond the power of the court. Such action was held to be in direct contravention of Article 3, Section 55, of the Constitution.

In the case of *Lindsey vs. The State*, 96 Texas, 587, it was held that the action of the commissioners court in selling judgments against insolvent debtors was valid under Article 3, Section 55, of the Constitution. In defining the words of this section Judge Williams used the following language:

"But we are not authorized to import into the Constitution language which it does not use. * * * It is one thing to release debtors or to extinguish their debts, liabilities or obligations without payment or performance and quite another to obtain by sale under fair and prudent management, the value of such assets."

We have, therefore, seen that the statute of limitation in effect releasing liabilities for taxes; municipal taxes levied but uncollected; reduction of rate of interest on notes payable to a county as purchase money of school lands; the receiving of a less sum for a settlement of accounts in favor of a county as against its officers; the return of a deposit made by a bidder on a paving contract in the nature of a penalty; and a compromise settlement by the grantee of a county school land in the commissioners court whereby a deed was made upon no consideration, all have been found to come within the meaning of the words "debt, obligation or liability."

The penalty for failure to pay taxes prior to January 31, 1920, has already accrued and such penalty, together with the taxes, are secured by a special lien against all property as is provided in Article 8, Section 15, of the Constitution. This lien, on the obligation and liability to pay taxes and penalties thereon, "attaches and becomes an incumbrance on the land from the date liability is fixed on the owner, which is the first day of January of the year, although the amount of said tax is not fixed and determined until some time subsequent thereto." *C. B. Caswell & Co. vs. Halbertzette*, 87 S. W., 911.

The obligation and liability both for the taxes and penalty is designated as an incumbrance in the case last mentioned above.

In a certified question the Supreme Court considering penalties said:

"But we are of the opinion that the penalty and costs which accrued upon the failure of the grantor in the deed to pay the taxes stand upon the same footing as the taxes themselves. It is the duty of the latter to remove the incumbrance. * * * Therefore, we think that if the *debt* of the covenantor which constitutes an incumbrance on the land is annexed either by law or by contract from a condition the happening of which the debt may be increased and the condition happens the increment is as much as part of the indebtedness as the original debt, so in this case by reason of the default by the grantor in the deed in

failing to pay the taxes assessed, the debts are by operation of law increased by penalties and costs which increase it was the duty of the covenantor and not the duty of the covenantee to prevent. Clearly the State, county and city has a lien upon the land as well for the penalty and cost as for the taxes themselves and we fail to see any principle upon which it could be claimed that any duty would devolve upon the covenantee to discharge at any stage the obligation which the covenantor had undertaken to be performed."

Under the above decisions and the various expressions of the Supreme Court indicating the nature of the obligations and liability which are contained within Section 55 of the Constitution, we are irresistibly led to the conclusion that a penalty for the failure to pay a tax prior to January 31st, is a liability or obligation within the meaning of the Constitution and the releasing and extinguishing of which is withdrawn from the hands of the Legislature.

We shall not pass without noticing the case of Adams, Revenue Agent, vs. Gragiscoma, 15 S. R., 798, decided by the Supreme Court of Mississippi, interpreting a similar clause of the Mississippi Constitution in which it was held that a penalty incurred for the selling of liquors without a license would not come within the meaning of the particular wording of the Mississippi Constitution.

The decision seeks to determine whether or not a penalty arising as above disclosed came within the meaning of the words "obligation and liability" as used in the Constitution, and it was said "a careful scrutiny of the language of the entire section shows that the use of the word 'liability' was intended to be restricted or perhaps it is more accurate to say that the word cannot be read in its full sense without doing violence to the purpose of the section as a whole."

Thereafter the opinion calls attention to the words "liability held and owned by the State" and the answer by payment thereof "into the *proper treasury*" and the further limitation "nor shall such liability or obligation be exchanged or transferred except on payment of its face value."

But the argument and rules of interpretation applicable to the Mississippi Constitution and its language are in nowise applicable to the general, broad and sweeping provisions of Section 55 of the Texas Constitution. And furthermore, the courts have shown a general tendency to give the general words used in this section their ordinary meaning.

By reason of the broad language in this Section 55, the construction thereof by the courts giving full effect to such words, we conclude that the penalty provided creates a liability within the meaning of our Constitution. 37 Pac., 1017.

Section 10, Article 8, of the Constitution prohibits the Legislature from releasing the payment of taxes levied for State and county purposes and the penalties herein discussed being so closely allied to the taxes and are considered by the adjudicated cases as an incident thereof, would subject them to the restriction mentioned in the foregoing article and section of the Constitution. *City of San Antonio vs. Toepperwin*, 135 S. W., 416.

Article 1, Section 16, would not be violated by the passage of such act releasing the penalties, for it is well understood that the remedy for the collection of taxes is subject to change and modifications by the Legislature. *De Cordova vs. City of Galveston*, 4 Texas, 470. And furthermore, a penalty is always executory as between individuals, and

no person can claim as against another a vested right in a penalty, but such construction placed upon the nature of a penalty does not militate against the holding that the Legislature is without power to release or relinquish penalties, for the reason that the Legislature, under Section 55, Article 3, of the Constitution, may not release any liability or obligation which an individual owes the State or municipal corporation. This constitutional clause applies to liabilities and obligations as between the States, lesser political subdivisions, and citizens, and the holding that releasing and relinquishing penalties already incurred is not retroactive, is in nowise in conflict with the holding that such a penalty is a liability or obligation within the meaning of Section 55, Article 3, of the Constitution.

Therefore, it is the opinion of this Department, and you are so advised, that the proposed legislation releasing and relinquishing "penalties" already incurred by taxpayers for failure to pay taxes prior to January 31, 1921, would be void because it contravenes Section 55, Article 3, and Article 8, Section 10, of the Constitution of Texas; however, a postponement of the payment of penalties already incurred would not be a "releasing or relinquishing" of an "obligation" or liability which is inhibited by the Constitution.

Yours very truly,

WALACE HAWKINS,
Assistant Attorney General.

Op. No. 2294, Bk. 55, P. 209.

CONSTITUTIONAL LAW—MUNICIPALITIES AND COUNTIES, DISTINCTIONS
BETWEEN THE TWO—POWER OF LEGISLATURE TO GRANT
AID TO COUNTIES.

Municipalities are established primarily for the benefit of their inhabitants, and are not for the common benefit of the State, or people at large.

Counties, while commonly designated quasi corporations, are essentially instrumentalities of the State; political subdivisions of the State created as an agency of local government for the performance of those obligations which the State owes the people at large.

The Legislature is not inhibited from granting public money to a county, provided the money is to be used in aid of a governmental function, or duty which the States owes to the people at large.

Section 51, Article 3, Texas Constitution.

AUSTIN, TEXAS, February 24, 1921.

Hon. John E. Quaid, Member House of Representatives, Capitol.

DEAR SIR: As chairman of a sub-committee of the Appropriation Committee, you have asked the Attorney General to advise you whether in his opinion House bill No. 391 is constitutional. This bill proposes to appropriate "out of the general revenues of the State of Texas, not otherwise appropriated, the sum of \$50,000" to each of the counties named in the act, totaling fifteen in number, the same to constitute the permanent school fund of the counties named in the act, the same to be "in lieu of any and all appropriations of public lands for county school purposes to which said counties, or any one thereof, may be entitled, under existing law."

It is stated in the emergency clause that the counties named in the act have never received any public land from the State for school purposes, and further, that there is not now any land that can be appropriated or given to the counties named in this act to be used by them for school purposes.

It has been the established policy of this State from the beginning to donate to each county a certain amount of public land to be and constitute the public school fund of the county. Prior to Statehood, the Congress of the Republic of Texas by an act approved January 26, 1839, appropriated three leagues of land to each county in the Republic for school purposes. Later this was increased to four leagues.

It seems that at the time the counties named in House bill No. 391 were created the public land of the State that could be appropriated to counties for school purposes had been exhausted, hence these counties were denied this donation or bounty from the State that all other counties had received.

It is now sought to have the State grant to these counties in lieu of land a money appropriation to be used in like manner as other counties under the law are required to use the proceeds derived from the sale of lands donated by the State.

Section 51, Article 3, of our Constitution provides in part that "the Legislature shall have no power to make any grant or authorize the making of any grant of public money to any individual, association of individuals, municipal or other corporation whatsoever."

Section 50, 52, 53 and 55 of said Article 3, and Section 3 of Article 11, contain inhibitions against the State, counties or municipalities granting money or credit to any individual, corporation, etc.; or the granting of any extra compensation for public service after the service has been rendered; or the cancelling of any indebtedness, liability or obligation owing to the State, or to any county or municipality; and denies "any county, city or other municipal corporation" the power to become subscribers to the capital of any private corporation, etc. All of these provisions are for the protection of the public funds and the public credit against misuse.

However, if there is any inhibition against granting aid to counties it is contained in that part of Section 51, Article 3, already quoted.

It will be observed that counties are not named in this section by name, but the inhibition does include "municipal or other corporations." There is a distinction to be drawn between a municipal corporation and a county; also between a private corporation and a county. This distinction is most clearly pointed out in the opinion of Mr. Chief Justice Phillips, to which we shall directly call attention.

In the case of Bexar County vs. Linden, the question before the court briefly stated was this: District attorneys receive most, if not all, of their fees from the State. Article 3869, Revised Civil Statutes, as amended, required the district attorneys after they had received the maximum amount that they were entitled to retain as compensation for their services to pay into the county treasury all fees received by them, including the fees received from the State, and the money paid into the county treasury became the property of the county. Linden, as district attorney of Bexar County, had received fees in excess of the

maximum amount he could retain. A lawsuit resulted, Linden contending that the statute requiring district attorneys to pay money received from the State into the county treasury for the use and benefit of the county was unconstitutional for the reason that to require this money received from the State to be paid to the county would be a grant of public money by the State to a county in violation of Section 51, Article 3, of the State Constitution. Linden won in the trial court. The Court of Civil Appeals at San Antonio also held the statute unconstitutional. 205 S. W., 478. Bexar County carried the case to the Supreme Court. See 220 N. W., 761.

The Supreme Court held the statute constitutional.

Judge Phillips, who wrote the opinion, quotes from Dillon's work on Municipalities, as follows:

"The primary and fundamental idea of a municipal corporation is an institution to regulate and administer the internal concerns of the inhabitants of a defined locality in matters peculiar to the place incorporated, or at all events *not common to the State or people at large.*"

Continuing, Judge Phillips said:

"The affairs of a municipality are municipal affairs, their concerns are municipal—those merely of the community, and the powers they exercise are municipal powers.

"This is not true of counties. They are essentially instrumentalities of the State. They are the means whereby the powers of the State are exerted through a form and agency of local government for the performance of these obligations which the State owes the people at large. They are created by the sovereign will without any special regard to the will of those who reside within their limits. Their chief purpose is to make effective the civil administration of the State government. The policy which they execute is the general policy of the State. Through them the powers of government operate upon the people and are controlled by the people. They are made use of by the State for the collection of taxes, *for the diffusion of education*, for the construction and maintenance of public highways, and for the care of the poor. All of these things are matters of State, as distinguished from municipal, concern. They intimately affect all the people. The counties are availed of as efficient and convenient means for the discharge of the State's duty in their regard to all the people."

Continuing, it is said:

"They possess some corporate attributes, but they are, at best, only quasi corporations. 1 Dillon, 37; *Heigel vs. Wichita County*, 84 Texas, 392, 19 S. W., 562, 31 Am. St. Rep., 63. *Primarily, they are political subdivisions—agencies for purely governmental administration. They are endowed with corporate character only to better enable them to perform their public duties as auxiliaries of the State.*"

Judge Phillips then quotes with approval from the opinion in the case of *Hamilton County vs. Mighels*, 7 Ohio St., 109, as follows:

"A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the State at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the State, and are, in fact, but a branch of the *general administration of that policy.*"

He then quotes from the case of *City of Sherman vs. Shebe*, 94 Texas, 129:

"Counties are commonly designated quasi corporations for the reason that being but political subdivisions of the State and organized purely for the purposes of government, they differ essentially not only from private corporations, but also from such public corporations as towns and cities, which are voluntary and are established largely for the private interests of their inhabitants."

He then calls attention to an opinion of our Supreme Court, written by Judge Stayton:

"In Judge Stayton's discussion in *City of Galveston vs. Posnainsky*, this difference is pointed out with the force and clearness characteristic of his opinions. It is there emphasized that counties are but 'an agency of the State through which it can most conveniently and effectively discharge the duties which the State, as an organized government, assumes to every person, and by which it can best promote the welfare of all'; and that the State makes use of them 'to exercise powers not strictly municipal, but in fact State powers, exercised for the State through the local officers within prescribed territorial limits.'"

Continuing, Judge Phillips said:

"Since the duties which the counties perform are State duties and the powers they exercise are State powers, an apportionment to them of State funds, as the payment into their treasuries of the excess fees of district attorneys under this statute, for the carrying out of those duties, is manifestly not a grant of public money."

We do not think the Supreme Court held, or intended to hold, that the State may grant public money to counties indiscriminately and without regard to the purpose for which it is to be used, but it has held in the above case that public money may be granted indirectly by the State to a county for a governmental purpose, and if it can be granted indirectly as is done in the matter of excess fees, it can be done directly, for it is fundamental that a thing cannot be done indirectly by the Legislature that the Legislature could not do directly.

Education is a matter of general interest to all the people and under our form of government it is the belief of many that the State owes no greater obligation to the people than the duty of furnishing to the children and young people adequate educational advantages and opportunities. Judge Phillips, in the above case, in enumerating those things governmental in their nature in which the States makes use of the counties as an agency to execute or perform, names "the diffusion of education."

We are of the opinion that in all educational matters, the county, speaking in a broad sense, is but the agent or the means used by the State to discharge a function or duty governmental in its nature, and that a grant of public money to a county to become and be used as a permanent education fund for the county is not inhibited by the Constitution.

Neither is House bill No. 291 discriminatory in its application provided that all counties that have not received a grant of public land from the State are embraced within its provisions.

I am with respect,

Very truly yours,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2301, Bk. 55, P. 234.

CONSTITUTIONAL LAW.

A law enacted by the Legislature to become effective only upon the happening of a future event, is not for that reason invalid.

A bond executed by the citizens of Austin guaranteeing that certain described lands that the State desires to purchase for the use of the University shall not cost the State above a certain amount, is legal.

AUSTIN, TEXAS, February 28, 1921.

Hon. Lee Satterwhite, Chairman Appropriations Committee, State Capitol.

DEAR SIR: I have your letter of the 24th instant, addressed to the Attorney General, reading as follows:

"The Committee on Appropriations have under consideration the purchase of certain lands adjacent to the University of Texas, from about two hundred separate owners, and the question has arisen in the committee as to whether or not certain representatives of the Austin Chamber of Commerce and the citizens of Austin, can legally bind themselves to guarantee to the State that all of said land within the prescribed metes and bounds can be procured for not exceeding a certain sum.

"We would like for you to advise this committee whether a guarantee or bond signed by the citizens of Austin, would be binding upon them in the event the State was unable to procure said land at the price fixed.

"The further proposition is that if the Legislature will appropriate a fixed sum of money to be available upon the procurement of titles to said land, that the citizens of Austin will guarantee that said land could be procured for not exceeding the amount specified and appropriated for that purpose.

"Mr. Baker, representing the citizens committee, has doubtlessly called on you to get your opinion upon this subject, and our understanding is that they are willing to sign a bond of such language and tenor as the Attorney General would require, in order to make it binding if it can be so drawn.

"Please give us as prompt an answer to this inquiry as possible, and oblige yours."

Your inquiry presents two questions. First, does the offer by the Chamber of Commerce and the citizens of Austin to guarantee that the land described in the act shall not cost the State of Texas to exceed a certain amount constitute improper or undue influence such as to invalidate the act? Second, can the Legislature enact a law to become effective only upon the happening of a future event, that is, the execution of the bond by the Chamber of Commerce and the citizens of Austin?

We shall discuss these two questions in the order named.

It is the opinion of this Department that the offer made by the Chamber of Commerce and the citizens of Austin does not constitute undue or improper influence. It has repeatedly been held by the courts that the gift of land or buildings by an individual to a State or county to be used for public purposes in the event the State or county will locate certain institutions at certain places, does not constitute bribery, and that such an offer does not constitute undue and improper influence upon the persons who have the right to decide where such State or county institution shall be located.

In the case of *Wells vs. Taylor*, 5 Montana, 202, the Supreme Court of Montana said:

"The petitioners further rely upon the allegations of their application, that

prior to the election there was presented an offer to the voters of the county in the form of a bond, conditioned for the building a courthouse at Boulder City, provided a majority of the votes cast at the election were in favor of changing the county seat of the county to that place. This offer was not bribery. A proposition of this kind, looking to the public welfare, and for the benefit of all the people alike, contains no element of criminality or immorality. The thing offered is of a public nature, pertaining to the public and not to individuals, and the party to be influenced is a whole county, and in a manner to benefit every inhabitant thereof. This is not the case of a candidate for public office, who, in order to secure votes, promises in case he shall be elected to donate a portion of his salary or other valuable thing to the county or State. This would be simply a proposition to purchase an office in consideration of personal services or money, or both. Such a proposition the law condemns as against sound policy, and as tending to corruption. A man who is so infirm in morals as to be willing to purchase an office, would probably resort to corrupt practices in order to extort from the people the price paid. Public buildings and places to transact the public business of the people are in every county a necessity. They are provided, and rightfully, by a tax upon the whole people, for the reason that all are benefited by their erection. But if, during the pendency of an election to change a county seat, a man or company of men should erect at a certain place a courthouse and county offices in order to retain the county seat at such place, could such man or company be charged with bribery, or the exercise of an undue influence upon the election? Reasonable men in casting their ballots look to the public interest and general welfare. A self-governing people have the right to do in a legal way whatever is not forbidden by the law or public policy, for the public good. Philanthropy might erect a public building for the use of the people. Might the donor not give and the people accept without being guilty of a crime? And if such gift were a courthouse, and made during the pendency of an election to remove or change the county seat, is it possible that the people would be guilty of a crime if, in casting their ballots, they took into consideration the public benefits to be derived from such gift? The motive which prompts the gift is not material. If the donation promotes the public welfare, the people, in casting their ballots, have the right to consider it, whether the motive be good or bad. A whole people are not bribed by the bestowal of public benefits for the good of all alike. The law proceeds upon the theory that a self-governing people are self-respecting, and that whole communities will not do any act that reflects upon their honor or integrity."

In the case of *Neal vs. Shinn*, 4 S. W., 771, the Supreme Court of Arkansas said:

"The complaint filed by the contestants, who are the appellants here, charges that the offer of the appellees to build a courthouse and jail, and donate them to the county in case the county seat should be changed, and the execution of a bond payable to the county commissioners for the faithful performance of their promise, was the offer of a bribe to the electors; that a sufficient number of votes to change the result was influenced thereby; and that the election voting a change of the county seat was, for that reason, void. That donating facilities for the public convenience as an inducement to the electors of a county to vote for the removal of a county seat will not invalidate the election has been ruled in every case where the question has arisen to which our attention has been called, and, as we think, upon sound reasoning."

In the case of *Douglass vs. County of Baker*, 23 Fla., 419, the Supreme Court of Florida said:

"We do not think the offer of MacClenny to build a courthouse at MacClenny, if the voters would locate the county site there, and his performance of the offer, invalidates the election. *Dishon vs. Smith*, 10 Iowa, 212; *Attorney General vs. Supervisors Lake Co.*, 33 Mich., 289; *State vs. Purdy*, 36 Wis., 213. The authorities recognize such offers of public conveniences as legitimate in such contests. They cannot be regarded as corrupt agencies, or as influencing corrupt voting."

In the case of *Hawes vs. Miller*, 56 Iowa, 395, the Supreme Court of Iowa said:

"It is alleged in the petition, and admitted by the answer, that a number of citizens of Manchester, who had signed the petition for the relocation of the county seat before the election, executed and filed in the office of the county auditor a bond obligating themselves to remove the jail from Delhi to Manchester, purchase and convey to the county an eligible site for the jail and county buildings, to furnish and lease to the county an eligible site for the jail and county buildings, to furnish and lease to the county for ninety-nine years the town hall, and to furnish to the county four sufficient rooms, with fire-proof vaults, all free of expense to the county, within thirty days after the canvassing of the vote, if it should be for the relocation of the county seat. It is also shown that by ordinance of the town of Manchester, the town hall was offered for the use of the county, in case the county seat should be established in that town. The bond and ordinance were published in the county newspapers, and circulars reciting them were sent to the voters of the county. The petition alleges that the number of electors who were influenced to vote for the relocation by these inducements offered by the town and citizens of Manchester exceeds the majority which the proposition received. There are no admissions or evidence upon these allegations of the answer. That the proposition had an effect upon the election cannot be doubted, and for the purposes of the case, it may be admitted that it was as great as is alleged in the petition.

"It is claimed by plaintiffs that the proposition of the citizens and town of Manchester, to furnish, free of expense, county buildings, was a bribe offered to the electors of the county to induce them to vote for the relocation of the county seat which defeats the election. The question of law here presented now demands our attention. To provide suitable buildings for county purposes at the county seat requires considerable outlay of money. This fact often possesses controlling influence in the location of county seats. It has often occurred that county seats have been located or relocated upon the ground that county buildings were supplied by the citizens of the town where the county seat is fixed by the vote of the people. The question of location of county seats involves matters of convenience and expense to the whole county. It may be inconveniently located, yet the people would endure the inconvenience rather than incur the expense of erecting new county buildings at another place. If the obstacle of expense be removed the electors would vote for a change. We see nothing like bribery in this. This precise question was before this court in *Deshon vs. Smith*, 10 Iowa, 212, and it was decided that contributions in land and money to be used for county purposes, in consideration of the location of the county seat, do not amount to bribery."

Other cases holding to the same effect are *Deshon vs. Smith*, 10 Iowa, 212; *State vs. Elting*, 29 Kan., 397; *State vs. Purdy*, 36 Wis., 225. We have not been able to find a single case holding to the contrary.

It is interesting to note that in the Montana case a bond was made guaranteeing that those who executed the bond would build a courthouse at Boulder City, provided a majority of the votes cast at the election were in favor of changing the county seat of the county to that place; and again in the Arkansas case, certain parties executed a bond payable to the county commissioners for the faithful performance of their promise in the event the county seat was changed; and in the Iowa case a bond was executed guaranteeing to purchase and convey to the city an eligible site for the county buildings and to furnish and lease to the county for ninety-nine years the county hall, and to do certain other things. In all of these cases no question is raised as to the validity of such bond. We consider that these cases are directly in point on the question under consideration, and we

can reach no other conclusion than the one announced with reference to this question.

Referring to the second question raised by your inquiry, that is, can the Legislature enact a valid law when the same is not to become effective except upon the happening of a future event, this question must be answered in the affirmative.

The Constitution of the United States is a grant of power from the States to the Federal Government. The Constitution of Texas is an instrument of limitations ordained and promulgated by the true sovereign, the people, and the Legislature may enact any law not forbidden in express terms or by reasonable implications by some provision contained in our State Constitution.

In the case of *Harris County vs. Stewart*, 91 Texas, 133, Mr. Justice Brown, speaking for the Supreme Court, said:

"Courts have no right to declare an act of the Legislature void because it is against the spirit of the Constitution; when a judge pronounces a law to be contrary to the Constitution, he must be able to put his finger upon the provision of that instrument which prohibits the act, or from which the prohibition naturally arises."

We do not find anything in our Constitution that prohibits the Legislature from enacting a law such as is referred to in your letter, nor do we find anything from which the prohibition naturally arises.

On the other hand, we do find the Constitution commanding the Legislature to "provide" for a university of the first class, Section 10, Article 7.

This Department on February 15, 1921, in an opinion addressed to Hon. W. O. Wright of your committee, held that the Legislature had the authority to appropriate out of the general revenue of the State funds to enlarge the present University campus. This the Legislature proposes to do, provided the citizens of Austin will guarantee that certain land definitely described in the proposed bill may be purchased by the State for the amount of the appropriation carried in the bill.

The Legislature, acting for the people of Texas, desires to safeguard the expenditure of the people's money, but at the same time they think it necessary to purchase the land described in the proposed act. It must be assumed that the Legislature is of the opinion that the amount of the appropriation is sufficient to purchase the land at a fair price, and that it is unwilling and determined not to pay more for the land than it is actually worth.

The citizens of Austin knowing that the purchase of this land for University purposes will increase the value of all property adjacent to the University and perhaps all property in Austin, are willing in consideration of the State purchasing this land, to guarantee that the cost of the land described in the act will not exceed the amount of the appropriation. We think from a legal standpoint that the proposed guarantee would be based upon a legal consideration and the bond or instrument of guarantee can doubtless be drawn so as to constitute an admission on the part of those who execute the same, that it is based upon a valid and legal consideration. In any event, no money need be drawn from the State Treasury until the deeds to all the land described in the act are ready for delivery to the com-

mission or Board of Regents, and for a consideration not in excess of the amount appropriated.

Judge Cooley, in his work on Constitutional Limitations, lays down this general proposition:

"But it is not always essential that a legislative act should be a completed statute which must in any event take effect as law, at the time it leaves the hands of the legislative department. A statute may be conditional, and its taking effect may be made to depend upon some subsequent event."

In *Peck vs. Weddell*, 17 Ohio St., 271, it was held:

"It is further objected to this act, that it purports to effect a removal of the county seat at an indefinite time, upon a contingency uncertain, and depending upon the discretion of the county commissions. But we do not see the force of this objection. Many laws can only operate upon the happening of certain contingencies; yet they are nevertheless valid."

In *Balt vs. Kirkley*, 29 Ed., 85, it was held:

"A valid law may be passed to take effect upon the happening of a future contingent event, even where that event involves the assent of its provisions by other parties."

In *Barto vs. Himrod*, 8 N. Y., 483, it was held:

"A valid statute may be passed to take effect upon the happening of some future event. Certain or uncertain, it is a law in presenti, to take effect in future. The event, or change of circumstances, must be such as, in the judgment of the Legislature, affects the question of the expediency of the law. The Legislature in effect declares the law inexpedient if the event should not happen, expedient if it should happen. They appeal to nobody to judge of its expediency."

The above language is quoted with approval in *Lothrop vs. Steadman*, 42 Iowa, 583.

In the case of *The State of Connecticut vs. N. H. & N. Ry. Co.*, 43 Conn., 351, it was held:

"In this controversy between the people of Plantsville and the defendants, the Legislature thought it expedient to grant relief to the former on condition that they, at their own expense, should erect suitable buildings for the station. Accordingly the act was so framed as to take effect only when that should be done. We see nothing objectionable in this. It was a legitimate exercise of legislative power and not a delegation of it."

In *Walton vs. Greenwood*, 60 Me., 356, the court said:

"The case is this. Section 3, of the 'act to change the place of holding the supreme judicial court in the County of Somerset and to change the shire town to Somerset County,' runs thus: 'The previous sections of this act shall be void and of no effect unless the town of Skowhegan, or its citizens, shall on or before the first day of March, in the present year, without expense to said county of Somerset, provide suitable room and other accommodations for said court and officers to the acceptance of a majority of said county commissioners, and shall execute and deliver to them a good and sufficient lease or other instrument, to secure the use thereof to said county, for the purpose aforesaid, during said five years, if the same shall be occupied so long, for the purposes specified in this act, and shall also convey or secure the conveyance in like manner, of a suitable site for county buildings in said Skowhegan.' Hereupon it is argued that here was an unconstitutional delegation of the power of legislation to the town of Skowhegan, or its citizens, at whose option the act was to be void, and that there are constitutional objections to a piece of legislation which makes the place where the courts shall be holden in a county, to depend upon the acts or omissions of any particular town or its citizens, and the judgment of the county commissioners thereupon. We do not find either in the letter or the

spirit of the Constitution anything which forbids the Legislature to attach conditions of this description to their acts. Upon the wisdom or expediency of so doing, it is no part of our duty to express an opinion. Of that, the law-making power, commissioned by the people for that purpose, must judge. Our office is to give a just and proper interpretation to all these clauses as we find them spread upon the statute book, and to hold them valid and binding, unless they appear clearly to be repugnant to the Constitution of this State or to that of the United States.

"The conditions are as much part of the act as the positive provisions to which they are subjoined, and which they qualify. The whole taken together, expresses the will of the Legislature in the form of law, and, not being in conflict with any constitutional provisions, but on the other hand being sanctioned by numerous precedents, must be held valid and binding."

In response to your request for a prompt answer to your inquiry, this opinion has been prepared in haste and the subjects and the authorities in support of our views have not been arranged with that degree of regularity that a systematic and well ordered mind demands. However, we do believe that our conclusions are supported by the weight of American legal authorities.

I am, with respect,

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2386, Bk. 56, P. 1.

CONCURRENT RESOLUTIONS—APPROPRIATION BILLS.

The provisions of a law passed by the Legislature in conformity with the constitutional requirements cannot be repealed or otherwise nullified by concurrent resolution.

Money cannot be appropriated by concurrent resolution, for the reason that no money can be drawn from the State Treasury except in pursuance of an appropriation made by law and the Constitution provides that "no law shall be passed except by bill."

AUSTIN, TEXAS, September 26, 1921.

Hon. Lon A. Smith, Comptroller, Capitol.

DEAR SIR: Your letter of the 23rd instant addressed to the Attorney General received. Your communication reads as follows:

"I am herewith submitting you the following accounts to cover insurance, to wit:

Arthur L. Skelley.....	\$315.38
The Stacy-Young Company.....	611.00
Millican & Hamby.....	302.08
Fred K. Fisher Insurance Agency.....	636.37
Fred K. Fisher Insurance Agency.....	551.90
E. R. Barrow & Company.....	115.40

"These accounts are to cover insurance on State property, and charged against appropriation D-330, Adjutant General's Department, and passed by the First Called Session of the Thirty-seventh Legislature.

"In the current appropriation for the Adjutant General's Department, we find these words: 'Providing for the payment of insurance premium covering property belonging to the State of Texas,' included along with appropriation for sundry other objects, \$160,000 for year ending August 31, 1922.

"Also, on page 129, House Journal of the fourth day, Second Called Session of the Thirty-seventh Legislature, we find a Senate Concurrent Resolution No. 3,

prohibiting the payment of such accounts, 'notwithstanding there may be items in the appropriation bills authorizing the expenditure of money for payment of insurance premiums.'

"Therefore, am I authorized to pass above accounts for payment?"

In the biennial appropriation for the support and maintenance of the Adjutant General's Department, we find that \$160,000 has been appropriated for each of the fiscal years. This amount covers many items of expense, including "the payment of insurance premiums covering property belonging to the State of Texas." This appropriation was made by the First Called Session of the Thirty-seventh Legislature.

The Second Called Session of the Thirty-seventh Legislature adopted Senate Concurrent Resolution No. 3, which reads as follows:

"Senate Concurrent Resolution No. 3, relating to insurance on State property.

"Whereas, It is of great financial importance to the State that a fixed policy be established with reference to carrying fire insurance upon buildings and contents belonging to the State and its various institutions; and

"Whereas, The insurance data and information tabulated and set out on page 261 of the first annual report of the State Board of Control indicate that a substantial saving can be made to the State in carrying its own insurance; therefore, be it

"Resolved by the Senate of the State of Texas, the House of Representatives concurring herein, That hereafter it shall be and is the fixed policy of this State that the State shall carry its own insurance upon State buildings and contents, and that no insurance policies shall be taken out upon any of the public buildings of this State, nor upon the contents thereof, and the State Board of Control and all other boards having charge of buildings of the State, and the contents of such buildings, are hereby instructed not to have such buildings nor property insured, notwithstanding there may be items in the appropriation bills authorizing the expenditure of money for the payment of insurance premiums.

"Provided, that it is declared to be the policy of the State hereafter at the end of each two-year period to set aside approximately one per cent of the value of all public buildings owned by the State as a sinking fund until ten per cent of the total value of all such buildings has been accumulated, and that this sinking fund shall be invested in school bonds in the school districts of this State.

"Provided, however, that this resolution, or any part of its provisions, shall not apply to or affect the University of Texas, and its branches, and that it is the fixed policy of the State that all buildings and the contents thereof, belonging to the University of Texas, and its branches, shall be kept insured at all times against any loss by fire or tornadoes."

In answering your inquiry, we are presented with two legal questions as follows:

First: Can the Legislature by concurrent resolution repeal or nullify the provisions of a law passed in conformity with the requirements of the Constitution?

Second: Can the Legislature appropriate public money and authorize its withdrawal from the State Treasury by concurrent resolution?

At the time the concurrent resolution was adopted the departmental appropriation bill authorizing the Adjutant General's Department to insure certain property belonging to the State and making an appropriation to pay the insurance premiums was a part of the laws of Texas, but this concurrent resolution expressly provides that "no insurance policies shall be taken out upon any of the public buildings of this State, nor upon the contents thereof, * * * notwithstanding there may be items in the appropriation bills authorizing the ex-

penditure of money for the payment of insurance premiums." Then again, this concurrent resolution expressly provides that it is the fixed policy of the State at the end of each two-year period to set aside approximately one per cent of the value of all public buildings owned by the State as a sinking fund until ten per cent of the total value of all such buildings has been accumulated, this sinking fund to be invested in school district bonds. The only way, of course, that this sinking fund could be created is by withdrawing from the State Treasury sufficient funds to amount to approximately one per cent of the value of the public buildings, and money cannot be withdrawn from the Treasury except by an appropriation made by the Legislature. So we find that this resolution attempts to make an appropriation.

We will now attempt to answer the second question; that is, can the Legislature by concurrent resolution make an appropriation of State funds for any purpose? On May 17, 1913, this Department advised Hon. W. P. Lane, the then Comptroller, that appropriations could not be made by the Legislature except by law; that all laws must be passed by bills. Opinions of the Attorney General, Vol. 31, page 321. This opinion was written by Hon. C. M. Cureton, then First Assistant Attorney General, now Attorney General, and consists of eighty-two typewritten pages, and thoroughly reviews all the American authorities on the subject involved. The opinion also directs attention to those parts of our own Constitution that directly deal with this subject. In addition to referring you to the above opinion, we will also quote from certain sections of the Constitution of Texas.

Section 6, Article 8, provides that "no money shall be drawn from the Treasury, but in pursuance of specific appropriations *made by law.*"

Section 29, Article 3, provides that "the enacting clause of all laws shall be: 'Be it enacted by the Legislature of the State of Texas.'"

Section 30 of Article 3 reads as follows: "No law shall be passed except by bill. * * *"

The appropriation bill which provides for the payment of these insurance premiums was passed in conformity with all the foregoing constitutional requirements. The concurrent resolution does not comply with any of them, as, for instance, it does not have the enacting clause required by the Constitution, and it is not a bill, but a concurrent resolution. Money cannot be drawn from the Treasury except by an appropriation made by law, and the only way that a law can be made is by bill, and this bill must contain the enacting clause as provided in Section 29 of Article 3. It follows, then, that no officer of this State is authorized to withdraw money from the State Treasury for the purpose of creating the sinking fund provided for in this concurrent resolution.

We do not think an appropriation bill passed in accordance with all constitutional requirements can be repealed or nullified by a concurrent resolution, but, if the resolution can be given that effect, we do not think the Legislature would have repealed that part of the appropriation bill providing for the payment of insurance premiums by this resolution had it known that the sinking fund provided for could not legally be established by means of a concurrent resolution.

You are respectfully advised that, in the opinion of this Depart-

ment, you are authorized to draw your warrant as Comptroller in payment of the accounts set out in your letter.

I am, with respect,

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2250, Bk. 54, P. 459.

POWER OF LEGISLATURE TO LEVY POLL TAX UPON WOMEN.

The Constitution of the State of Texas does not prohibit the Legislature from levying a poll tax upon all persons, both men and women.

AUSTIN, TEXAS, September 17, 1920.

His Excellency, the Hon. W. P. Hobby, Governor of Texas, Austin, Texas.

MY DEAR GOVERNOR: On September 14, 1920, you propounded to the Attorney General's Department an inquiry, the effect of which is to be advised if the Legislature has the power to impose a poll tax upon females the same as on males, without the necessity of additional constitutional enactment.

Answering your inquiry, I beg to advise that it is the opinion of the Attorney General's Department that the Legislature has the constitutional right to impose a poll tax upon all citizens, irrespective of sex. The authority upon which we predicate our conclusions is as follows:

Article 8, Section 1, of the Constitution adopted in 1876, provides, among other grants of authority, the following specific grant:

"The Legislature may impose a poll tax."

This specific grant of authority is without limitation, is clear and unquestionable in its meaning, and there is no other provision of the Constitution adopted subsequently which is in conflict therewith. Other provisions of the Constitution relating to the poll tax are as follows:

Article 7, Section 3, provides that "one-fourth of the revenue derived from the State occupation taxes and a poll tax of one dollar on every male inhabitant of this State between the ages of twenty-one and sixty shall be set apart annually for the benefit of the public free school."

The Court of Criminal Appeals, in an opinion by Judge Ramsey (Solon vs. State, 114 S. W., 359) held that this latter provision had the effect in express terms of levying a poll tax upon every male inhabitant between the ages named.

This provision of the Constitution was adopted in 1909, but we call your attention to the fact that the adoption of this provision of the Constitution was for the purpose of providing revenues for the schools, and was in effect an appropriation of one dollar of the taxes collected from male inhabitants of the State to the public schools and is in no sense a limitation upon the general power of the Legislature to levy a poll tax in any amount and upon any persons in its discretion it would indicate. As tending to show that this provision is not

susceptible of such construction, I call your attention first to the fact that it appropriates one-fourth of the revenue from the occupation taxes. It has never been construed that the Legislature would not have the authority to appropriate more than one-fourth if it so desired, and it appropriated a poll tax of one dollar on every male inhabitant of this State between certain ages, and it has never been construed that this is a limitation upon the power of the Legislature to appropriate more than one dollar, for indeed, the Legislature has specifically appropriated \$1.50 by an act of the Legislature passed in 1892, and the power of the Legislature to levy and collect more than the one dollar levied or appropriated by the Constitution has never been doubted. The article of the statute to which I refer is 7354, Revised Civil Statutes, and reads as follows:

"There shall be levied and collected from every male person between the ages of 21 and 60, resident within this State, on the first day of January of each year (Indians not taxed and persons insane, blind, deaf and dumb, or those who have lost one hand or foot excepted), an annual poll tax of \$1.50, \$1.00 for the benefit of free schools and 50 cents for general revenue purposes; provided, that no county shall levy more than 25 cents poll tax for county purposes."

In many features this article of the statute has been assailed and construed by the courts of this State, but the power of the Legislature to levy more than the constitutional appropriation of one dollar has never been denied or even questioned. The following cases are the principal ones construing this provision of the statutes:

Bluitt vs. State, 121 S. W., 168.

Bigham vs. Club, 95 S. W., 675.

In 1902, the qualified voters of this State adopted Section 2 of Article 6 of the Constitution. After reciting the various qualifications of electors, the following proviso is added:

"Provided further that any voter who is subject to pay a poll tax under the laws of the State of Texas shall have paid said taxes before he offers to vote at any election in this State, and hold a receipt showing his poll tax paid before the first day of February next preceding such election."

The only effect of this provision of the Constitution is to make the payment of poll taxes a prerequisite to the right to vote and since the payment of poll taxes by reason of the provisions of Article 7, Section 3, of the Constitution is only required of male inhabitants of this State, it follows that the effect of the proviso in Article 6, Section 2, would be to place upon all male inhabitants of this State the duty of the payment of a poll tax as a prerequisite to the right to vote, and as we have already held in an opinion to your Excellency that the Nineteenth Amendment destroyed all distinction based on sex, the effect of that amendment when applied to the provisions of our Constitution and laws is to nullify all provisions thereof which will be in conflict therewith. We pointed out to your Excellency in that opinion that the levy of a poll tax upon all male inhabitants of this State was a revenue provision of our Constitution, adopted in 1876, and has been fully sustained by the courts of this State, and is in no way affected by the adoption of the Nineteenth Amendment to the Constitution of the United States.

Since we have, therefore, held that Article 7, Section 3, thereof, is in no way affected by the provisions of the Nineteenth Amendment to

the Constitution of the United States, and that only that part of the Constitution, Article 6, Section 2, of the State of Texas, which makes the payment of a poll tax by every person subject thereto a prerequisite to the right to vote is affected. It follows, therefore, that in order to ascertain who are subject to the payment of a poll tax, we must refer to Article 7, Section 3, of the Constitution, and to Article 7354, Revised Civil Statutes of the State. By reference to Article 7, Section 3, of the Constitution, we find that male inhabitants only are required to pay a poll tax, while Article 7354, Revised Civil Statutes, likewise assesses a poll tax upon all male inhabitants and designates certain exceptions.

Article 6, Section 2, therefore, in effect, adopts and reads into its provisions the essential parts of the revenue article necessary to make its own provisions whole and intelligible. Let us, therefore, transfer and read into Section 2, Article 6, the part of Article 7354, Revised Statutes, which is necessary to complete Section 2 of Article 6, and instead of referring to persons who are subject to pay a poll tax let us insert into Section 2 of Article 6 the language of Article 7354, levying the poll tax. After doing this, we have the proviso of Section 2, which related to the payment of a poll tax, reading as follows:

“And providing further that every male person between the ages of twenty-one and sixty years, resident within this State on the first day of January (Indians not taxed, and persons insane, blind, deaf and dumb, and those who have lost their hand or foot excepted), shall have paid an annual poll tax of \$1.50 for the benefit of the free schools, and must have paid 50 cents for general revenue purposes, and 25 cents for county purposes, and must have paid said tax before he offers to vote at any election in this State, and hold a receipt showing his poll tax paid before the first day of February next preceding such election.”

It will be noted that in the above paragraph we have only read into Section 2 of Article 6 the provisions of Article 7354 of the Revised Civil Statutes, which were necessary to its completion.

We do not think that it can be doubted that when Section 2 of Article 6 has been completed, all legal minds must conclude that its provisions in so far as they place upon the male voter a heavier duty than is imposed upon female voters, are in direct conflict with Section 19 of the Constitution of the United States, and being in conflict, only that part, however, which is in conflict will be nullified. The answer, therefore, is irresistible that the provision which makes the payment of a poll tax as a prerequisite to the right to vote is in conflict with the Nineteenth Amendment to the Constitution of the United States in that there is a distinction which is based solely upon sex, and as stated above, when this distinction based upon sex is destroyed, the result follows that all persons qualified to vote may vote without the poll tax prerequisite.

After a careful search of the Constitution and an examination of all of its provisions relating to the subject of poll tax, we conclude, and so advise you, that the Legislature has the power to impose a poll tax upon all persons, male and female, subject, however, to the provisions of Section 2 of Article 6 of the Constitution, which requires the issuance of a poll tax receipt prior to the first day of February, next preceding such election; in other words, the Legislature, which is now about to convene, would not have the power to levy a

poll tax upon women which, under the Constitution, would become a voting prerequisite in the coming November election, for the reason that the Constitution requires the payment of a poll tax, and the issuance of a receipt therefor, before the first day of February next preceding such election.

Yours very truly,

W. A. KEELING,
Acting Attorney General.

OPINIONS ON CORPORATIONS, FOREIGN AND DOMESTIC; INSURANCE; BANKS.

Op. No. 2395, Bk. 56, P. 61.

CO-OPERATIVE SAVING AND CONTRACT LOAN COMPANIES.

1. Any corporation, whether organized in this State or elsewhere, whose purposes include the issuance of what are ordinarily classed as contract saving certificates, whose character or plan is similar to the stock of a building and loan association, whereby the subscribers pay or deposit installments at stated intervals until the maturity of such contract or certificates, comes within the operation of Chapter 5, Acts of the First Called Session, Thirty-fourth Legislature, it being also Chapter 25b, Title 25, of Complete Texas Statutes.

2. Such corporations, if foreign, in order to obtain a permit to operate in Texas, must show compliance with the requirements of that act as to the subscription of the entire capital stock, the payment of one-half thereof in money at the time of organization and the payment in money of the remainder within two years from the date of its organization.

3. A corporation of this kind having been organized more than two years must show its entire capital stock to have been fully paid in money.

AUSTIN, TEXAS, June 21, 1921.

Hon. Ed Hall, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: 1. I have examined the charter of the Security Saving and Loan Company of Reno, Nevada, whose President, Mr. W. H. Hendricks, discussed with your office the matter of its entry into this State.

The statement of the purposes of this corporation, as contained in the charter and its amendments, show that its purposes are in substance the "sale" of certain contracts or certificates whereby the subscribers pay sixty cents (\$.60) per month for one hundred months at which time the certificate or contract is to be matured, whereupon such subscriber receives the certificate fully paid up for one hundred (\$100) dollars, showing the obligation of the company for this amount. These certificates, I understand, are ordinarily used in retiring loans made by the company to the holders, though this is not an essential characteristic, as they may be used merely as a basis of investment or means of saving, by the subscribers, of money. These certificates are sometimes converted into other forms of loan certificates issued by the company. This plan is substantially the means whereby building and loan associations borrow their money from subscribers. Obviously people who thus lend their money to any such concern are the ones for whose protection this statute was designed. Accordingly, whatever the phrasing or description of their contracts or certificates, when their effect is to attain the use by the concern of the subscribers' money, this act of the Legislature applies.

2. Section 21 of this act provides:

"Such foreign company must, as to its capital stock, be in conformity with the provisions of this act relative to domestic companies. * * *"

Section 19 of the act requires any such corporation from another State, which may desire to transact business in Texas, to furnish the Commissioner of Insurance and Banking a statement under oath show-

ing fully the amount of its capital stock, the amount thereof paid up, together with full details as to its assets, liabilities and contracts. The evident purpose of this is to enable the Commissioner to know the condition of this company as to its capital stock, as well as the solvency of the assets in which such stock may be invested.

Section 3 of the act provides that:

"The capital stock of all such institutions hereafter organized shall not be less than twenty-five thousand dollars and not less than one-half of the capital stock must be paid in in actual currency, bank notes or certified checks; while the remainder may be paid in deferred payments, payable in equal or greater installments annually for a period of time not exceeding two years."

It seems plain from these provisions that the Legislature intended to protect the savings of lenders to these companies by especially requiring that the capital stock shall be subscribed and paid in the manner indicated, and that no room be found therein for the inclusion of speculative profits. This statute constitutes an exception to Article 1314, Revised Statutes, which permits foreign corporations in general to obtain permits to do business in this State upon a less substantial showing as to subscription and payment of capital stock.

The charter submitted to my consideration shows that the concern was organized in March, 1917, with an authorized capital stock of two hundred and fifty thousand (\$250,000) dollars, of which only one thousand (\$1000) dollars was subscribed and paid. There is no showing that the remainder has been subscribed or paid. Presumably its status is now the same. This falls short of the requirement of our statute as to capital stock having been fully paid, and unless it be shown by them to the entire satisfaction of your department that the capital stock has been fully subscribed and fully paid in cash, the company will not be eligible to receive a permit, regardless of what your finding may be as to the solvency of its existing assets.

I may add that this investigation was made and these conclusions reached before I learned from Mr. Hendricks that his submission of these papers was merely tentative, but since the question may probably arise again, I am taking the liberty of putting the matter into this form for your future reference.

Very respectfully,

EUGENE A. WILSON,
Assistant Attorney General.

Op. No. 2449, Bk. 57, P. 20.

SAVINGS BANKS AND SAVINGS DEPARTMENTS—RESERVES OF AS AFFECTED BY THE FEDERAL RESERVE ACT.

Articles 517e and 517f relating to reserves of Texas banks which become members of the Federal Reserve Bank, do not apply to savings banks nor to savings departments of banks or banks and trust companies organized in this State.

AUSTIN, TEXAS, August 11, 1922.

Hon. Ed Hall, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: Replying to your request for advice respecting the requirements of saving banks and banks maintaining savings departments

as to reserves, upon their becoming members of the Federal Reserve Bank, I have the honor to draw your attention to the following:

The general purpose of the Federal Reserve Act is to provide a system of great financial institutions located in various sections of the country which shall have the resources and prime function to supply the commercial financial needs of the various institutions entitled to membership therein, viz., State and National banks which do an ordinary loan and deposit business with the legitimate financial support. It may be that this is not the precise expression of the statute, but the familiar history of the times and the operation of the law warrants this suggestion.

Chapter 3 of Title 14 of the Revised Statutes, which relates to savings banks, clearly contemplates the establishment of an institution which shall pay interest on its deposits and which shall not be required to pay its deposits upon demand.

Article 403, in this chapter, prescribes the character of investment which may be made by such corporations of all moneys received by it as deposits, which are as follows: (1) Bonds or interest-bearing notes of the United States; (2) bonds of the State of Texas, or other States; (3) city, county, town or school district bonds; (4) railroad bonds; (5) real estate mortgage notes; (6) real estate sufficient to furnish a domicile for the corporation. Thus, the right to rediscount paper or make ordinary commercial loans is excluded.

Article 406 of this chapter provides "there shall be kept an available cash fund of not less than fifteen per cent of the whole amount of its assets, and the same or any part thereof may be kept on hand or on deposit, payable on demand," with approved reserve agents.

With these several provisions before us it seems plain that membership in the Federal Reserve Bank is not essential to any of the objects of the creation of savings banks and in all probability such membership was not contemplated by the Legislature at the time of creating the statute.

Chapter 4 of this title relates to the organization of savings departments by banks or bank and trust companies.

Article 432 in this chapter provides for the investment of savings deposits, which investments are similar in general to those set out in Article 403, supra.

Article 435 reads as follows:

"That there shall be kept on hand at all times not less than fifteen per cent of the whole amount of such deposits in such savings department; one-third of which shall be kept in actual cash in such savings department and two-thirds of which may be kept with reserve agents."

Neither the deposits of a savings bank nor those of the savings department of an ordinary bank are under the protection of the Guaranty Fund, a different method of securing and protecting them being provided by these chapters, and upon the whole, it may be said the savings banking system is in substance different from the general banking system of this State which relates to commercial banking. Added to this is the fact that savings banks and savings departments usually have by-laws which conform with the statutes relating to the obligation of the bank in respect to the investment of its deposits, and the payment of

such deposits, and savings accounts are evidenced by entries in the pass books, which pass books contain rules and regulations relating to these, and which usually contain a contract whereby the bank will carry the prescribed reserves against the deposits.

While Articles 517e and 517f authorize banks to conform to the reserve requirements of the Federal Reserve Banks of which they may be members, we think, in view of the foregoing, that it was not intended by the language of these articles to relax the security afforded to savings depositors by the 15 per cent reserve requirements of our law. Thus, in view of the ready support afforded to banks doing an ordinary commercial business, by reason of the rediscounting facilities open to them by membership in the Federal Reserve Bank, the more onerous reserve requirements of the Texas law could be dispensed with. However, the statute having provided an elaborate system for the investment of funds and the retention of a specified reserve whose investment is prohibited, but which must be kept in cash or with reserve agents and which reserve forms a part of the comprehensive system provided for the protection of savings depositors, we are led to the view that it was not the purpose of Articles 517e and 517f to interfere with this system, but instead that these articles merely refer to ordinary commercial banks or to the commercial branches of such banks as carry savings departments.

You are therefore respectfully advised that the requirements of the Texas law in respect to reserves against saving deposits are not affected by such bank's membership in the Federal Reserve Bank.

Yours very truly,
EUGENE A. WILSON,
Assistant Attorney General.

Op. No. 2278, Bk. 56, P. 110.

BANKS AND BANKING.

It is unlawful for any bank to hypothecate or pledge as collateral security for money borrowed its securities to an amount more than fifty per cent greater than the amount borrowed thereon, and any excess collateral can be recovered from the bank holding same.

Article 570, Revised Statutes, 1911.

AUSTIN, TEXAS, January 25, 1921.

Hon. Ed Hall, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: From your letter of January 22nd, addressed to the Attorney General, it appears that a certain State bank in this State was closed by your department. It further appears that a National bank in this State holds bills payable executed by such State bank in the sum of \$127,140.83, secured by collateral consisting of bills receivable and liberty bonds aggregating \$299,504.72, which amount is \$123,426.71 in excess of fifty per cent more than the amount borrowed.

You call our attention to Article 570, Revised Statutes of Texas, 1911, which reads in part as follows:

"It shall be unlawful for any State bank to hypothecate or pledge as collateral security for money borrowed upon bills receivable or certificates of de-

posit or otherwise, its securities to an amount more than fifty per cent greater than the amount borrowed thereon."

You then ask us to advise you whether or not the National bank can be required to surrender to you the excess held by it in the sum of \$123,426.71.

You are advised that in our opinion the above-quoted provision of the statute is plain, unambiguous and mandatory, and that you can recover from the National bank the amount of securities held by it in excess of fifty per cent more than the loan to the State bank. It is a well-established principle of law that any contract made in violation of any civil or penal law is void. We are not called upon in this opinion, and do not hold that you may recover all of the securities pledged with the National bank, but we do advise you that you can recover the excess collateral deposited with it.

In support of the proposition announced above, we cite the following authorities:

Wickes-Nease vs. Watts, 70 S. W., 1001.

Texas Anchor Fence Co. vs. City of San Antonio, 71 S. W., 301.

Rue vs. Railway Co., 74 Texas, 474.

Fowler vs. Bell, 90 Texas, 150.

In the case of Wickes-Nease vs. Watts, above cited, in which a writ of error was dismissed by the Supreme Court for want of jurisdiction, Wickes, the appellee, brought suit against the appellant to recover a balance of \$574.50 claimed to be due for professional services rendered by him as a physician and surgeon. Appellant's answer contained a special exception to the effect that it did not appear from the petition that at the time of rendering the alleged services the plaintiff was a duly authorized and qualified practicing physician and surgeon in the State of Texas. The Court of Civil Appeals sustained this exception and said:

"The general rule is that any act which is forbidden either by the common or statutory law, whether it is malum in se, or merely malum prohibitum,—whether indictable, or only subject to a penalty or forfeiture, or however otherwise prohibited by statute or the common law,—cannot be the foundation of a valid contract. Bish. Cont., Secs. 470, 471. The test whether unlicensed persons may recover for services rendered may generally be stated to turn upon the question whether the statute or ordinance is prohibitory or for revenue. Benj. Sales (61st Am. Ed.), Secs. 30-38. If the prohibition is express, there is an end of the question. Smith vs. Robertson (Ky.), 50 S. W., 852, 45 L. R. A., 510."

In the case of Texas Anchor Fence Company vs. City of San Antonio, the appellant sued the city for \$491, being the purchase price of certain iron fencing and gates sold to the city. The city defended upon the ground that the account had been paid to L. Mahneke, an alderman of the city, who had purchased the claim from Geo. A. Hill, agent of appellant. The Court of Civil Appeals of this State held that the payment to the alderman was on grounds of public policy illegal and void, for the reason that in the purchase of said claim, the alderman became interested in the claim against the city in violation of Article 264 of the Penal Code of the State, and also in violation of a provision of the city charter of the City of San Antonio, providing that no member of the city council or any officer of the corporation shall be directly or

indirectly interested in any work, business or contract the expense price or consideration of which is paid from the city treasury. In this case, the court cited the case of *Rue vs. Railway Company* and *Fowler vs. Bell and Knippa vs. Iron Works*, 66 S. W., 322, and held that the payment to the alderman who had purchased the claim did not extinguish the debt and gave judgment in favor of the fence company against the city.

It, therefore, appears from the holding of the courts that any contract made in violation of the law is void. The National bank in accepting the collateral was charged with the knowledge of the statute that the State bank was without authority to hypothecate securities in excess of fifty per cent more than the amount borrowed, and it cannot rely upon the contract made the State bank in violation of this express provision of the law.

We, therefore, advise you that you can recover the excess collateral from the National bank in question.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

Op. No. 2282, Bk. 56, P. 144.

BANKS—BANK EXAMINERS.

Where by reason of the employment of bank examiners whose term of service limits them to a salary less than the amount of the appropriation and a surplus is thereby created, the Commissioner may appoint bank examiners and pay salaries from such surplus, although the appropriation bill makes provision for only twenty-three examiners, provided the number of examiners shall not exceed one for each forty banking corporations subject to examination and the total salaries remain within the total of the appropriation.

Articles 521, 521a (Act of 1917, Appropriation Bill, Thirty-sixth Legislature).

AUSTIN, TEXAS, February 9, 1921.

Hon. Ed Hall, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: You ask an opinion of this Department upon the following state of facts verbally submitted by you. You have in your employ twenty-three bank examiners, only two of which are paid \$3000, and there are other examiners who by reason of the length of time they have been in the service are not paid the full amount authorized by the present appropriation bill. Under this state of fact you desire to be advised whether or not you would be authorized to employ an additional bank examiner to be paid from the savings out of the present appropriation arising by reason of the fact that some of the employes are not paid the full amount allowed by the appropriation bill because of the length of time they have been in the service.

Article 521 of the Revised Statutes authorizes you to employ such a number of State bank examiners as may be necessary with the limitation that the number shall at no time exceed one for each forty banking corporations subject to examination. The present appropriation bill, which was enacted by the First Called Session of the Thirty-sixth Legislature contains the following items:

“Salary of twenty-three bank examiners to be classified as follows:

“Four men.....	\$ 8,000	\$ 8,800
Thirteen men.....	28,600	31,200
Two men.....	4,800	5,200
One man.....	2,600	2,800
Three men.....	9,000	9,000.”

We take it that the Legislature in specifying the number of bank examiners, for which the appropriation was made, to be twenty-three, that this was the number of bank examiners authorized to be appointed under Article 521, that is, one examiner for each forty banking corporations subject to examination. In other words, it was the purpose of the Legislature to provide for the maximum number of examiners that might be appointed under the law.

By the Act of April 9, 1917, salaries of bank examiners are fixed as follows:

For the first year of service.....	\$2,000
For the second year of service.....	2,200
For the third year of service.....	2,400
For the fourth year of service.....	2,600
For the fifth year of service.....	2,800
For the sixth year of service.....	3,000

which is the maximum amount that may be received by a bank examiner.

It will be noted that in the appropriation bill above quoted it was contemplated that for the first year of the appropriation you would have four men of the first year of their service, thirteen of the second year, two of the third year, one of the fourth year, and three of the sixth year or more, whereas, by the appropriation for the second year it is contemplated that you should have four men of the second year of service, thirteen men of the third year, two men of the fourth year, one man of the fifth year, and three men of the sixth year or more. This clearly indicates a purpose on the part of the Legislature to make an appropriation that by the amounts therein included would conform to the statutes governing the amount of these salaries, for the reason that it carries an increase of \$200 per year for each man for the second year of the bill as is contemplated by the Act of 1917, above referred to.

Now it cannot be assumed, and we do not feel at liberty to charge the Legislature with assuming, that each of the twenty-three men employed by you for the first year would remain with you during the second year, but that during the second year you would have new men coming into the force, who, under the law, would not be entitled to receive the full amount of the appropriation. To illustrate: The Legislature in passing this bill assumed, and we presume that such assumption was based upon representations made by the Commissioner, that for the first year of the appropriation there would be four men on the force of examiners who were serving their first year, and acting upon this, an appropriation was made of \$8000 for those four men. For these same four men, however, there is made for the second year an appropriation of \$8800, or an increase of \$200 per year for each amount. We cannot say that the Legislature intended that there should be four men upon your payroll drawing \$2200 each, irrespective of their length of service. We, therefore, conclude that the Legis-

lature intended that by making this appropriation they were providing for the number of men authorized by law and at salaries fixed by the statute. This is correct statutory interpretation, that is, that statutes dealing with the same subject must be construed together as forming parts of one and the same law.

Bearing in mind this rule of construction then, we refer again to Article 521, authorizing the Commissioner to employ one bank examiner for each forty banking corporations subject to examination. This statute being in pari materia with that fixing the salaries, and the appropriation for the payment of such salaries must be construed as a part of the whole law upon the subject and when so construed, we are led to the conclusion that it was the purpose of the Legislature in making an appropriation to provide for the salaries of all bank examiners authorized under the statutes. We have shown that the Legislature did not intend that a literal construction should be placed upon the appropriation bill, in that it was not intended that the appropriation of \$8800 should be paid to four men of first year service, because that would be flagrant violation of the Act of 1917 fixing salaries. Now, if it was not the intention of the Legislature to violate the last named statute, it would be equally reasonable to suppose that they did not intend by limiting the number of examiners to twenty-three for which appropriation was made, to deprive the Commissioner from appointing the number of examiners authorized by Article 521. The Legislature clearly intended this appropriation to have sufficient elasticity to meet the demands of the statutes authorizing the appointment of examiners.

If, therefore, by reason of resignation or retirement of members of your force of examiners and the employment of new men, resulting in the payment of less salary under the law, there has accumulated a surplus in the total of the appropriation, we are of the opinion that you could employ additional men within the limit fixed by Article 521 and pay their salaries out of the surplus in the appropriation, limited, of course, to the total of the appropriation.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

Op. No. 2257, Bk. 54, P. 507.

BANKS AND BANKING.

A National bank cannot qualify under the laws of this State to act as guardian, etc., without bond or be sole surety upon bonds.

Articles 540, 544, R. S., 1911; Sections 195 and 199, 'Briggs' Digest of Banking Laws, 1920.

AUSTIN, TEXAS, October 14, 1920.

Hon. J. T. McMillin, Commissioner of Insurance and Banking, Capitol.

MY DEAR MR. COMMISSIONER: The Attorney General has your letter, reading as follows:

"Under the provisions of Article 540, Revised Statutes of Texas, State banking corporations may, by making with the State Treasurer a deposit of \$50,000 in securities approved by the Commissioner of Insurance and Banking, qualify

as guardian, curator, executor, administrator, assignee, receiver, trustee by appointment of any court, or under will, or depositary of money in court, without giving bond as such, and become sole guarantor or surety in or upon any bond required to be given under the laws of this State, any other statute to the contrary, notwithstanding.

"Article 544, Revised Statutes, provides that 'any person or association of persons, or any other corporation organized under the laws of this State, doing the business specified in Article 540, shall enjoy the privileges conferred by said article by complying with the provisions thereof. * * *'"

"Will you be good enough to advise me, therefore, if, in your opinion, a National bank may lawfully make the deposit specified in Article 540, and thereby acquire the resulting exemption from bond when acting as a fiduciary?"

In our opinion, a National bank cannot qualify under the statutes referred to, for the following reasons: It is true that under the Federal Reserve Act a National bank may be permitted, when not in contravention of State or local law, to serve in the capacity of trustee, executor, administrator, etc., relieved from the necessity of executing the usual bond whenever the laws of the State authorize or require them to deposit securities for the protection of such trusts. The question then arises, do the laws of this State authorize such procedure? Section 195 of Briggs' Digest, 1920, is as follows:

"Any company, which may hereafter be organized under the provisions of this title to do business in this State, which shall make the State Treasurer a deposit of fifty thousand dollars, consisting of cash, treasury notes of the United States, or government, State, county, municipal or other bond, or bonds, notes or debentures, secured by first mortgages or deeds of trust, or mortgages or deeds of trust on unincumbered real estate in this State, worth at least double the amount loaned thereon, or such other first class securities as the said commissioner may approve, said bonds or securities not to be received or held at a rate above par, but if their market value is less than par, they shall not be held above their actual market value, and which shall satisfy said commissioner of its solvency, and shall have received the certificate of said commissioner that such company has made said deposit and has satisfied him of its solvency, it being hereby made the duty of said commissioner to issue such certificate in accordance with the facts, shall be permitted to qualify as guardian, curator, executor, administrator, assignee, receiver, trustee by appointment of any court or under will, or depositary of money in court, without giving bond as such, and become sole guarantor or surety in or upon any bond required to be given under the laws of this State, any other statute to the contrary notwithstanding; and, whenever any such company shall exhibit to the court, judge, clerk or other officer making such appointment, or whose duty it is to approve such bond, the certificate of the Commissioner of Banking of the State that such company has complied with the provisions of this chapter with respect to said deposit, and proof of solvency, the court or officer making such appointment, or whose duty it is to approve such bond, may appoint such company to such office or trust, and permit it to qualify as such without giving bond, and permit such company to become sole guarantor or surety upon any bond required to be given under the laws of this State, without requiring any other surety therefor. Provided, said company maintain a premium reserve of the amount required to reinsure all outstanding risks, to be determined by taking fifty per cent of the premiums on all unexpired risks that have less than one year to run, and a pro rata of all gross premiums on risks that have more than one year to run, and further that they be requested to file with the Insurance Department, within sixty days after the first of January of each year, a report sworn to by president and secretary, or by two of its principal officers, as to the surety and bond business done by the same, and that they shall pay taxes thereon as required of other surety companies."

The privilege conferred by the above section upon banks organized

under the laws of this State is extended to any person, association or corporation organized under the laws of this State, and also to corporations organized under the laws of any other State by Section 199 of the same digest, which is as follows:

“Any person or association of persons, or any other corporation organized under the laws of this State, doing the business specified in Article 540 (Sec. 195), shall enjoy the privileges conferred by said article by complying with the provisions thereof. And any corporation, organized under the laws of any other State, may do the business specified in said article by *complying with the laws of this State relating to insurance other than life.*”

It is clear that the first sentence of the above quoted article does not apply to National banks, although it is contended that the meaning of this sentence is that any person or association of persons doing the business specified in Section 195, shall enjoy the privileges conferred by said article by complying with the provisions thereof, such construction eliminating from this section the clause, “or any other corporation organized under the laws of this State.” In other words, the contention is that a corporation organized under the laws of any other State is not comprehended by this sentence, and, therefore, such corporation organized under the laws of another State, or of the United States, could avail itself of the privileges granted. This might be a correct interpretation were it not for the succeeding sentence in the section, which authorizes any corporation organized under the laws of any other State to do the business specified by complying with the laws of this State relating to insurance other than life. Three classes are recognized by this section. First, persons; second, association of persons, and third, corporations. A National bank is a corporation organized under the laws of the United States, and it is not an association of persons within the meaning of this section, and, therefore, it cannot enjoy these privileges under the construction that it is an association of persons who may comply with the provisions of the law.

This provision is that a corporation organized under the laws of any other State shall enjoy these privileges. A National bank is not organized under the laws of any other State. It is organized under the laws of the United States. There are various instances in the banking and insurance laws of this State where reference is made to corporations organized either under the laws of some other State or of the United States. Where the lawmakers of this State refer to a corporation organized under the laws of some State of the Union, they speak of it as a corporation organized under the laws of any other State, and where they refer to a corporation organized under the laws of the United States, they use language indicating such purpose. So we find no provision in either of these sections extending this privilege to a National bank.

If it were contended that a National bank is organized under the laws of another State, within the meaning of this article, then we are confronted with the remaining portions of that sentence providing that such corporation shall comply with the laws of this State relating to insurance. The language here used is very sweeping and uncertain in its meaning. Of course no one corporation, regardless of its purpose, can comply with all the laws of this State relating to insurance. No insurance company can comply with all of such laws, but each company must comply with the law relating to the particular

character of insurance it is authorized to do. Of course the Legislature probably intended that such corporations should comply with the insurance laws relating to the particular character of insurance such corporation sought to do, and if such is the proper construction, then we are relegated to the Act of the Thirty-third Legislature, Chapter 66, amending Article 4928, Revised Statutes, which authorizes the organization of private corporations to act as trustee, assignee, executor, administrator, guardian and receiver, and to act as surety and grantor of employees, trustees, executors, administrators, guardians, etc. This statute requires that corporations organized under its provisions shall have a paid-up capital stock of not less than one hundred thousand (\$100,000) dollars, and keep on deposit with the State Treasurer money or securities in an amount not less than fifty thousand (\$50,000) dollars. The latter requirement is likewise made under Section 199, now under discussion, but it is further provided by the surety company act, above referred to, that all foreign corporations, transacting the business of guaranty and fidelity company in this State, shall file with the Commissioner of Insurance and Banking an affidavit showing that such foreign company has on deposit with the State Treasurer of its home State one hundred thousand (\$100,000) dollars, or more, in money, bonds or other securities for the protection of its policyholders. Of course no National bank can comply with this latter agreement, if indeed any foreign corporation, other than a guaranty company, can do so, which makes manifest the uncertainty of the latter sentence of Section 199.

We, therefore, advise you that under the laws, as they now exist in this State, a National bank cannot avail itself of the privileges granted by Article 540, Revised Statutes, 1911, same being Section 195, Briggs' Digest of Banking Laws of 1920.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

Op. No. 2316, Bk. 55, P. 362.

NECESSARY TRAVELING EXPENSES—BANK EXAMINERS.

Bank examiners, assigned to particular districts, cannot acquire a permanent abode to the extent that they would be deprived of their necessary traveling expenses in the district.

Where bank examiner is assigned to work in the office of the Commissioner, he is not entitled to traveling expenses while in Austin.

April 1, 1921.

Hon. Ed Hall, Commissioner of Insurance and Banking, Austin, Texas.

DEAR SIR: The Attorney General has your communication from which it appears that you have divided the State into districts and assigned to each district a bank examiner, who examines the banks of that district; that such assignment is for a period of three months at a time.

It also appears that you have assigned one of the bank examiners to work incident to the examination of banks in your office here in Austin.

You desire to be advised whether or not the traveling expenses of the bank examiners may be paid from the fund appropriated for that purpose. It further appears from your communication that where an examiner is assigned to a particular district, he is required to designate some point within the district as his headquarters where you may communicate with him.

Under Sections 175 and 176 of the Banking Laws Digest of 1920, each bank examiner is entitled to the salary therein stipulated, besides necessary traveling expenses. The answer, then, to your question depends upon the proper construction to be placed upon the term "necessary traveling expenses."

In an opinion rendered by this Department on January 27, 1917, to Hon. Sam C. Johnson, the then Chief Deputy Game, Fish and Oyster Commissioner, which opinion is to be found in Report and Opinions of the Attorney General, 1916-1918, at page 105, this Department held that the official residence of every head of a department or an employee thereof, where such department is located in Austin, is in that city, and it is the duty of such officers and employees to maintain their place of abode there. We further held in this opinion that the items in various appropriation bills provide for the expense of any officer or employee while on the road traveling on business of the State away from the office of such department and from his place of abode where such department is located, and there is no authority in law for the allowance of any living expense account of any officer or employee while he is in the city of Austin under the guise of a traveling expense account.

You will notice that in the opinion above referred to it is contemplated that an officer or an employee may have his official situs fixed at a point other than the seat of government. It was under this condition that the Department, on July 2, 1920, rendered to Hon. E. R. McLean, Secretary of the Railroad Commission of Texas, an opinion to the effect that a deputy supervisor in the employ of the oil and gas division of the Commission would not be entitled to traveling expenses when located permanently at a particular point in the State other than the seat of government.

The case of the bank examiners does not fall precisely within the rule laid down in the opinion to Mr. McLean, for the reason that while they are assigned to a particular district for a period of three months, and must have their designated headquarters at a point where you may be constantly in touch with them, they are not permanently assigned to any particular locality, and they have no opportunity to acquire a home within the district to which they are assigned.

The rule is different, however, in the case of the assignment of one of the bank examiners to work in your office here in the Capitol. While carrying out the form of making an assignment for three months only, yet, as I understand your practice, such assignment is actually for an indefinite period, and, therefore, this assignment would fall within the rule announced in the opinion to Hon. Sam C. Johnson, and hereinabove referred to.

We therefore advise you that in the opinion of this office, the bank examiners assigned by you to districts outside of Austin are entitled to their necessary traveling expenses, and that your examiner assigned

to work here in Austin, being located at the seat of government, is not entitled to expenses while in Austin.

You also mention the fact that it occasionally transpires that it is necessary for you to call in your examiners from their respective districts for consultation, and you also desire to know whether or not they would be entitled to traveling expenses and hotel bills while here in the city.

In answer to this inquiry, you are advised that the expenses of these examiners in coming to Austin from their respective districts, as well as their hotel bills while here, should be considered necessary traveling expenses and should be paid from the appropriation for that purpose.

Very truly yours,

C. W. TAYLOR,
Assistant Attorney General.

Op. No. 2360, Bk. 56, P. 179.

CORPORATIONS, AND THE SAME OR SIMILAR CORPORATE NAMES.

A foreign or domestic corporation is not entitled to the use of the same or a similar corporate name in the same general territory as would render deception of the public, as well as injury to the first user of the corporate name probable.

Article 4725, Complete Texas Statutes of 1920; Fletcher's Work on Private Corporations, Vol. 2, page 1678, and other authorities cited herein.

AUSTIN, TEXAS, June 16, 1921.

Hon. Ed Hall, Commissioner of Insurance and Banking, Austin, Texas.

DEAR SIR: You have submitted to this Department a letter from the Great Southern Life Insurance Company, a corporation incorporated under the laws of Alabama, which reads as follows:

"We are considering applying for license to transact business in Texas and beg to ask if you would permit us to qualify under the charter name of The Great Southern Life Insurance Company of Alabama. Our present name is identical with that of your Great Southern Life, so we know, of course, it will be necessary for us to add the words 'of Alabama' in order to qualify in your State. In replying, please be good enough to forward a copy of your insurance laws, in order that we may be fully informed as to requirements."

Article 4725, Complete Texas Statutes of 1920, in defining who may incorporate as life, health and accident insurance companies, provides that "the name of the proposed company, which shall contain the words 'insurance company' as a part thereof, and which must not so closely resemble the name of any existing company transacting an insurance business in this State as to mislead the public."

Fletcher's work on Private Corporations, Vol. 2, Section 735, page 1678, in discussing this question, uses this language:

"Foreign corporations, it has been held, are not privileged over domestic ones in the matter of the use of names similar to those of existing corporations even though the statute, while preventing the creation of a corporation under a name prejudicial to the rights of an existing corporation, makes no reference to the rights in the State of a foreign corporation bearing such a name, and the mere absence of such reference will not oust a court of equity of its general jurisdiction, which it possesses independently of statute, over the subject."

In the case of American Clay Manufacturing Company vs. American

Clay Manufacturing Company of New Jersey, which to our mind the question involved is identical with the one submitted in the letter herein quoted, the Supreme Court of Pennsylvania held:

"A corporation assuming the name of an old corporation will be enjoined from using it, though there is no fraudulent intent; the nature and necessary consequence of such use being to injure the old corporation by confusing its identity. A foreign corporation which has assumed the name of an older domestic corporation which it could not obtain if incorporated in the State, will be enjoined from the use thereof, though it has complied with the registration laws and thereby received a certificate to do business in the State."

In 10 Cyc., p. 151, the general rule is stated to be that "while the name of a corporation is not in strictness a franchise, yet the exclusive right to its use may be protected in equity by the writ of injunction by analogy to the protection of trade-marks, just as the name of an individual, a partnership or a voluntary association may be protected."

This would be the rule if we had no statute against the duplication of corporate names, and should certainly be applied where the policy of the law has been declared by the Legislature to be that confusion in names of business concerns or corporations shall be avoided.

The right of a foreign corporation to do business in the State under its corporate name cannot be attacked by a domestic corporation likewise of similar name, where the first mentioned corporation was doing business in the State for several years before the last mentioned corporation was organized. High Court of Wisconsin, Independent Order of Foresters vs. The Commissioner of Insurance, 73 N. W., 326. It has been held, however, that a domestic corporation organized under a name identical for all practical purposes with that of a foreign corporation after the latter has gone into the State and has been doing business therein, but without complying with the statutes governing foreign corporations, will be deemed to have a prior right to the use of the corporate name. Central Trust Company vs. Central Trust Company of Illinois, 149 Fed., 787; Mutual Export Company and Import Corporation vs. Mutual Export and Import Corporation of America, 241 Fed., 137.

It was held in the case of Mutual Export and Import Corporation of America, under the corporation statute of New York, providing that no foreign stock corporation shall do business in the State without having first procured a certificate of authority, and that no such certificate shall be granted to any foreign corporation having the same name as an existing domestic corporation, or a name so nearly resembling it as to be calculated to deceive. A foreign corporation doing business within the State without a certificate is not entitled to the use of its corporate name within the State, as against a subsequently incorporated domestic corporation having a similar name which it adopted without knowledge that it was the name of a foreign corporation, since the foreign corporation's failure to comply with the laws requiring it to procure the certificate of authority to do business prevented the domestic corporation from learning of a similarity of names. Thus, it will be seen that this case, that is to say, the corporate name, is in point if not identical with the case under discussion, there having been heretofore issued a certificate of authority to do business in Texas to the "Great Southern Life Insurance Company," a corporation incorporated under the provisions

of the statute authorizing the formation and incorporation of life insurance companies in Texas. The only distinction between the last named company and the Great Southern Life Insurance Company of Alabama would be the added words "of Alabama." This the court held in the last cited case to be of sufficient similarity or so nearly resembling it as to be calculated to deceive.

In the case of *The Central Trust Company vs. The Central Trust Company of Illinois*, supra, the complainant, Central Trust Company, a corporation of another State engaged in business in Chicago, Illinois, for a number of years but failed to comply with the requirements of the statute to entitle foreign corporations to do business in the State until 1903. Defendant, Central Trust Company of Illinois, was incorporated in that State and also engaged in business in Chicago. Confusion having arisen in respect to the delivery of mail addressed to the "Central Trust Company," complainant filed its bill to require the delivery to it of all mail so addressed. The court held that the defendant having been the first to lawfully use the name was prior in right, and that the complainant's bill could not be maintained.

It is fraudulent to set up a business under a designated corporate name which is calculated to lead and does lead the public to suppose that such business is the business of another person, and a corporation is entitled to protection against the use of such words, under such circumstances, and in the same locality as to render probable the deception of the public and injury to the business of the corporation.

The corporation first established under the laws of a given State and who has established a reputable business standing, is entitled to the protection of the law under its corporate name, to the extent that a subsequent corporation will not be permitted to adopt the corporate name of one company similar thereto of the prior corporation covering the same general territory, such as would render deception of the public as well as injury to the prior corporation probable. *Farmers Loan and Trust vs. Farmers Loan and Trust Company*, 1st N. Y. Supp., 47.

The doctrine that the courts will protect a corporation in the use of its corporate name does not apply where there is no need of such protection. Thus, two companies may lawfully use the same name and issue a publication thereunder where the circumstances and locality of the respective publications are such as to render improbable any interference with each other's business. *Investors' Pub. Co. vs. Dobinson*, 87 Fed., 56.

The instant case is not one of a "trade-mark." However, to our mind, the laws protecting trade-marks would be applicable to the protection of a corporate name, and it has been held that where an article is sold over a wide territory under a certain trade-mark or a business conducted under a certain trade name is not local in character but is either co-extensive with the country or covers a large portion thereof, the mere fact that a subsequent user of the same name is located a considerable distance from the prior user will not disentitle the latter to an injunction restraining the former from the unfair use of such trade-mark or trade name within the territory where the business of the two compete.

Gray vs. Taper-Sleeve Pulley Works, 16 Fed., 436.

Ball vs. Best, 135 Fed., 434.

- Bissell Chilled Plow Works vs. T. M. Bissell Plow Co., 121 Fed., 357.
 Richardson & B. Co. vs. Richardson & M. Co., 27 N. Y. S. R., 808, 8 N. Y. Supp., 53.
 Lee vs. Haley, L. R., 5, Ch. 155, 39 L. J., Ch. N. S., 284, 22 L. T. N. S., 251, 18 Week. Rep., 242.
 Londonderry vs. Russell, 3 Times L. R., 360.
 National Starch Mfg. Co. vs. Munn's Patent Maizena & Starch Co. (1894), A. C., 275, 63 L. J. P. C. N. S., 112, 6 Reports, 462.
 Collins Co. vs. Cohen, 3 Kay & J., 428.

Thus, where rivals are engaged in selling the same character of goods in the same open market, and are marketing their goods with the same name, being the name under which they are doing business, the fact that such rivals manufacture such goods in separate communities has no special significance, and protection will, nevertheless, be accorded the first user to the extent necessary to prevent the deception of the public. Bissell Chilled Plow Works vs. T. M. Bissell Plow Co., 121 Fed., 357.

So, where it is apparent that a person shapes his business and uses his own name to present the same to the public, with the intention of obtaining the benefit of the standing, good will, etc., of a similar business conducted by another under a substantially similar name, and in the same territorial field, the use by the former of such name in the same connection is a fraud upon the latter which will be enjoined, even though the place of business of the former is Chicago and the place of business of the latter New York City. Ball vs. Best, 135 Fed., 434.

You are, therefore, advised that it is the opinion of this Department that you would not be authorized to issue a certificate of authority to the "Great Southern Life Insurance Company of Alabama," for the reasons heretofore set out, and for the fact that your department has heretofore issued a certificate of authority to do business in this State to the Great Southern Life Insurance Company, the only distinction between the corporate name being the two words "of Alabama," and the courts in many cases cited herein hold that this slight distinction is sufficient to justify proceedings in the courts of the prior corporation enjoining the subsequent corporation from the use of such corporate names so similar to each other; and that they would probably render deception of the public as well as injury to the first user probable.

Very truly yours,

C. L. STONE,
 Assistant Attorney General.

Op. No. 2323, Bk. 55, P. 131.

ANTI-TRUST LAWS—LIABILITY OF CORPORATIONS ORGANIZED IN
 RESTRAINT OF TRADE.

1. Corporations cannot be authorized to do or perform any act which would be unlawful when performed by individuals or other corporations.
2. Any act which when performed by two or more retail merchants would be a violation of the anti-trust laws, cannot be performed through the medium of a corporation, even though the corporation should be authorized to be created under the law.

AUSTIN, TEXAS, April 25, 1921.

Hon. C. W. Payne, Chief Clerk to the Secretary of State, Capitol.

DEAR SIR: You transmit to this Department several proposed charters of retail merchants' associations and chambers of commerce, all of which are proposed to incorporate under Section 56 of Article 1121 of the Revised Civil Statutes, and you desire to know if these proposed charters in any way contravene the provisions of the anti-trust statutes of the State.

Answering this inquiry, you are advised as follows: Section 36 of Article 1156 was added to this article in 1899. It was added for the sole purpose of permitting chambers of commerce and boards of trade and cotton exchanges to incorporate. It was never designed to permit retail merchants' associations as such to incorporate. Such associations would only be entitled to incorporate when they are not in fact retail merchants associations, but are in fact chambers of commerce and boards of trade.

In passing this section under all proper rules of construction, the Legislature only intended to legalize and authorize corporations to be formed for legal purposes. Under no proper construction could it be contended that the Legislature in authorizing a corporation to be formed intended by this act to authorize the corporation when so formed to do or perform any act which would be unlawful if performed by other corporations or individuals, nor could it be contended that the Legislature intended in the authorization of the formation of a corporation to repeal by implication existing laws upon any subject. On the contrary, when the Legislature authorized the creation and formation of corporations to do and perform the functions of chambers of commerce and boards of trade and cotton exchanges, it meant simply to authorize such corporations when so formed to do and perform in a lawful manner legal and lawful acts.

Articles 7796, 7797 and 7798 define trusts and conspiracies against trade. It will not be necessary here to set out in full the definitions, but the exact question presented is, does Section 56 of the Corporation Laws, above referred to, authorize acts which would otherwise constitute violations of the anti-trust laws? It would not be contended that this section authorizes such violations, because there is nothing said therein concerning the anti-trust laws. Does it have this effect, then, by implication?

Section 56 was enacted into law in the year 1899. Our present anti-trust statute was passed in 1903. The latter enactment as well as the former, was carried forward in the Revised Statutes of 1911. Neither the latter act nor subsequent amendments thereto contain any provision whatever exempting persons or corporations affected by Section 56, above mentioned, from the provisions of the anti-trust laws. We lay down the following propositions to guide us in arriving at a conclusion, to wit:

First: Grants of special privileges or exemptions are strictly construed and in a doubtful case an intention to make such grant will not be presumed, so that in the absence of clear language evidencing such an intention, it will be presumed that the Legislature did not intend to grant special exemptions or privileges in favor of particular persons or corporations.

Second: It will be presumed that the Legislature did not intend to pass an unconstitutional statute or to include in any statute an unconstitutional provision.

Third: A corporation takes its charter subject to the restraints of the general laws and police regulations, unless expressly and constitutionally exempted from their operation.

These three propositions will be taken up in the order above set forth.

As to the first proposition, Cooley's Constitutional Limitations, 7th edition, page 563, contains the following language:

"The State, it is to be presumed, has no favors to bestow and designs to inflict no arbitrary deprivation of rights. Special privileges are always obnoxious and discriminations against persons or classes are still more so; and as a rule of construction, it is to be presumed they were probably not contemplated or designed."

See also Sections 227 and 540 of Lewis' Sutherland Statutory Construction, 2nd edition.

Second: It would scarcely be necessary to cite an authority upon the proposition that it will not be presumed that the Legislature intended to pass an unconstitutional statute. However, we quote the following from Section 498 of Lewis' Sutherland Statutory Construction, 2nd edition:

"Whenever an act can be so construed and applied as to avoid conflict with the Constitution and give it force of law, this will be done. Where one construction will make a statute void for conflict with the Constitution, and another would render it valid, the latter will be adopted though the former at first view is otherwise the more natural interpretation of the language."

There can be little doubt that the statute would be unconstitutional if it were susceptible of the construction that it has the effect of authorizing particular persons or corporations to violate the anti-trust laws. A case in point is *Gordon vs. Winchester Building Association*, 12 Bush (Ky.), 110, 23 Am. Rep., 713. In that case the Supreme Court of Kentucky held that a special statute authorizing a corporation to take a rate of interest greater than that allowed by the general law was unconstitutional as an attempt to confer special privileges upon the corporation.

In the State of Kentucky there existed a statute fixing the lawful rate of interest that might be charged in the State of Kentucky. The Legislature passed an act granting a charter to a corporation containing a clause which if valid would have authorized the corporation to charge a greater rate of interest than allowed under the general laws. The court, as above cited, held this provision unconstitutional, saying:

"It is our boast that under our government none are entitled to exclusive rights but that all are governed by equal laws, subject to like burdens and entitled to equal privileges. Yet if that portion of appellee's charter under consideration is a legitimate exercise of legislative power that equality which has been supposed to exist is enjoyed by sufferance at the will of the Legislature and is not secured as a right by the fundamental law."

And further along the court also said:

"If the Legislature may constitutionally confer such privileges and exemptions upon one citizen, then it may confer the like privileges and exemptions upon one or five in each county in the State and thereby create a privileged

class in every community to grow and fatten by practices in which all others are prohibited under penalty from engaging."

Our bill of rights declares that all freemen when they form a social compact have equal rights and no man or set of men is entitled to exclusive, separate public emoluments or privileges but in consideration of public services. See Section 3 of Article 1, Constitution of Texas.

Under this constitutional provision a provision is an occupation tax law levying occupation taxes on peddlers and exempting from the operation of the law ex-soldiers who are incapacitated and other enumerated classes of persons is unconstitutional. *Ex parte Jones*, 38 Cr. App., 482, 43 S. W., 513; *Rainey vs. State*, 41 Cr. App., 254, 53 S. W., 882.

An act of the Twenty-fifth Legislature levying occupation tax upon cotton buyers and exempting merchants therefrom is violative of this section. *Rainey vs. State*, 41 Cr. App., 254, 53 S. W., 882; *Poteet vs. State*, 41 Cr. App., 268, 53 S. W., 869.

An act of the Thirtieth Legislature levying an occupation tax on the sale of non-intoxicating malt liquors in local option territory and exempting from its operation druggists or pharmacists, is unconstitutional because discriminatory. *Ex parte Woods*, 52 Cr. App., 581, 108 S. W., 1171.

An act of the Thirtieth Legislature imposing license or occupation tax on barbers, but exempting from the tax students of the University, etc., and also barbers in towns of one thousand inhabitants or less, contravenes this section in that it grants special privileges to certain individuals and denies such privileges to others who follow the same occupation. *Jackson vs. State*, 55 Cr. App., 557, 117 S. W., 818.

The word "person" as used in this section includes corporations. *Beaumont Traction Co. vs. State*, 122 S. W., 615.

An act of the Twenty-eighth Legislature, being applicable only to corporations, and not to natural persons, joint stock companies, etc., operating electric railroads, contravenes this section of the State Constitution. *Beaumont Traction Co. vs. State*, 122 S. W., 615.

The third proposition is that a corporation takes its charter subject to the restraints of the general laws and police regulations, unless expressly and constitutionally exempted from their operation. Under this proposition we find the following language in 14A, Corpus Juris, page 265:

"In determining the powers of a corporation, the charter or other instrument of incorporation is always to be read in connection with the general laws applicable to it, and particularly with reference to the laws in force at the time it was enacted. Furthermore, corporations are subject to the restraints of the general laws and police regulations, whether existing at the time of incorporation or afterward enacted, although not expressly mentioned, whenever they are within the reason of them. Such laws are to be read into their charters, and they cannot conduct their business in disregard of them any more than an individual may, unless expressly and constitutionally exempted from their operation. And, although the Legislature may exempt them from the operation of such laws, subject to the constitutional restrictions, *an intention to do so is not to be implied unless such intent is clear*. And of course a special charter granted by the Legislature may expressly entitle the corporation to the benefit of, or render it subject to, existing or subsequent general laws."

Unless expressly exempted, corporations are subject to the same control as individuals under the police power of the State whether exercised directly through its Legislature or by delegation through the legislative body of a municipal corporation.

Burbank vs. Bethel Steam Mill Co., 75 Me., 373; 46 Am. Rep., 400.
Richmond, etc., R. Co. vs. Richmond, 26 Gratt. (67) Va., 83.

The right to pay a railway through a city does not by implication prohibit a municipal corporation from restraining the use of engines thereon propelled by steam. *Richmond, etc., R. Co. vs. Richmond*, supra.

A corporation authorized to construct and maintain a sawmill, etc., is subject to a general law prohibiting the erection of a stationary steam engine without first procuring a license therefor. *Burbank vs. Bethel Steam Mill Co.*, supra.

A charter which granted to an incorporated company the power to contract without limit for commissions in addition to the lawful interest, was held not to enable the corporation to take usury under the name of commissions. *Johnson vs. Griffin Banking, etc., Co.*, 55 Ga., 691.

A charter authorizing a corporation to receive personalty on deposit, and to make advances thereon, and to collect and receive interest and commission at the customary rates, and to take charge and custody of property, and to advance moneys thereon, does not repeal the usury laws in favor of the corporation by permitting it to charge additional interest for a loan, under the guise of compensation for the custody and management of the security. *Tyng vs. Commercial Warehouse Co.*, 58 N. Y., 308.

Corporations are subject to the laws against usury, and a charter will not be so construed as to exempt them unless the intention of the Legislature to do so is clear. 14A, *Corpus Juris*, page 266.

General words in a charter are to be taken as authorizing the corporation to do acts which by the general law are indictable offenses. *Horst vs. Moses*, 48 Ala., 129; *State vs. Krebs*, 64 N. C., 604.

A charter giving a corporation the right and power to sell and dispose of any real or personal property placed in their hands for sale, in any mode or manner the agency shall deem best, does not authorize it to sell by means of a lottery, when the general laws make it indictable to conduct a lottery. *State vs. Krebs*, supra.

An act of the Legislature to establish a charitable association for the benefit of the common school fund authorizing the association to sell certificates of subscriptions entitling the holder to such prizes as might be awarded to him by case of lots, or by lot, chance, or otherwise, in such manner as it might seem best to promote the interests of the school fund, etc., did not authorize the association to keep a gaming table. *Horst vs. Moses*, supra.

An act of the Legislature authorizing a corporation to encourage science, and to aid the State University to replace its library, does not authorize it to set up a lottery, or to sell tickets authorizing the winner to demand money. *Tuscaloosa Scientific, etc., Assn. vs. State*, 58 Ala., 54.

Under an act of the Legislature authorizing the incorporation of associations for benevolent, religious, educational and scientific pur-

poses, a corporation organized for such purpose has not authority to conduct prize fights contrary to the general laws, even though as a general proposition boxing matches might come within the terms of "scientific purposes." *State vs. Business Men's Athletic Club*, 167 S. W., 901.

Although the purchase of stock of a corporation is under some circumstances lawful, still a corporation organized under the general statutes is not authorized to purchase stock in another corporation, where the effect would be to create a monopoly. *People vs. Chicago Gas Trust Co.*, 130 Ill., 268, 8 L. R. A., 496.

In this State it has been held that a hotel or restaurant keeper, though authorized to pursue his occupation on Sunday, is not thereby authorized to violate any prohibitory law. *Savage vs. State*, 50 App., 199, 88 S. W., 351.

It has been held in numerous cases that statutes authorizing the formation of corporations as social clubs do not confer upon the corporation or its members the authority to conduct a business which if done by an individual would be illegal. As an example of these cases, we cite *Hanger vs. Commonwealth of Va.*, 107 Va., 872, 60 S. E., 67.

The conclusion is inevitable that a corporation organized under Section 56 of Article 11.21, Revised Civil Statutes, or the members thereof, cannot by reason of the provisions of said Section 56 claim the right or authority to violate the anti-trust laws of this State. As before stated, if the statute is susceptible of such a construction, it is clearly unconstitutional and we cannot suppose that the Legislature intended to pass an unconstitutional statute in the absence of clear language showing such an intention.

Considering this proposition in connection with the rule that statutes granting such privileges and exemptions are strictly construed and that a corporation takes its charter subject to the general laws and police regulations of the State, together with the further fact that the act in question discloses no intention of repealing the anti-trust laws of this State, or any part thereof in favor of such corporations or their members, we cannot see how it could be reasonably contended that Section 56 would authorize any act in violation of our anti-trust laws.

We call attention to the further fact that our Constitution declares against monopolies and certainly it could not be contended that the statute authorizes the performance of any act or acts that would create or tend to create a monopoly in view of the provisions of the Constitution mentioned.

Under our construction of the statute, which seems to us to be a reasonable one, Section 56 should be read as follows:

"For the organization of cotton exchanges, chambers of commerce and boards of trade, with power to provide and maintain suitable rooms for the conduct of their business, and to establish and maintain uniformity in the commercial usages of cities and towns *not violative of the Constitution or laws of this State*, to acquire, preserve and disseminate valuable business formation *not violative of the Constitution or laws of this State*, which shall govern all transactions connected with the cotton trade, and with other commodities where standards and classification are required, and generally to promote the interest of trade and increase the facilities of commercial transactions, provided that nothing is herein authorized *in violation of the Constitution and laws of this State.*"

In the case of Northern Securities Co. vs. United States, 193 U. S., pp. 197 to 411, the Supreme Court held illegal the Northern Securities Company as violating the provisions of the Federal Anti-Trust Act, holding that inasmuch as the several railroad companies were prohibited from making any contract or agreement which would be in violation of the anti-trust laws, they could not form a corporation legally which would have that effect. The court said:

"In our judgment, the evidence fully sustains the material allegations of the bill, and shows a violation of the act of Congress, in so far as it declares illegal every combination for conspiracy in restraint of commerce among the several States and with foreign nations, and forbids attempts to monopolize such commerce or any part of it."

The effect of the court's holding in this case is that inasmuch as it is a violation of the anti-trust law for parallel and competing lines of railroad to enter into any combination or understanding in restraint of trade, it would be just as offensive to the law for a corporation to be formed composed of the stockholders of the several parallel and competing lines of railroad to accomplish this result by means of the new corporation. The courts will tear away the legal frame work of the corporation and look to the object of its formation and the results accomplished by its formation.

Under the anti-trust laws of the State of Texas it is a violation for any two or more retail merchants to have any character of contract, understanding or agreement as to any trade, custom, the manner and method of handling any commodity retailed by them, fixing any price or standard of any commodity, agreeing upon any territory in which the commodities may be sold, or in fact any agreement by and between them affecting any element of competition in the sale of any commodity, would be a violation of the anti-trust laws.

Should a corporation be formed composed of two or more retail merchants, and through this corporation these merchants made any agreement, contract, combination or understanding which would have been a violation of the anti-trust laws had they not been members of the corporation, this would still be a violation of the anti-trust laws just as much so as if it had not been done by and under the direction of the corporation. Should retail merchants, therefore, be members of any corporation, they are prohibited as officers, stockholders or directors of this corporation from making any combination, contract, agreement or understanding affecting any trade, custom or practice in relation to the sale of any commodity as retail merchants.

You are, therefore, advised that any corporation organized for the purpose of or which may have the probable effect of lessening the competition in any line of business when formed for that purpose, would constitute a violation of the anti-trust laws, and would itself be void, and you would be within your rights in rejecting any such charter when offered to you to be filed, it being a question of fact as to what is proposed to be done and accomplished by the corporation. It would be your duty to ascertain as fully as you can just what is to be done and accomplished by the corporation, and if as stated, it is formed for the purpose of destroying any element of competition in the sale of any commodity, you should decline to file the charter. You should examine carefully every charter offered to see whether or not it is

being formed for the purpose of or as a convenient means or vehicle through which the anti-trust laws could be violated, and when convinced that it is organized for such purpose, you should decline to file the charter.

Yours very truly,

W. A. KEELING,
Acting Attorney General.

Op. No. 2375, Bk. 56, P. 160.

FOREIGN CORPORATIONS—FILING FEES.

The original filing fee paid by a foreign corporation does not entitle the corporation to file an amended charter which increases its capital stock, except by paying fifty dollars for the first ten thousand of such increase and ten dollars for each additional ten thousand, the fee in no event to exceed twenty-five hundred dollars.

August 23, 1921.

Hon. S. L. Staples, Secretary of State, Capitol.

DEAR MR. STAPLES: In your letter of August 18th addressed to the Attorney General you submit the following facts:

Libby, McNeil & Libby, a corporation organized under the laws of the State of Maine, on the 12th day of March, 1920, filed in your department a certified copy of its articles of incorporation with authorized capital stock of \$12,800,000, fully subscribed and paid. Said corporation upon the payment of \$2500 was granted a permit to do business in Texas for a period of ten years.

On the 4th day of June, 1920, this corporation filed amended articles of incorporation in the State of Maine, increasing its capital stock to \$27,000,000, fully subscribed and paid.

After submitting the foregoing facts, you ask this Department to answer the following question:

“What fee should we charge said corporation for the filing of said amendment and issuing amended permit to said corporation with \$27,000,000 authorized capital stock instead of \$12,800,000, the amount of the authorized capital stock at the time the permit was granted in the first place?”

Accompanying your letter is a copy of our opinion of date October 11, 1920, written by Judge C. W. Taylor to the then Commissioner of Insurance and Banking. Judge Taylor discusses that part of Article 3837, Revised Civil Statutes, as amended by Chapter 45, Acts of the Regular Session, Thirty-sixth Legislature, which fixes the fees to be paid by domestic corporations. That part of Article 3837 construed by Judge Taylor reads as follows:

“For each and every charter, amendment or supplement thereto, of a private corporation created for any other purposes intended for mutual profit or benefit, a fee of fifty dollars shall be paid when said charter is filed, provided that if the authorized capital stock of said corporation shall exceed ten thousand dollars, it shall be required to pay an additional fee of ten dollars for each additional ten thousand dollars of its authorized capital stock, or fractional part thereof, after the first, and provided further, that such fee shall not exceed the sum of twenty-five hundred dollars.”

This Department held that the original filing fee does not cover the charges for subsequent amendments or supplements.

You also enclose with your inquiry a letter from J. H. Maxey, general counsel for the Gilliland Oil Company, another foreign corporation, apparently in the same position as Libby, McNeil & Libby. You also enclose a letter from Albert H. and Henry Veeder, attorneys for Libby, McNeil & Libby. In their letter they contend that our opinion as to the fees to be paid by a domestic corporation does not apply to a foreign corporation. That part of Article 3837 fixing the fees to be paid by a foreign corporation reads as follows:

"Each and every foreign corporation that files with the Secretary of State a certified copy of its articles of incorporation and any amendments thereto and obtains a permit to do business in this State, and each and every foreign corporation now holding a permit to do business in this State, or shall hereafter obtain a permit to do business in this State, that shall subsequently file with the Secretary of State, a certified copy of any amendment or supplement to its articles of incorporation, such corporation shall pay to the Secretary of State as filing fees the following: Fifty dollars for the first ten thousand dollars of its capital stock actually subscribed, and ten dollars for each additional ten thousand dollars or fractional part thereof; provided that in no event shall such fee exceed the sum of twenty-five hundred dollars; provided that each and every foreign corporation having a permit to do business in this State, shall be required to immediately file with the Secretary of State of Texas, a certified copy of any amendment or supplement to its original articles of incorporation, when any such amendment or supplement to its original articles of incorporation is filed in the State, territory or foreign country, under whose laws such corporation is incorporated, after such permit is granted; provided, that the fee required to be paid by any foreign corporation for a permit to engage in the manufacture, sale, rental, lease or operation of all kinds of cars, or to engage in conducting, operating or managing any telegraph line in this State, shall in no event exceed the sum of twenty-five hundred dollars."

The language used by the statute in fixing the fees to be paid by a domestic corporation and that to be paid by a foreign corporation is not identical, but a careful reading of the two provisions indicates to our minds an intention on the part of the Legislature to treat foreign and domestic corporations precisely alike in the matter of filing fees. No good reason has been pointed out why the Legislature should, or did, discriminate against a Texas corporation in favor of a foreign corporation. This Department having held that a domestic corporation that amends its charter and increases its capital stock must pay a filing fee for the filing of the amended charter, we must adhere to our former opinion as what was said in that opinion applies to the provisions of the law fixing the filing fees of foreign corporations.

You are therefore advised that the filing fee paid by a foreign corporation does not entitle the corporation to file an amended charter increasing its capital stock without paying fifty dollars for the first ten thousand dollars of such increase and ten dollars for each additional ten thousand dollars of such increase, "provided that in no event shall such fee exceed the sum of twenty-five hundred dollars."

Answering your exact inquiry, you are advised that you should collect from Libby, McNeil & Libby for filing the amendment to its charter a fee of twenty-five hundred dollars.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2433, Bk. 57, P. 339.

CORPORATION FRANCHISE TAX—DOMESTIC CORPORATIONS HAVING
DUAL PURPOSES.

1. The Huntsville Cotton Oil Company operating as a cottonseed oil mill and which also generates and supplies electric light, motor power and manufactures and supplies ice to the public, derives its authority from Subdivision 73, Article 1121, Complete Statutes of 1920.

2. Domestic corporations chartered for two or more purposes named in Subdivision 73, Article 1121, Complete Statutes of 1920, regardless of date of charter are required to pay the franchise tax levied by Article 7393 on its entire capital stock, surplus and undivided profits, for each and every purpose contained in its charter.

3. Statutes construed. Subdivisions 72 and 73, Article 1121, Complete Statutes of 1920; Article 7393, Acts Twenty-eighth Legislature, Chapter 138, 1903; Acts Thirty-third Legislature, Chapter 134, page 267, 1913; Acts Twenty-ninth Legislature, Chapter 53, page 73, 1905; Acts Thirtieth Legislature, Chapter 52, page 294, 1907; Acts Thirty-third Legislature, Regular Session, Chapter 168, Senate bill 252, page 352; Acts Twenty-ninth Legislature, Chapter 19, 1905, amended 1907, 1913, 1919; Ramsey vs. Todd, 67 S. W., 133; Johnson vs. Townsend, 124 S. W., 417.

AUSTIN, TEXAS, May 22, 1922.

Hon. S. L. Staples, Secretary of State, Capitol.

DEAR SIR: The Attorney General has received your communication of May 16th and referred the same to the writer for reply.

Briefly stated, you submit the following questions:

1. What franchise tax is the Huntsville Cotton Oil Company, having the following purpose clause, "This corporation is created for the following purposes, to wit: (1) The operation of a cotton seed oil mill. (2) The generation and supply of electric light and motor power to the public; and (3) Manufacture and supply of ice to the public," required to pay?

2. What franchise tax is levied upon a corporation having the dual purposes mentioned in subdivision 73, Article 1121, Complete Statutes of 1920?

In reply to your first inquiry, we will state that this Department adheres to its ruling of September 23, 1913, which was given to Hon. F. C. Weinert, Secretary of State, contained in the Reports and Opinions of the Attorney General, 1912-14, page 332.

The writer of the opinion referred to stated clearly the history of subdivisions 72 and 73, Article 1121, Complete Statutes of 1920, up to the date of its commencement. The conclusions then announced were: "charter of cotton oil mill corporations cannot be amended so as to include in their purpose clause the business of operating gins generally for the public," and "cotton oil companies are governed by the provisions of subdivision 73, Article 1121, Revised Statutes, as amended by the Thirty-third Legislature, Chapter 168, page 352, and the provisions of subdivision 72, Article 1121, have no application."

Since this opinion interprets subdivision 72 to mean that corporations may be created to include two or more of the following purposes, namely: the construction, purchase and maintenance of: (a) mills; (b) gins; and the manufacture and supply to the public of (1) ice; (2) gas; (3) light; (4) heat; (5) water, and (6) electric motor power; and that the manufacture and supply to the public of either

or all of the foregoing household necessities must be in connection with the operation of a mill or a gin or both; and that the term "mill" was applicable to all of that genus except cotton seed oil mill, which is specifically provided for in subdivision 73, we now reiterate and adhere to this prior statement of the law and advise in conformity therewith.

More particularly the Huntsville Cotton Oil Company, which conducts and operates a cotton seed oil mill and engages in the generation of and supply of electric light and motor power to the public and manufactures and supplies ice, was incorporated under said subdivision 73, Article 1121, Complete Statutes of 1920.

Having eliminated subdivision 72 as authorizing the creation of such a company as the Huntsville Cotton Oil Company, and since such company does not come within subdivision 28 of Article 1121 nor any other subdivisions of said article, and is specifically mentioned in subdivision 73, which authorizes the dual purposes contained in its charter, it is a necessary conclusion that such company derives its power under subdivision 73, Article 1121.

Sealy Oil Mill and Manufacturing Company vs. Bishop Manufacturing Company, 235 S. W., 850, and 220 S. W., 203.

In the last mentioned case, a supposition was advanced arguendo, that the powers of the defendant would have been enlarged had the corporation in question also engaged in cotton seed oil mill business under subdivision 72, Article 1121, but the court specifically stated, "We found that it was authorized to maintain *mills*, but the evidence shows it was only engaged in the ginning and ice business." This being true, we think the dictum does not conflict with the opinion of the Attorney General heretofore rendered.

Your second question asks what franchise tax a corporation is required to pay having within its purpose clause the purposes named in subdivision 73, Article 1121, Complete Statutes of 1920. It will be necessary to note briefly the history of the legislation antedating and out of which grew subdivision 73, as it now stands.

The Supreme Court of Texas, in the case of Ramsey vs. Todd, rendered June 23, 1902, 67 S. W., 133, established and set at rest any doubt that might have existed under Article 1122, paragraph 2 thereof, prohibited the creation of a corporation for two distinct purposes, each of which were set out in a separate subdivision of what is now Article 1121. The court stated that "the statute does not authorize the incorporation for two distinct purposes, each of which is mentioned in a separate subdivision of Article 642 (1121) of the Revised Statutes, and that, therefore, the writ of mandamus applied for in this case must be denied." Thereafter, in the succeeding year, the Legislature passed a bill effective July, 1903 (Chapter 138, page 227, Gammel's Laws, 28th Legislature), authorizing incorporation for two or more distinct purposes. In the emergency clause it was stated "and whereas, since this incorporation the Supreme Court has recently held in effect that such incorporations are illegal, and, whereas, there is a public necessity that small corporations incorporated for milling and ginning purposes in the small towns of the State should be allowed to manufacture *in connection therewith* ice, gas, heat and light" creates an emergency. This enactment as amended by the Act of the Legislature

in 1913, page 267, Chapter 134, which added thereto the last paragraph of the present subdivision 72 of Article 1121, is the complete legislation from which we have at the present time subdivision 72.

It will be noted that the material portions of this subdivision were enacted prior to 1910, in the same year that the Supreme Court of the State of Texas decided *Johnson vs. Townsend*, 124 S. W., 417.

As above stated, the interpretations of subdivision 72 are completely set out in the opinion referred to. Succinctly stated, the only corporations which may be created under subdivision 72 are mills and gins, or either, which in connection with such mills and gins, or either, also manufacture and supply to the public ice, gas, light, heat, water and electric motor power, or either of such commodities; or such mills and gins, or either, which harvest grain or harvest and thrash grain. Also, such corporation as engages in furnishing ice to the public, which in connection therewith have the power to conduct to some extent a refrigerating business.

The Legislature recognizing the rule laid down in *Ramsey vs. Todd* in the year 1905, proceeded to provide for corporations having a dual purpose. The first of these acts which is the basis of subdivision 72, Article 1121, Complete Statutes of 1920, is the act passed by the Regular Session of the Twenty-ninth Legislature, Chapter 53, page 73, effective July 1, 1905. The entire act reads as follows:

"Corporations—Authorizing Formation of, for Two or More Distinct Purposes. (S. B. No. 211.) Chapter 53

"An Act to amend Chapter 2, Title 21, of the Revised Statutes of the State of Texas, by adding thereto Article 650b, authorizing incorporation for two or more distinct purposes and separate franchise tax for each purpose, and with an emergency clause.

"Be it enacted by the Legislature of the State of Texas:

"Section 1. That the following article be added to Chapter 2, Title 21, of the Revised Statutes of the State of Texas, to be known as Article 650b:

"Article 650b. Private corporations may be created for, or after being created, so amended as to include two or more of the following purposes, namely: The supply of water to the public, the manufacture and supply of ice, electric light and motor power, or either of them to the public; and the manufacture, supply and sale of carbonated water, and the operation of cottonseed oil mills; *provided, that private corporations including more than one of the purposes mentioned in this article in their charters shall each pay the franchise tax as provided by law for each of the purposes included in their respective charters; and provided further that the authorized capital stock of incorporations authorized by this article shall not exceed \$200,000. The provisions of this act shall not apply to cities of over ten thousand inhabitants.*

"Section 2. Whereas, there are many small cities and towns in the State where water and light plants could be more economically operated together than independently, to the advantage of the citizens of many localities; therefore, an emergency and imperative public necessity authorizing the suspension of the constitutional rule requiring bills to be read on three several days is created, and the rule should be and is hereby suspended, and that this act take effect and be in force from and after its passage, and it is so enacted."

In 1907, after the foregoing mentioned article, the Legislature, in Chapter 52, page 294, Acts of the Regular Session, Thirtieth Legislature, re-enacted in haec verba the above quoted act, except that it added after the words "cotton seed oil mills" the following: "Or cotton compresses," re-enacting the proviso "that private corporations including more than one of the purposes mentioned in this article in

their charters *shall each pay the franchise tax as provided by law for each of the purposes included* in their respective charters.

It will be noted that the foregoing act authorizing the creation of corporations to include two or more purposes existed at the time and prior to the decision of *Johnson vs. Townsend*, 124 S. W., 417, which laid down the doctrine that charters could not contain two distinct and separate purposes defining two distinct and separate businesses, even though these purposes were specified in one subdivision of Article 1121. Undoubtedly this was and is the general rule. The Legislature has provided exceptions thereto. These exceptions existed prior to the decision of the *Johnson vs. Townsend* case, and have existed since that time.

The codifiers in the Revised Statutes of 1911 carried forward the provisions of the act above quoted in subdivision 73, Article 1121, as enacted, except that the word "subdivision" was used in place of the word "article" as in the original enacted bill; that is, the codifiers in adjusting the acts of the Legislature to the codification rightfully made this correction.

In 1913 at the Regular Session of the Thirty-third Legislature, Chapter 168, being Senate Bill No. 252, page 352, of the Session Laws, the Legislature modified and amended the existing law. The act simply amended subdivision 73, Article 1121, in Title 25 as contained in the Revised Statutes of 1911. This amendment contained the same purpose clauses as were contained in the prior enactments and made no change whatever in respect thereto. However, the provisions of the 1905 act making applicable the act to corporations having a situs in cities of less than ten thousand was stricken out so that the locale of a corporation was not a limitation. However, the provision contained in the last paragraph of Section 73 as it now exists was inserted. This proviso reads as follows:

"Provided, that corporations including more than one of the purposes named in this article shall pay the franchise tax provided by law for each of the purposes so included in their said charters of amendments thereto; and provided further that the authorized capital stock of corporations created under or authorized by this article which shall include irrigation and any one or more of the other purposes named in this article, shall not exceed \$1,000,000; and that the authorized capital stock of corporations created under or authorized by this article which shall include waterworks, for the supply of water to the public or municipalities, and any one or more of the other purposes named in this article except irrigation, shall not exceed \$500,000, and that the authorized capital stock of corporations so authorized by this article for any two or more of the purposes named in this article except irrigation and waterworks or the supply of water to the public shall not exceed \$200,000."

It will be noted from the underlined portions of the proviso last quoted that the franchise tax provision contained in the Act of 1905 was brought forward with practically the identical words as contained in that act. It will be noted also that the limitation of capital stock to two hundred thousand dollars in the original act was amended in the 1913 act so that the maximum would vary from not less than a million or five hundred thousand or two hundred thousand dollars, as controlled by the purpose and combination of purposes which the particular corporation had.

An analysis of subdivision 73 shows that corporations are authorized by the Act of 1905 as amended in 1907 and 1913, to have the

following purposes in their charter, namely: (1) supply of water to the public; also (2) ice; (3) gas; (4) electric light; (5) electric motor power; (6) carbonated water; (7) the operation of cottonseed oil mills; (8) cotton compresses. An examination of the various subdivisions of Article 1121 shows that subdivision 12 authorizes the creation of corporations for the supply of water to the public; subdivision 72 authorizes the manufacture of and supply of ice to the public; subdivision 13 authorizes the manufacture and supply of gas, and the supply of light, heat and electric motor power, or either of them, to the public; subdivision 14 authorizes the transaction of any manufacturing or mining business and the purchase and sale of such goods, wares and merchandise, which would include the manufacture and sale of carbonated water to the public. Subdivision 28 authorizes the construction, purchase and maintenance of cotton compresses. Subdivision 34 authorizes corporations to construct and maintain water power, and so on.

We have enumerated these instances for the purpose of showing that they existed prior to the enactment of subdivision 73. These subdivisions were sufficient authority under which to create, and doubtless under which was created, corporations for the purpose of conducting and carrying on businesses which have been mentioned in subdivision 73. It is true that theretofore corporations were not authorized to combine the purposes contained in different subdivisions of Article 1121, and when the power was granted to such existing corporations to amend their charter so as to take advantage of the provisions of Article 73, we must conclude that such pre-existing corporations obtained such power from that subdivision. It is true that subdivision 72 enacted in 1903, authorized mills and gins, or either, in connection with such business to perform certain other functions as supplying the public with such necessities as ice, gas, light, heat and water. That act specifically provided, as the emergency clause which is quoted above clearly sets out, that the single business of milling and ginning, or either, must be conducted. However, in connection therewith, such corporations were authorized to perform the other services mentioned in the act. Therefore there was no provision in subdivision 72 with reference to taxation as is contained in subdivision 73, which is a broader and more comprehensive enactment, making an exception to the general rule that a corporation may conduct only one business.

With this understanding of subdivisions 72 and 73, we must conclude that the sole intent of the Legislature in enacting subdivision 73 was not to create a new purpose for a business theretofore incapable of being chartered, but to authorize the combination of businesses as had theretofore been authorized in separate and various subdivisions. These purposes are only *named*, that is, enumerated in subdivision 73 and in almost the exact language of the pre-existing subdivisions. Regardless of the article under which a corporation was originally created, if it has two or more purposes mentioned in subdivision 73, which it could only have under the authority of that article, it is subjected to the tax therein mentioned. We see no distinction as to status for taxation between corporations chartered prior to the enactment of subdivision 73 and which have subsequently amended their charters,

as compared with those chartered subsequent to the enactment of this subdivision.

Of course, in determining the franchise tax which a corporation owes, we must resort to the general act assessing and levying the tax.

In the year 1905, when the authority was granted by the Legislature for chartering a corporation with two or more distinct purposes, the Legislature—Chapter 19, Acts of the Twenty-ninth Legislature—provided for a franchise tax on private domestic corporations in the sum of one dollar on each two thousand dollars of authorized capital stock up to and including one hundred thousand dollars, and one dollar on each ten thousand dollars in excess of one hundred thousand dollars up to and including one million dollars, and one dollar on each twenty thousand in excess of one million dollars, etc.

In 1907, the franchise tax was again amended, and, upon each and every private domestic corporation a franchise tax was levied and computed as follows: fifty cents on each one thousand dollars of authorized capital stock, surplus and undivided profits and up to one million and thereafter twenty-five cents for each additional one thousand dollars.

In 1913, the act was again amended, and likewise in 1919, which resulted in the present franchise tax law. This last mentioned act likewise levies a graduated tax upon the authorized capital stock, surplus and undivided profits. (Article 7393, C. S., 1920.)

While the statutes referred to assess and levy a franchise tax on the domestic corporations, we think that the provisions in subdivision 73, Article 1121, Complete Statutes of 1920, substantially in the same words as is contained in the Act of 1905, specifies the manner in which the franchise tax law shall be applied to corporations mentioned in that subdivision. That is to say, while we must look to the franchise law for authority to levy and assess the tax, yet we are required to apply subdivision 73 of Article 1121 in determining the tax payable by corporations doing business thereunder. One of the conditions which the Legislature exacted in granting the specific privileges was that the franchise tax should be made applicable as therein specified.

There is no doubt that the Act of 1905, and necessarily subdivision 73, provides that "a separate franchise tax for each purpose shall be assessed and collected." This franchise tax is "the franchise tax as provided by law." While it is true that the franchise tax of 1905 is not the same as the tax of 1907 or 1913 or 1919, yet the language of the subdivision makes applicable the franchise tax "as provided by law," whatever it may be.

It is suggested that the graduated franchise tax should be assessed and collected only on that portion of the total capital stock allocated to the different business purposes of the corporation. That is to say, as in the case of the Huntsville Cotton Oil Company having three purposes with a capital stock of one hundred thousand dollars capital devoted to the oil company; thirty thousand dollars for the electric light plant and twenty thousand dollars for the ice plant rather than that such corporation should pay the franchise tax of one hundred thousand dollars for each purpose.

We are led to the conclusion from the language used by the Legislature that it intended that corporations having a duplicate or triple business should pay the franchise tax on its total capital stock the

number of times there are purposes in the purpose clause of its charter. The condition for the use of the special privilege is certain and unequivocal.

To give the statute the meaning as suggested would render the provisions of the 1905 act contained in subdivision 73, Article 1121, surplusage and without meaning. We readily see, under the limitations of capital stock in the act, that to allocate the capital stock to the various businesses and to charge the graduated tax on that part of the capital devoted to the particular business would aggregate the same in every instance as the single application of the graduated franchise tax to the total capital stock. That is to say, the franchise tax levied on three-thirds would aggregate and equal the franchise tax levied on the whole. This is as true as the accepted geometric axiom, that the whole is equal to its parts, or vice versa. We think it clear that the Legislature meant what its language imports and that to give the statute the construction suggested would render it meaningless and inert.

You are advised that the Huntsville Cotton Oil Company obtains its right to do business under subdivision 73, Article 1121, and is subjected to the tax therein specified; that corporations having a dual or triple purpose which purposes are enumerated in subdivision 73, Article 1121, are liable for the franchise tax provided by law assessable upon its total capital stock the number of times such corporation has charter purposes in its charter.

Respectfully,

WALACE HAWKINS,
Assistant Attorney General.

Op. No. 2406, Bk. 57, P. 84.

CORPORATIONS—POWER TO BORROW AND LOAN MONEY—CONSTRUCTION OF STATUTES.

1. Public warehouse companies organized under Section 28, Article 1121, R. S., 1911, have power to borrow money for the legitimate purposes of their business.

2. Public warehouse companies with the power to loan money, although they may not conduct the business of accumulation of money for the purpose of loaning, yet they may loan money in the same manner as an individual conducting a warehouse business for his own benefit and in the course of such business.

Statutes construed: Section 28, Article 1121; Article 1162, amended by Chapter 39, Acts Regular Session, Thirty-fifth Legislature, 1917; Articles 1164 and 1165, R. S., 1911.

AUSTIN, TEXAS, January 21, 1922.

Agricultural Loan Agency of the War Finance Corporation, Fort Worth, Texas.

GENTLEMEN: The Attorney General is in receipt of your inquiry of January 17th in which certain questions are propounded relative to the power and authority of the Del Rio Wool & Mohair Company of Del Rio, a corporation organized under Section 28, Article 1121, of the Revised Civil Statutes of 1911 of the State of Texas. The questions affect the power of the corporation, first, to borrow money; and, second, the power to loan money in which the specific question is raised by the general counsel of the War Finance Commission "as to whether

or not the Del Rio Wool & Mohair Company has the power, as is granted by their charter, to make advances on live stock and execute their bills payable secured by collateral for at least an equal amount." These questions will be answered in the order in which they are propounded.

A private corporation in Texas has the power to borrow money for the corporation whenever the nature of its business renders it proper and expedient that it should do so. This implied power was restricted to the borrowing of money incidental to the business of a corporation and was not considered as a principal power. This authority was exercised even prior to the statute hereafter quoted. *Taylor Feed Pen Co. vs. Taylor National Bank*, 181 S. W., 534, and on appeal; *Jones vs. Smith*, 87 S. W., 210. But the Legislature in 1917 at its Regular Session repealed the pre-existing statute, which stated that "the corporation shall have the power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, and may execute bonds or promissory notes therefor and may pledge the benefit and income of the corporation," and substituted in lieu thereof the following language: "Corporations shall have the power to borrow money on the credit of the corporation and may execute bonds or promissory notes therefor, and may pledge the benefit and income of the corporation." It will be seen from the amended article that the existing restrictions on the power of corporations to borrow money was removed. We therefore reply to the first inquiry that the Del Rio Wool & Mohair Company conducting a public warehouse business, under the provisions of Section 28, Article 1121, has the express power conferred upon it by the Legislature of the State of Texas to borrow money. The Legislature also has removed the limitation on amounts of money to be borrowed.

In respect to the second question propounded, we understand that the War Finance Corporation is interested in knowing whether or not the Del Rio Wool & Mohair Company has the capacity and power to loan money for the purposes mentioned in the Act of August 24, 1921, being an act to amend the War Finance Corporation Act approved April 5, 1918, so as to provide relief for producers of and dealers in agricultural products and for other purposes. Therefore, the initiation of the question raising the power of the Texas corporation and those similarly situated to loan money.

It is necessary to set out the statute and purpose clause under which the Del Rio Wool & Mohair Company is chartered in order to ascertain the extent of its power to loan money. Section 28 of Article 1121, Revised Statutes of 1911, 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."

Under this purpose clause there may be corporations chartered to conduct the following business: construction, purchase and maintenance of mills; construction, etc., of gins; construction, etc., of cotton compresses; construction, etc., of grain elevators; construction, etc., of wharves; the construction, purchase and maintenance of public warehouses for the storage, purchase and sale of products and commodi-

ties; for the construction, purchase and maintenance of grain elevators for the storage, purchase and sale of commodities and products; warehouse and grain elevator companies for the storage of products and commodities, and the loan of money by such elevators or public warehouse companies.

From a reading of the charter of the Del Rio Wool & Mohair Company we find that on November 15, 1921, it was so amended as to take the company out of the provisions of the statute enacted by the First Called Session of the Thirty-fifth Legislature authorizing corporations for the purpose of conducting a general warehouse business so that the corporation is now exercising its authority under the section and statute quoted above. It provides that it shall have the following purposes:

"The purposes for which this corporation is formed is to do a general public warehouse business and incidentally to do any and all things incident to the conduct of such business. It shall have the right to construct, purchase and maintain public warehouses for the storage of products and commodities and the right to purchase, sell and store products and commodities, and the right and power to loan money."

There can exist no uncertainty as to whether or not the Del Rio Wool & Mohair Company's purposes, as specified in its charter, comes within the provisions of the statute quoted. *Ramsey vs. Todd*, 95 Texas, 614.

In the absence of an expressed power to loan money, corporations in Texas may, by implication, exercise the power to loan money as a proper and necessary means to enable it to accomplish the purpose for which it was incorporated; but in this specific instance the Legislature has conferred upon warehouse companies the power to loan money. It is necessary, therefore, to examine into the extent of these express powers. By an examination of the various purposes for which corporations may be created, we find that the Legislature has provided for corporations to erect and repair buildings and "the accumulation and loaning of money for said purposes"; also, for the purchase, sale or subdivision of real property in towns, cities and villages, and "for the accumulation and loaning of money for that purpose," and other clauses which might be quoted. But in the specific instance the Legislature has used different language in respect to public warehouse companies in that it stated that public warehouse companies may be created with the added power "and the loan of money by such elevator and public warehouse companies." The same language is not used in this section as in those limiting the purpose of loaning money to that specified in the section.

The real issue, therefore, is to what extent is a public warehouse company organized under Section 28 of Article 1121, Revised Statutes of 1911, by which such corporation may loan money. This is wholly a question of degree. We must give meaning to the provision allowing public warehouse companies to loan money. While the Legislature was cognizant of the implied incidental power of a corporation to loan money, nevertheless it specifically granted to such corporations express power. We do not think that the Legislature intended by granting this power to permit a corporation organized under Section 28 and conducting a warehouse company to exercise at the same time the power granted in Section 29. Under this clause the words "accumu-

lation and loan of money" are used, whereas, in Section 28 the words "loan of money" alone are used. Stated succinctly, a warehouse company may not conduct a general loan company. This conclusion is further based on the wording of Section 28, which says that a warehouse company may have the power to loan money. This works a restriction on the loaning business in that it must be conducted by a warehouse company. As stated above, to what extent this restriction affects the power of the warehouse company to loan money is a question of degree, and resort must be had to the character of warehouse business, the custom of warehousemen in conducting such a business and the public policy announced by the statutes and courts in limiting the powers of corporations.

Article 1164, Revised Statutes of 1911, provides that "no corporation, domestic or foreign, doing business in this State shall employ or use its stock, means, assets or other property, directly or indirectly for any purpose whatever other than to accomplish the legitimate business of its creation, or those purposes otherwise permitted by law." This statute makes a legal utilization of the assets of the company otherwise than to perform the purpose for which it was created. It is also the general and settled rule in Texas that every expressed grant of power to a corporation carries with it the implied power to do whatever is necessary or reasonably appropriate to the exercise of the authority expressly conferred. *Comanche Oil Co. vs. Browne*, 99 Texas, 660. Furthermore, it is in the adjudications of this State that a corporation may do such things "as are usually incidental in practice to the prosecution of its business and no more." *Northside Ry. Co. vs. Worthington*, 88 Texas, 562. In the same case it is stated further:

"Whatever be a corporation's legitimate business, it may foster it by all the usual means, but it may not go beyond this. It may not, under the pretext of fostering, entangle itself in proceedings with which it has no legitimate concern. If the means be such as are usually resorted to and constitute a direct method of accomplishing the purposes of the incorporation, they will be regarded as within the corporation's powers, but if they are unusual and tend in an indirect manner only to promote its interests, they will be held to be ultra vires."

Warehouse companies may certainly loan money on products and commodities of whatever character held within the warehouse. Such commodities may be agricultural, products of the farm and ranch, gardens and whatsoever. Beef from slaughtered animals are products from the farm. In *Re Snyder*, 79 Pac., 819. Sheep raised on the farm and butchered and stored in a warehouse are products of the farm. Cattle come within the meaning of commodities and products. But this is not the full extent of the powers of the corporation to loan money. If it were not true, there would have been no additional power conferred by the expressed statute. The corporation may foster its business in a legitimate way. A warehouseman is necessarily interested in the products and commodities of the farm and ranch. It is the immediate source of his business. Also, he is affected by the seasonal crops, the welfare of the farm and ranch. His business depends entirely and immediately on the welfare and success of the farming and ranching industry.

It is well known that a corporation engaged in a business that has a seasonal activity may loan its surplus funds during its inactive periods. *Garrison Canning Co. vs. Stanley*, 133 Iowa, 57.

A corporation may loan money where the direct purpose of making the loan is to extend the sale of its own products. *Brothy vs. American Brewing Co.*, 26 Pac., 628. Also, it is held that a trading company may loan money to one dealing with it as to enable the borrower to make its purchase. *Holmes vs. Willord*, 11 L. N. A., 170. Furthermore, while the doctrine is announced in Texas that a corporation may foster its own business, it must do this in the usual manner, that is, in the manner which is customary throughout the country. Custom is utilized by the Texas court in passing upon the legitimate powers of corporations where a certain business is conducted generally with an attached power. It has been consistently held that a corporation is not acting *ultra vires* when it exercises this customary power. *Bishop vs. Sealy Oil Mill*, — S. W., —. (Advance sheet.)

The practices of individuals engaged in a warehouse business and other corporations in the State in fostering its business cannot be disregarded. We understand from the communication and other sources that many of the Texas companies doing a similar business advance moneys to protect and foster the cattle, cotton, truck, fruit, wool and farm industries. The benefit which accrues to the public warehouseman in loaning money to producers of commodities and products to be stored, handled and shipped is direct and certain. We have set out these authorities for the purpose of setting the field notes to the power vested in a corporation exercising the authority contained in Section 28, Article 1121, and for the purposes of information. We would not say that a warehouseman may loan money generally where no benefit and direct results would come to his business or to persons not vitally connected with his business, nor would we say that a public warehouseman may engage in loaning money for speculative purposes, but we are convinced that the extent of the *Del Rio Wool & Mohair Company* and similar corporations would include the power to make advances on live stock and products on the farm and ranch.

We trust that the foregoing answers to your inquiries will satisfactorily give the information desired.

Respectfully,

WALACE HAWKINS,
Assistant Attorney General.

Op. No. 2255, Bk. 54, P. 500.

CORPORATIONS—FRACTIONAL SHARES OF STOCK.

Corporations have no authority to issue certificates showing ownership of fractional shares of stock, except where the reduction of capital stock results in individual ownership of fractional shares.

Article 1122, R. S., 1911; Chapter 112, Regular Session, Thirty-sixth Legislature.

AUSTIN, TEXAS, October 11, 1920.

Hon. C. D. Mims, Secretary of State, Building.

DEAR SIR: This Department is in receipt of a letter, carbon copy of same being sent to you from Messrs. Miller & Miller, attorneys at Fort Worth, Texas, from which it appears that in 1902 the Guaranty Abstract & Title Company of Fort Worth was incorporated for fifteen

thousand (\$15,000) dollars, divided into one hundred and fifty (150) shares of the par value of one hundred (\$100) dollars each. It appears that of the capital stock, John Tarlton owns three-fourths, or $112\frac{1}{2}$ shares, C. A. Boaz owns one-eighth, or $18\frac{3}{4}$ shares, George Beggs owns one-twentieth, or $7\frac{1}{2}$ shares, W. R. Edrington owns one-twentieth, or $7\frac{1}{2}$ shares, and B. W. Owens owns one-fortieth, or $3\frac{3}{4}$ shares. It does not appear from the letter of Messrs. Miller & Miller that certificates have been issued for the fractional shares of stock above indicated, but we presume that they have.

It is now desired to increase the capital stock from fifteen thousand (\$15,000) dollars to forty thousand (\$40,000) dollars, and the present stockholders to take the increase in the proportions in which they hold the original capital, which would result in the additional capital being divided among the stockholders in full shares, eliminating the fractional shares held by each, but in doing so it would be necessary for the stockholders to subscribe for the new stock in fractional shares. The question presented by Messrs. Miller & Miller is, would the Secretary of State be authorized to file the amendment showing a subscription to the additional capital in fractional shares?

For many years it has been the consistent ruling of the Attorney General's Department, as well as of the Secretary of State, that the capital stock of the corporation cannot be divided into fractional shares, and the present administration of this office adheres to that ruling, with the exception hereinafter set out, for the following reasons:

Article 1122, Revised Statutes of 1911, provides in part that the charter of a corporation must state the amount of its capital stock and the number of shares into which it is divided. Therefore, the capital stock must be divided into a certain number of full shares, not fractional shares. Therefore, for an original charter, or an amendment, to provide for fractional shares would be in violation of this article of the statute.

The above is a correct interpretation of the article mentioned, for the reason that the Legislature in the enactment of Chapter 112, Acts of the Regular Session of the Thirty-sixth Legislature, provided that in case where the reduction of capital stock results in fractional shares the holders thereof shall be entitled to vote the same. If fractional shares had been permissible, it would have been a useless thing for the Legislature to have enacted this statute, and, therefore, the enactment of this law is the legislative interpretation to the effect that it is only in case of a reduction of the capital stock resulting in fractional shares in order that each stockholder may own his proportionate share of the reduced capital that it is permissible to issue certificates for fractional shares of stock incorporated.

We therefore advise you that you would not be authorized to file a charter or an amendment thereto providing for fractional shares of capital stock except in case where the stock of the corporation is reduced and the reduction results in ownership of fractional shares.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

Op. No. 2452, Bk. 57, P. 24.

RAILWAY CORPORATIONS—CHARTER—AMENDMENT—FEES—STOCK.

1. Article 3837, Vernon's Texas Civil and Criminal Statutes, 1922 Supplement, does not require a corporation on filing an amendment to its charter which does not increase its stock to pay to the Secretary of State a fee of fifty cents for each one thousand dollars capital stock required by its charter.

2. Same—Statutory construction. Construction of the statutes in accordance with its reason and spirit may be preferred to one based on its strict law where not inconsistent with its terms.

Statute construed: Article 3738, Vernon's Texas Civil and Criminal Statutes, 1922 Sup., Act of the Thirty-sixth Legislature, Chapter 45.

August 17, 1922.

Hon. S. L. Staples, Secretary of State, Capitol.

DEAR SIR: In your letter of August 16, 1922, addressed to the Attorney General, you state that your department has been presented with a proposed amendment to the charter of the International & Great Northern Railway Company and that you desire to correctly ascertain the amount of fee that should be charged for filing same. You further state that:

"The International & Great Northern Railway Company was chartered on August 10, 1911, with an authorized capital stock of \$11,500,000, composed of 115,000 shares of the par value of \$100 each. Of this 115,000 shares, 50,000 thereof were designated as preferred stock, and 65,000 shares as common stock. On this basis, their stock was divided as follows:

Preferred stock	\$ 5,000,000
Common stock	6,500,000
	<hr/>
	\$11,500,000

"The filing fee paid at time this charter was granted is shown to have been \$5900.

"The amendment submitted changes the name of the corporation to International-Great Northern Railroad Company, and amends Article 8 to read as follows:

"The number and amount of the shares of the capital stock of this corporation shall be one hundred and fifteen thousand shares, of the par value of \$100 each, and all of said stock shall be common stock."

"This amendment in no way increases in dollars and cents the amount of the capital stock of the corporation. The only change made is in the designation of the shares, by eliminating the preference given to 50,000 shares, as shown by the original charter, and making all of the 115,000 shares common stock. The amendment also changes the name of the corporation from International & Great Northern Railway Company to International-Great Northern Railroad Company."

And you desire an opinion of this Department as to whether or not you shall charge the fee for filing said amendment at the rates given in Article 3837, Revised Statutes, which you state would amount to the maximum sum of twenty-five hundred (\$2500) dollars, or should you charge the minimum fee prescribed by statute.

Your inquiry involves the construction of Article 3837, Vernon's Texas Civil and Criminal Statutes, 1922, Supplement, Acts of the Thirty-sixth Legislature, Chapter 45. That part of Article 3837 necessary for this Department to construe by reason of your inquiry reads as follows:

"The Secretary of State, besides other fees that may be prescribed by law, is authorized and required to charge for the use of the State the following fees:

"For each and every charter, amendment or supplement thereto of a private corporation created for the purpose of operating or constructing a railroad, magnetic telegraph line or street railway or express company, authorized or required by law to be recorded in said department, a fee of two hundred dollars to be paid when said charter is filed; provided, that if the authorized capital stock of said corporation shall exceed one hundred thousand dollars, it shall be required to pay an additional fee of fifty cents for each one thousand dollars authorized capital stock, or fractional part thereof, after the first one hundred thousand; and provided further that such fee shall not exceed the sum of twenty-five hundred dollars."

The article above referred to is a part of Chapter 1 of Title 58 of the Revised Statutes, and has from time to time been amended by the various Legislatures, but the only amendment since its original passage has been to change the amount of the fee, otherwise the article remains in substance the same. The article appeared in the revision of 1895 as Article 2439 and reads exactly as above except the minimum fee provided is one hundred dollars and an additional fee of twenty-five dollars for each one hundred thousand dollars authorized capital stock or fractional part thereof after the first is required, whereas, by the article under construction, two hundred dollars is required to be paid as the minimum fee and fifty cents per thousand additional above one hundred thousand dollars of the authorized capital stock. Article 2439 is construed by Chief Justice Gaines in the case of St. Louis Southwestern Railway Company against Todd, 94 Texas, 632, 68 S. W., 778, and in passing on this question the court says:

"Nor is there any difficulty as to the amount to be collected upon filing of the original charter. But, as to amendments to the charter, the language quoted admits of three possible constructions. First, that, upon the filing of an amendment the fee must be assessed upon the entire capital stock of the corporation at the proportionate rate fixed by the statute, without regard to whether the stock be increased by the amendment or not; second, in no event shall more than \$100 be charged for the filing of an amendment or supplement; and, third, in case the amendment provides for an increase of the capital stock of the corporation, then in addition to the fixed charge of \$100, there shall be paid \$25 for each additional \$100,000 or fractional part of such increase in excess of \$100,000. The first construction is that upon which respondent insists, and is that which, upon first blush, more nearly accords with the letter of the statute; but, in our opinion, it does not comport with the reason and spirit of the enactment. The law was first passed in 1883, and it was doubtless considered that it was just that those who desired to be invested with the powers and immunities of corporate existence should pay in advance a fee for the privilege. It is likewise apparent that it was also considered that as to all corporations organized for profit, except those to be chartered under Chapter 14 of Title 21 of the Revised Statutes, for the construction and maintenance of channels and docks, it was equitable, when the capital stock exceeded a certain amount, an additional fee in proportion to the excess should be charged. Now, to give the provision the first construction would be to duplicate this additional charge every time any amendment, however trivial, should be filed. A railroad corporation, within a month after its incorporation, might desire to make an unimportant change in the line to be constructed, and for that purpose might file an amendment to its charter. In such a case we can see why it should be made to pay the fixed fee for filing the amendment, but we are unable to discover any good reason why the Legislature should desire to compel it to pay a second time the additional compensation for the privileges for which it had already been taxed. This, if not double taxation, would be, in spirit at least, contrary to the rule of uniformity and equality in taxation which the Constitution enjoins. It should not

be held that the Legislature intended to do an unreasonable thing unless the language of the statute compels such construction. On the other hand it is but just and equitable, whenever a corporation organized for profit tenders an amendment which increases its capital stock, that it should pay the additional tax for such increase, just as if it had filed an original charter with the same amount of capital stock as the increase. Any other rule would be liable to abuse, and enable corporations of the character of those under consideration to evade the statute, first by filing a charter with a capital stock of \$100,000, and then in a short time thereafter filing an amendment greatly increasing the amount. It is evident that such was not the intention of the Legislature. The reasonable and equitable rule upon the filing of an amendment is to charge for the amendment the fixed fee as for an original charter; and, in case the amendment adds to the capital stock of the corporation, to charge the same additional fee for such increment as would be charged for an original charter with a capital stock of that amount. This is our construction of what the Legislature intended by the statute in question, and it is not inconsistent with its terms. The statute does not speak of 'the authorized capital stock' of an original charter, nor of that of an amendment, as distinguished from each other. The language is that, 'if the authorized capital stock of said corporation shall exceed \$100,000, it shall be required to pay an additional fee,' etc. This does not say that, in case an amendment be filed which increases the capital stock the 'additional fee' shall be paid again upon the excess of the original stock as well as upon the increase. It is true, the lawmakers mean by 'the authorized capital stock' the entire stock, and that the fee must be paid upon the whole. It does not follow that it was not intended that so much as was assessable upon the original stock should be paid when the original charter was filed and so much as was chargeable upon the increase should be collected after the filing of the amendment. In every case where an amendment with increase of stock is filed, and the additional fee is paid upon the increase, then 'the additional fee' provided in the statute upon the excess of the entire stock over \$100,000 is fully paid, and the requirement of the statute, we think, is fulfilled. We conclude that the only reasonable construction of the statute in question is that when an amendment to a charter is filed, if there be an increase of the capital stock by an amount over \$100,000, then the additional fee is chargeable upon the excess of such increase over the amount named, but that, if the amendment does not authorize an increase of stock, then the fixed fee of \$100 only should be charged for its filing."

In view of the above decision we are of the opinion that inasmuch as the capital stock of the International & Great Northern Railway Company was not increased by the proposed amendment that the proper fee to charge for filing the amendment would be the minimum fee prescribed by the statute.

Yours very truly,

F. M. KEMP,
Assistant Attorney General.

Op. No. 2417, Bk. 57, P. 185.

CORPORATIONS—MUTUAL AID ASSOCIATIONS—INSURANCE.

1. A local mutual aid association within the meaning of Article 4859, Revised Civil Statutes, cannot be chartered under the Fraternal Benefit Society Act, and cannot file its charter with the Commissioner of Insurance and Banking.

2. A local mutual aid association having for its main object and purpose the raising of a mortuary fund through the collection from its members of membership fees, dues and assessments, to pay death benefits of approximately one thousand dollars each to any named beneficiary or the estate of the deceased member, provided, the deceased member had paid dues, assessments, etc., at the time of death, and was in good standing, is not for the support of a

benevolent or charitable undertaking within the meaning of Article 1121, Sub-division 2, Revised Civil Statutes of 1911, and cannot be chartered as a corporation. The Secretary of State is unauthorized to file its charter.

3. The association mentioned not having complied with the insurance laws, and there being no statute in this State authorizing the formation of such corporations, cannot be incorporated in this State.

AUSTIN, TEXAS, January 25, 1922.

Hon. S. L. Staples, Secretary of State, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter of December 13, 1921, enclosing the proposed charter of the Home Benefit Association of Dallas, Texas, requesting an opinion as to whether this charter should be filed in the office of the Secretary of State or that of the Commissioner of Insurance and Banking. The same has been referred to me for attention and reply.

The purpose clause of this proposed charter is in the following language:

"This association is formed for the purpose of conducting a local mutual association as described in Article 4859 of the Revised Civil Statutes of the State of Texas."

It is not necessary to decide whether this purpose clause would be sufficient to describe the purpose of the corporation as disclosed by the constitution and by-laws. We are ruling upon the question whether a corporation of the nature of this one as disclosed not only by the purpose clause but also by such constitution and by-laws can be chartered, since we assume a proper purpose clause would be formulated so as to properly describe the purpose of the corporation, if it should be held that it may incorporate at all.

The charter provides that the place of business of the association shall be in the City of Dallas, Dallas County, Texas, and the association shall not conduct its business beyond a radius of fifty miles from the courthouse in the City of Dallas. There is no capital stock. Each certificate holder is declared to be a stockholder while in good standing.

The policy or certificate which would be issued to each member of this association is in the following language:

"Class.....
 Policy No..... Series..... Age.....
 HOME BENEFIT ASSOCIATION OF DALLAS, TEXAS,
 A Local Mutual Aid Association.
 Dallas, Texas.., 192...

THIS CERTIFIES THAT..... is this day admitted a member of this association, conditioned:

First: agrees to pay assessments, levied by the directors, of \$1.00 upon the death of each member and 25 cents for expenses, total, \$1.25 each member, within 10 days from call and agrees further, that failure to pay any assessment so levied within 10 days from date of call, shall forfeit all claims as a member of this association, and..... agrees that the constitution and by-laws of this association shall be a part of this contract.

Second: agrees to a stipulation that this certificate shall only bind the association to pay to..... the sum of one dollar for each member in good standing at the time of..... death, and should two or more deaths occur between assessments, the beneficiary of each in priority as fixed by date of death, shall be entitled to the amount collected on each succeeding assessment, one assessment for each death, said

amount not to exceed \$1000, should..... die in good standing in the association.

.....
President.

.....
Secretary and Treasurer.

Attest: I accept this certificate subject to the conditions above set forth.
Annual dues, \$2.00 in advance."

The proposed constitution and by-laws show, in substance, that the members shall consist of white persons, male and female, between the ages of sixteen and sixty-five years. They must be in good health when they join and the number shall not exceed one thousand members in any one series. Two classes are provided for, depending on age, in each series and as many series may be formed as are necessary to take care of the applications. A membership fee of seven dollars is collected at the time the application is made, and one dollar thereof is placed in the mortuary fund, ten cents paid to the mortuary director, and the balance goes to the secretary and solicitor. This includes two dollars annual dues, paid in advance. When a member dies, after certificates have been issued, the beneficiary of said member shall be paid one dollar from each member in good standing and an assessment of one dollar and twenty-five cents shall be made against each member in the series to provide a mortuary fund for the next death, of which one dollar goes to such fund and twenty-five cents for the extra expenses, such as mailing out circulars and taking care of overhead expenses, etc. The one dollar so collected, together with the one dollar paid by each new member, shall constitute the mortuary fund. Upon failure to pay an assessment within ten days from notice, a member forfeits his membership and is entitled to no benefits and is not liable for future dues to the association. A member may be reinstated by paying up back dues and assessments within thirty days, provided he is in good health. No debts are to be created except by membership certificate in case of death. There is a governing board composed of seven members and an advisory board of three members. There is a president, vice-president, secretary and treasurer and medical director. The obligation assumed by the members shall be several and separate and not joint obligations of all. Any person or the estate of the applicant may be named as the beneficiary. A member may change the beneficiary by the surrender of his or her certificate and have a new one issued, upon the payment of twenty-five cents. The employment of solicitors is provided for and the vice-president and general manager is required by the by-laws to be a solicitor. The secretary and treasurer is also a solicitor. All applications must be examined and approved by the medical director. Every applicant for membership is required to give a health reference from his or her family physician, and is required to truthfully answer all questions set forth in the application. If the applicant is found not to be in good health, the application and the seven dollars application fee shall be returned to the applicant. Upon the death of a member in good standing the beneficiary named in the certificate shall be paid the sum due on said certificate, provided proper death proofs are made satisfactory to the secretary and treasurer. No death claim will be paid on the death of the person who has not been a member more

than one year, if such member, sane or insane, shall have committed suicide. After the death of the member the secretary is required to mail notices to each member, requiring the payment by each member of one dollar and twenty-five cents, one dollar thereof to be used for the next death loss and twenty-five cents to go to the secretary for expenses connected with such assessment. The annual dues, payable yearly in advance, are two dollars.

There are other details provided for, but the above and foregoing is sufficient to enable one to understand the nature of the proposed corporation.

Let us determine first whether the charter of such a company should be filed with the Commissioner of Insurance and Banking. As above disclosed, this association purports to be one of those mentioned in Article 4859, Revised Civil Statutes of 1911, as amended. It has not been suggested that there is any provision of the statutes authorizing a corporation of this kind to file its charter with the Commissioner of Insurance and Banking, unless it be Chapter 7 of Title 71, Revised Civil Statutes of 1911, as amended, which chapter has to do with fraternal beneficiary associations, or fraternal benefit societies. An examination of this chapter discloses that there is no affirmative authority granted to incorporate other than fraternal beneficiary associations, or fraternal benefit societies, as defined in said chapter. That portion of the chapter defining fraternal benefit societies reads substantially as follows:

"Art. 4827. Fraternal Benefit Societies defined.—Any corporation, society, order or voluntary association, without capital stock, organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of benefits in accordance with Section 5 hereof (Art. 4832) is hereby declared to be a fraternal benefit society. (Acts 1913, p. 220, Sec. 1.)

"Art. 4828. Lodge system defined.—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 its 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 on the lodge system. (Id., Sec. 2.)

"Art. 4829. Representative form of government defined.—Any such society shall be deemed to have a representative form of government when it shall provide in its constitution and laws for a supreme legislative or governing body, composed of representatives, elected either by the members or by delegates elected, directly or indirectly by the members, together with such other members as may be prescribed by its constitution and laws; provided, that the elective members shall constitute a majority in number and have not less than two-thirds of the votes, nor less than the votes required to amend its constitution and laws; provided, further, that the meetings of the supreme or governing body, and the election of officers, representatives or delegates, shall be held as often as once in four years. The members, officers, representatives or delegates of a fraternal benefit society shall not vote by proxy. (Id., Sec. 3.)"

There are other provisions of the chapter relating to the nature of these societies, but the above are sufficient to show that the Home Benefit Association of Dallas does not come within the definition of fraternal beneficiary associations or fraternal benefit societies.

It is the opinion of this Department that the proposed corporation is not a fraternal benefit society or fraternal beneficiary association

within the meaning of said Chapter 7 of Title 71. It has no lodge system, no ritualistic form of work and the provisions made for the payment of benefits do not purport to comply strictly with Article 4831, which is Section 5 of the original enactment.

Besides, the association is designed to come within the meaning of the terms of Article 4859, which provides that the provisions of the fraternal beneficiary association chapter shall not apply to certain local mutual aid associations. Article 4859 reads as follows:

"Art. 4859. Provisions not to apply to local mutual aid associations; annual statement by such associations, etc.—The provisions of this chapter shall not apply to incorporated or unincorporated mutual relief or benefits, 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 2000 members which are hereby denominated local mutual aid associations, provided that such associations are in no manner directly or indirectly connected, federated or associated with any such association and do not directly or indirectly contribute to the expense or support of any other such association, or to the officers, promoters, or manager thereof, and provided that no person or officer shall receive from said association any payment on account of organization or other expenses or salaries who is not a bona fide resident of the county or area in which such association is domiciled. The association above mentioned shall annually, on or before March 1, file a statement with the Commissioner of Insurance and Banking, which shall be signed and sworn to by the president, secretary and treasurer, or the officer holding positions corresponding thereto. Such statement shall show whether the association has, during the preceding year, done any business outside of the county or areas in which it is domiciled, and shall state whether or not said association is associated, federated or directly or indirectly connected with any other, and shall show what, if anything, has been contributed during the preceding year by said association or the members, to any person or officer, or director thereof for salaries, commissions or promotion expenses, and the name and residence of the party or parties receiving the same. The Commissioner of Insurance and Banking, may, at his option and it shall be his duty, if not satisfied with said statement, to demand other and additional statements and examine the books, papers, and records of said association, either himself or by some other suitable person authorized by him. Should it appear to the Commissioner of Insurance and Banking that any such local mutual aid association is not carrying on business as set forth in this article, and is not entitled to the exemption therein set forth, such association shall be subject to and comply with all provisions of this chapter, as a fraternal beneficiary association. Every such local association claiming to be entitled to the benefit of the exemption created by this article shall plainly state upon its certificates, applications and all advertising matter, in a conspicuous manner, that said association is a local mutual aid association, or same shall be deemed subject to all provisions of this chapter concerning fraternal beneficiary associations. (Acts 1913, p. 220, Sec. 31; Acts 1919, Ch. 50, Sec. 1.)"

It will be noted that this article provides that the provisions of the chapter shall not apply to incorporated or unincorporated mutual relief or benefits, 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 fifty miles surrounding the city or town in which its principal office is to be located, etc. This express provision alone would make it clear that charters of the kind under consideration cannot be filed under the Fraternal Beneficiary Association Act. In view of this express provision and also because

the association does not come within the definition of a fraternal benefit society, this Department holds that it cannot be incorporated under said Chapter 7 of Title 71. We find no other statute authorizing the filing of such charters with the Commissioner of Insurance and Banking, and, therefore, we advise you that this charter cannot be filed with that official.

There is little difficulty in arriving at the above conclusion, since the statutes are plain and unambiguous, and this Department has heretofore so advised, although no formal opinion seems to have been rendered. The next and more difficult question is whether the charter may be filed with the Secretary of State—whether there is any authority at all for the formation of such corporations under this State.

If this association can be chartered at all it is by virtue of subdivision 2 of Article 1121 or under Chapter 11 of Title 25, Revised Civil Statutes. It will probably not be contended that this is an association within the meaning of said Chapter 11. At any rate, this chapter is no more liberal in its terms, so far as our inquiry is concerned, than is subdivision 2 of Article 1121.

Subdivision 2 of Article 1121 authorizes the formation of corporations for the following purposes:

“The support of any benevolent, charitable, educational or missionary undertaking.”

The question turns, therefore, on whether the Home Benefit Association of Dallas is or would be, if chartered, for the support of any benevolent or charitable undertaking within the meaning of the statute. It is, of course, not for the support of an educational or missionary undertaking.

The Legislature, of course, used the terms “benevolent” and “charitable” according to their established meaning under judicial decisions. It becomes proper, therefore, to examine carefully and at some length the authorities dealing with this question.

Webster’s Dictionary defines the words benevolence, benevolent, charity, charitable, in so far as material to our inquiry, as follows:

“Benevolence: the disposition to do good; good will; charitableness; love of mankind accompanied with a desire to promote their happiness; an act of kindness; good done; charity given.”

“Benevolent: having a disposition to do good; possessing or manifesting love to mankind and a desire to promote their prosperity and happiness; disposed to give to good objects; kind; charitable.”

“Charity: love; universal benevolence; good will; * * * liberality to the poor and to the suffering, to benevolent institutions or to worthy causes; generosity; whatever is bestowed gratuitously on the needy or suffering for their relief; alms; any act of kindness.”

“Charitable: full of love and good will; benevolent; kind; liberal in benefactions to the poor; giving freely; generous; beneficent.”

In addition to the literal definition of these words, it may be well to examine briefly into the origin and history of benevolent and beneficial associations. It has been said that the prototype of benevolent and beneficial associations is met with in the friendly benefit societies of England which appeared more than a century ago and aimed at making provision for the relief of their members in sickness, and for the payment of a small sum at death to defray the attendant funeral

expenses. Like other associations or persons for agreed and lawful purposes, they may be simply voluntary associations or corporations. Their organization is usually based upon the lodge system with a more or less graduated series of central or governing bodies, throughout which a representative form of government ordinarily prevails. Their business is usually transacted in conformity with certain ritualistic forms and ceremonies and the benefits they extend to their members in the nature of insurance are said to be but incidental to their fraternal and social features, except in certain cases, as in the case of relief departments of modern railroads. Frequently it is purely optional with a member as to whether he shall take advantage of the insurance feature of the association or not. They have no capital stock, as they are founded upon the principle of entire mutuality. They usually make provision for the relief of the members against accident, disease, old age and the defrayal of funeral expenses of deceased members. See 19 R. C. L., pages 1178 et seq. The authority cited contains this statement:

"But while the principles of life insurance are thus applicable to the operations of mutual benefit associations, their great underlying purpose is not to insure or indemnify against loss, but to accumulate a fund from the contributions of members to be used in their own aid or relief in the misfortunes of sickness, injury or death."

This work distinguishes the objects and purposes of these associations from charities as follows:

"Distinguished from Charities.—Although it has been held that mutual benefit societies are charitable institutions in the sense that they may lawfully undertake to transact their business on Sunday, even to the extent of hearing and determining charges against members which result in the expulsion of the latter nevertheless they are not charities, in the legal sense of that term, and are easily distinguishable therefrom. No matter how diversified the purposes of mutual benefit societies may be, they are always confined to their own members and are dependent upon the payment by them of the assessments required by the by-laws. In a certain sense, beneficiary members get what is paid for, and nothing more, for if they cease to pay they cease to receive. As a matter of fact, members continue to pay for the benefit of another, not because of any charitable or benevolent impulse, but because they expect, upon their death, that those whom they are interested in, or bound by law or ties of affection to provide for, will receive the amount which it is agreed in the beneficiary certificate will be paid by the association to such beneficiary. This is neither charity nor benevolence. Moreover, payment to the beneficiary does not depend upon his or her financial condition. A wealthy child or widow of the assured member would be entitled to claim the amount named in the certificate equally with one poor or needy. Benefits are paid because of, so much money and so many assessments paid by the assured member and whatever benevolence or charity may be connected therewith is of a purely commercial character. Societies whose principal income is derived from compulsory contributions levied upon their members for the purpose of creating a fund to be used exclusively for the benefit of their members cannot be said to be either benevolent or charitable within the usual meaning of those terms. Accordingly it is generally held that they are not 'charities' within the meaning of statutory provisions exempting the property of such institutions from taxation, even though their surplus funds, together with voluntary contributions of members, are devoted to the relief of the needy. According to a few authorities, however, laws exempting from taxation the property of benevolent or charitable institutions, should be liberally construed so as to include fraternal or mutual benefit societies where their purposes are largely educational or charitable."

It is also stated in the same work that while the principles of insurance law govern many of their relations with their members and the beneficiaries of the latter, it is generally acknowledged that benevolent and beneficial associations are not insurance companies. It is not necessary to state fully the distinctions made between these associations and insurance companies. We respectfully refer those interested to pages 1183-84 of 19 R. C. L.

The words "benevolent" and "charitable" have been judicially defined and discussed in many court decisions, and in view of the importance of the subject matter of this opinion, we take the liberty of quoting rather extensively from these decisions. The following are taken from Words and Phrases, Vol. 2, pages 1074 et seq.:

"'Charity,' in its widest sense, denotes all the good affections which men ought to bear towards one another, and in that sense embraces what is generally understood by benevolence, philanthropy, and good will. In its more restricted sense it means merely relief or alms to the poor. *Morice vs. Bishop of Durham*, 9 Ves., 399, 400, 405; *State vs. Laramie County Commissioners*, 55 Pac., 451, 456, 8 Wyo., 104; *Town of Hamden vs. Rice*, 24 Conn., 350, 355.

"Mr. Binney, in his great argument in the case of *Vidal vs. Girard's Ex'rs*, 43 U. S. (2 How.), 127, 11 L. Ed., 205, defined a pious or charitable gift to be whatever as given for the love of God, or for the love of your neighbor, in the catholic and universal sense, given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private, or selfish. The love of God is the basis of all that is bestowed for His honor, the building of His church, the support of His ministers, the religious instruction of mankind. The love of neighbor is the principle that prompts and consecrates all the rest. This definition was approved by the Supreme Court of Pennsylvania. *Pennoyer vs. Wadhams*, 25 Pac., 720, 722, 20 Or., 274, 11 L. R. A., 210 (citing *Price vs. Maxwell*, 28 Pa. (4 Casey), 23, 35); *Boyd vs. Philadelphia Insurance Patrol*, 6 Atl., 536, 539, 113 Pa., 269; *Jackson vs. Phillips*, 96 Mass. (14 Allen), 539, 556; *Ford vs. Ford's Ex'r*, 16 S. W., 451, 452, 91 Ky., 572; *Johnson vs. De Pauw University*, 76 S. W., 851, 852, 25 Ky. Law Rep., 950; *Harrington vs. Pier*, 82 N. W., 345, 357, 105 Wis., 485, 50 L. R. A., 307, 76 Am. St. Rep., 924; *St. Clement vs. L'Institut Jacques Cartier*, 50 Atl., 376, 377, 95 Me., 493; *Allen vs. Stevens*, 49 N. Y. Supp., 431, 435, 22 Misc. Rep., 158.

"A 'charity,' in a legal sense, may be defined as a gift to be applied, consistently with existing law, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show it is charitable in its nature. *Webster vs. Sughrow*, 45 Atl., 139; 40, 69 N. H., 380, 48 L. R. A., 100 (citing *Jackson vs. Phillips*, 96 Mass. (14 Allen), 539, 556); *Pennuyer vs. Wadhams*, 25 Pac., 720, 722, 20 Or., 274, 11 L. R. A., 210; *State vs. Laramie County Com'rs*, 55 Pac., 451, 456, 8 Wyo., 104; *Kelly vs. Nichols*, 25 Atl., 840, 841, 18 R. I., 62, 19 L. R. A., 413; *Detwiller vs. Hartman*, 37 N. J. Eq. (10 Stew.), 347, 353; *De Camp vs. Dobbins*, 29 N. J. Eq. (2 Stew.), 36, 44; *Livesey vs. Jones*, 35 Atl., 1064, 55 N. J. Eq., 204; *Protestant Episcopal Education Soc. vs. Churchman's Representatives*, 80 Va., 718, 762; *In re Hinckley's Estate*, 53 Cal., 457, 497; *People vs. Fitch*, 47 N. E., 983, 988, 154 N. Y., 14, 38 L. R. A., 591; *Hoeffler vs. Clogan*, 49 N. E., 527, 529, 171 Ill., 462, 40 L. R. A., 730, 63 Am. St. Rep., 241; *Everett vs. Carr*, 59 Me., 325, 330; *Harrington vs. Pier*, 82 N. W., 345, 357, 105 Wis., 485, 50 L. R. A., 307, 76 Am. St. Rep., 924; *Stuart vs. City of Easton* (U. S.), 74 Fed., 854, 858, 21 C. C. A., 146; *Clayton vs. Hallett*, 70 Pac., 429, 438, 30 Colo., 231, 59 L. R. A., 407; *Troutman vs. De Boissiere Odd Fellows' Orphans' Home & Industrial Assn.* (Kan.), 64 Pac., 33, 36 (citing *Jackson vs. Phillips*, 96 Mass. (14 Allen), 539); *Doughten vs. Vandever*, 5 Del., Ch. 51, 65 (citing Justice Gray in Jack-

son vs. Phillips, 96 Mass. (14 Allen), 539, 556); Haggerty vs. St. Louis, K. & N. W. R. Co., 74 S. W., 456, 462, 100 Mo. App., 424.

"The definition of 'charity' has been steadily broadening. It was once held to be whatever is given for the love of God, or for the love of your neighbor, free from any taint or stain of any consideration that is personal or selfish. But the purity and unselfishness of the motive came to be regarded by the courts as important only in the moral aspects of the act, and was not insisted on in determining whether a gift was to a charitable use. In Appeal of Donahugh, 86 Pa., 306, 312, 'charity' was defined as something done out of good will, benevolence, and a desire to add to the happiness or improvement of our fellow beings. Trustees of Academy of Protestant Episcopal Church vs. Taylor, 25 Atl., 55, 56, 150 Pa., 565.

"The test which determines whether an enterprise is charitable or otherwise is its purpose. If its purpose is to make profit, it is not a charitable enterprise. Long vs. Rosedale Cemetery (U. S.), 84 Fed., 135, 136 (citing Union Pac. R. Co. vs. Artist (U. S.), 60 Fed., 365, 9 C. C. A., 14, 23 L. R. A., 581); Haggerty vs. St. Louis, K. & N. W. R. Co., 74 S. W., 456, 462, 100 Mo. App., 424.

"Const., Art. 10, Sec. 6, exempting from taxation lots and buildings used exclusively for 'purposes purely charitable,' exempts a hospital conducted by a religious community who devote themselves to the gratuitous care of the sick, paid patients being also received, but the whole object of the institution being charity, nobody connected with it deriving any profit from the work carried on there, and any profit derived from paid patients being applied exclusively to the charitable purposes of the institution, and every part of the building used exclusively for a hospital. The object being clearly charitable and exclusively so, and all idea of private gain, profit, or advantage being excluded, the purpose is 'purely charitable,' within the meaning of the law. State ex rel. Alexian Bros. Hospital vs. Powers, 10 Mo. App., 263, 266.

"An act, to be charitable in a legal sense, must be designed for some public benefit open to an indefinite and vague number; that is, the persons to be benefited must be vague, uncertain, and indefinite until they are selected or appointed to be the particular beneficiaries of the trust for the time being. Money contributed by the members of a club to a common fund, to be applied to the relief and the assistance of the particular members of the club when in sickness, in want of employment, or other disability, is not a charitable fund. It is not charity to give to your friend because of friendship, nor to your associate in a society because of your duty imposed by the laws of that society. "Charity," in the legal sense, has been illustrated by a reference to the customs of the ancient Jews to leave at random a sheaf of corn here and there in a field for the poor gleaners who follow the harvesters, it being unknown who would get it.' Franto vs. Bohemian Roman Catholic Cent. Union, 63 S. W., 1100, 1101, 164 Mo., 304, 54 L. R. A., 723, 86 Am. St. Rep., 611.

"A common fund created by voluntary contributions, the benefits being restricted to the members of the association, has not ordinarily been considered a charitable fund. Where the common fund of an unincorporated association organized for the purpose of nursing and caring for sick members, providing for maintenance and medical attention during illness and of burying such as should die, was created by initiation fees and monthly contributions, such fund is not a charitable trust. Burke vs. Roper, 79 Ala., 138, 142.

"A charitable use is one of a public nature, tending to the benefit or relief in some shape or other of the community at large, not restricted to the mutual aid of a few. An association whose objects are stated to be the employment of its funds in purposes of mutual benevolence amongst its members and families does not make it one whose object is a charitable use. Babb vs. Reed (Pa.), 5 Rawle, 151, 158, 28 Am. Dec., 650; St. Clement vs. L'Institut Jacques Cartier, 50 Atl., 376, 377, 95 Me., 493.

"Payment of sickness and funeral benefits for members only, out of an income chiefly derived from regular compulsory dues paid by such members, is not a use for a benevolent or charitable purpose, within Pub. St., c. 11, sec. 5, cl. 3, exempting from taxation real estate of societies devoting their entire income to benevolent, charitable, and other purposes. Young Men's Protestant Temperance and Benevolent Soc. vs. City of Fall River, 36 N. E., 57, 160 Mass., 409.

"A statute exempting the moneys and properties of an 'institution of purely public charity' from taxation cannot be construed to exempt a charitable or benevolent association which extends relief only to its own sick and needy members and to the widows and orphans of its deceased members. *Morning Star Lodge, No. 26, I. O. O. F., vs. Hayslip, 23 Ohio St., 144, 146.*

"A fraternal benefit society having a lodge system, with ritualistic work, and paying benefits in case of death of its members, is in the nature of an insurance organization, and is not a society of purely public charity within the exemption laws. *State Council of Catholic Knights vs. Board of Review of Effingham Co., 64 N. E., 1104, 1105, 198 Ill., 441.*

"Within the meaning of Const., Art. 10, Sec. 3, empowering the Legislature to exempt all property from taxation which is used for charitable purposes, is not limited to public purposes, but applied to the purposes of an association which uses its entire revenues for paying current expenses and assisting indigent members and their families. *City of Petersburg vs. Petersburg Benevolent Mechanics' Assn., 78 Va., 431, 436.*

"Charity may be benevolence, but all benevolence is not necessarily charity. The word 'charitable,' as used in the residuary clause of a will giving the property to trustees to be expended for benevolent and charitable purposes, is synonymous with 'benevolent.' *Fox vs. Gibbs, 29 Atl., 940, 942, 86 Me., 87.*

"'Charity,' as used in a will devising property for the furtherance and promotion of piety and good morals, and for the purposes of benevolence or charity or temperance, or for the education of deserving youths, 'is not to be interpreted in its largest technical sense, but is used in its limited and ordinary popular acceptation, and is synonymous with 'benevolence.' *Saltonstall vs. Sanders, 93 Mass. (11 Allen), 446, 470.*

"A Tennessee statute exempting organizations for charitable and benevolent purposes from taxation, etc., does not exempt a co-operative fire insurance company. *Co-operative Fire Ins. Order of Knoxville vs. Lewis, 80 Tenn. (12 Lea), 136.*

"The term 'charity' cannot be construed to include life insurance, which is merely a business transaction. *State vs. Taylor, 27 Atl., 797, 798, 56 N. J. Law (27 Vroom), 49.*"

The following are from Volume 1, Words and Phrases, 2nd series, pages 644 et seq:

"Though the word 'benevolent' covers a wide field, its essential and substantial meaning is familiar and easily grasped. It is little, if any, more indefinite than the word 'charitable,' and in many cases it has been held to have been synonymous with 'charitable.' *In re Dulles' Estate, 67 Atl., 49, 50, 218 Pa., 162, 12 L. R. A. (N. S.), 1177.*

"'Charity' is a gift to promote the welfare of others in need; and 'charitable,' as used in constitutional and statutory provisions relating to exemptions from taxation, means intended for charity, and 'benevolent' as used therein is entirely synonymous with 'charitable.' *Mason vs. Zimmerman, 106 Pac., 1005, 1008, 81 Kan., 799.*

"The words 'benevolent' and 'charitable' are nearly synonymous in meaning and as frequently used are entirely so, especially when applied to purposes or institutions. *Kansas Masonic Home vs. Board of Com'rs of Sedgwick County, 106 Pac., 1082, 1086, 81 Kan., 859, 26 L. R. A. (N. S.), 702.*

"In a bequest to be divided among such benevolent, charitable, and religious institutions and associations as might be selected by the testator's executors, the word 'benevolent' should be construed as synonymous with 'charitable,' and a bequest was therefore not void for uncertainty. *In re Murphy's Estate, 39 Atl., 70, 71, 184 Pa., 310, 63 Am. St. Rep., 802 (citing Domestic and Foreign Missionary Society's Appeal, 30 Pa., 435; Whitman vs. Lex (Pa.), 17 Serg. & R., 88, 17 Am. Dec., 644; Saltonstall vs. Sanders, 93 Mass. (11 Allen), 446; Rotch vs. Emerson, 105 Mass., 431; Goodale vs. Mooney, 60 N. H., 528; 49 Am. Rep., 334; Webst. Dict.).*

"'Charity' is defined as benevolence, any act of kindness or benevolence, and 'charitable' is defined as pertaining to or characterized by charity, benevolence

or kindness, and a gift to the board of park commissioners of a city for the purpose of erecting a drinking fountain for horses, and in connection therewith a life-size bronze statue of a certain horse, with an inscription thereon stating that it was donated by testator, and that the horse was the first to make a certain record, was a gift for charitable purposes within the inheritance tax law, Sec. 24, exempting such gifts from taxation. *In re Graves' Estate*, 89 N. E., 672, 673, 242 Ill., 23, 24 L. R. A. (N. S.), 283, 134 Am. St. Rep., 302, 17 Ann. Cas., 137.

"'Benevolent' includes objects and purposes that are not 'charitable.' *Van Sychel vs. Johnson*, 70 Atl., 657, 658, 80 N. J. Eq., 117.

"'Benevolent' is wider than 'charitable' in its legal signification. A trust for benevolent and charitable objects, as the trustee may select, is void as being indefinite and vague. *Hegeman's Ex'rs vs. Roome*, 62 Atl., 392, 393, 70 N. J. Eq., 562.

"Comp. Laws, Sec. 8258-8263, as originally enacted, was entitled 'An act to provide for the incorporation of benevolent societies,' and authorized a corporation to provide for the relief of distressed members, the visitation of the sick, etc., and such other 'benevolent and worthy purposes' and objects as affect the members of the corporation, and gave the corporation power to receive and enjoy property, and to sell, mortgage, and dispose of the same, provided that the proceeds arising from all estates and investments should be devoted exclusively to the benevolent purposes and objects of the corporation. Held, that the word 'benevolent' has a much broader significance than the word 'charity,' and includes things which are in no sense charities, and refers to the kind intention of the donor rather than the condition of the donee, meaning in its broader sense liberality and generosity, though its meaning may be circumscribed by the circumstances, and, as used in the statutes, it denotes acts tending to relieve misfortune and confer a benefit on a needy member, though he may not be an actual object of charity, so that a conveyance by the society to all of its members was not a disposition for 'benevolent purposes,' and hence was beyond the powers of the society. *German Corporation of Negaunee vs. Negaunee German Aid Society*, 138 N. W., 343, 345, 172 Mich., 650 (quoting 1 Words and Phrases, pp. 753-756).

"Incorporated mutual benefit associations such as a typographical society, which is open to all printers of the city in which it is located, or a teachers' association, open to all teachers, or a bank officers' association, open to all bank officers and clerks, are public, and not private, charities, though their benefits are limited to their own members; and a gift to them is a gift for a 'charitable purpose,' within the meaning of a will giving the residue of testator's estate to trustees, to be applied 'to such charitable purposes' as to them may seem proper. *Minns vs. Billings*, 66 N. E., 593, 183 Mass., 126, 5 L. R. A. (N. S.), 686, 97 Am. St. Rep., 420."

The word "benevolent" has also been considered on numerous occasions, and we set out the following definitions, etc., as found in Volume 1, Words and Phrases, pages 754 et seq:

"The word 'benevolent' of itself, without anything in the context to qualify or restrict its ordinary meaning, clearly includes not only purposes which are deemed charitable by a court of equity, but also any acts of kindness or good will, or a disposition to do good, the objects of which have no relation to the promotion of education, learning, or religion, the relief of the needy, the sick, or the afflicted, the support of public works, or the relief of public burdens, and cannot be deemed 'charitable' in the technical and legal sense. *Chamberlain vs. Stearns*, 111 Mass., 267, 268.

"'Benevolent purpose' is not interchangeable with the expression 'charitable purpose.' While it is true that there is no charitable which is not also a benevolent purpose, yet a converse is not equally true, for there may be a 'benevolent' purpose which is not 'charitable,' in the legal sense of the term. *Adye vs. Smith*, 44 Conn., 60, 71, 26 Am. Rep., 424.

"'Benevolent' is more definite and of a far wider range than 'charitable' or 'religious,' and includes all gifts prompted by good will or kind feeling towards the recipient, whether an object of charity or not, and it has no legal meaning

separate from its usual meaning. *Norris vs. Thomson's Ex'rs*, 19 N. J. Eq. (5 C. E. Green), 489, 523.

"Benevolent is a word of much the same general import and meaning as charitable, benevolence having for its object the general good of mankind, and not comprehending in its common acceptation a gift bestowed for purely private and personal reasons. *Parks' Adm'r vs. American Home Missionary Soc.*, 20 Atl., 107, 109, 62 Vt., 19.

"'Benevolent' means, literally, well-wishing, and has a larger meaning than 'charitable'; hence, though many charitable institutions are properly called 'benevolent,' as used in Rev. St., Sec. 1038, Subd. 3, exempting from taxation the personal property of benevolent associations, it is not necessary that the association or institution should be free to all, in order to make it a benevolent association. *St. Joseph's Hospital Ass'n vs. Ashland County*, 72 N. W., 43, 96 Wis., 636.

"The design of what are known as 'benevolent societies,' which are purely of a philanthropic or benevolent character, is not to indemnify or secure the members from loss, but from the contribution of members to accumulate a fund to be used in their own aid or relief in the misfortunes of sickness, injury, or death. *State vs. Pittsburg, C., C. & St. L. R. Co.*, 67 N. E., 93, 98, 68 Ohio St., 9, 96 Am. St. Rep., 635 (citing *Commonwealth vs. Equitable Beneficial Ass'n*, 137 Pa., 412, 18 Atl., 1112).

"The name of an association will not necessarily fix or establish its real legal character. Even if it has adopted the name of a 'benevolent association,' it would make no difference. The law looks through and behind the names of things, and passes its judgment upon their substance. If the prevalent purpose and nature of an association, of whatever name, be that of insurance, the benevolent or charitable results to its beneficiaries would not change its legal character. *Bolton vs. Bolton*, 73 Me., 299, 303.

"The great underlying principle of benevolent associations is not to indemnify or secure against loss; its design is to accumulate a fund from the contributions of its members for beneficial and protective purposes, to be used for their own aid or relief in the misfortunes of sickness, injury, and death. The benefits, although secured by contracts, and for that reason to a limited extent assimilated to the proceeds of insurance, are not so considered. Such societies have no capital stock, they yield no profit, and their contracts, although beneficial and protective, altogether exclude the idea of insurance, or indemnity or security against loss. Such an organization is not an insurance company. *Dickinson vs. Grand Lodge, A. O. U. W. of Pennsylvania*, 28 Atl., 293, 294, 159 Pa., 258. See, also, *Northwestern Masonic Aid Ass'n vs. Jones*, 26 Atl., 253, 254, 154 Pa., 99, 35 Am. St. Rep., 810; *National Mut. Aid Soc. vs. Lupold*, 101 Pa., 111, 119; *Pennsylvania Mut. Life Ins. Co. vs. Mechanics' Savings Bank & Trust Co. (U. S.)*, 72 Fed., 413, 420, 19 C. C. A., 286, 38 L. R. A., 33, 70.

"Mutual aid associations, which are primarily for social and charitable purposes, and for securing efficient mutual aid among their members, are not usually described as 'insurance companies,' but belong to the distinctly recognized class of organizations known as 'benevolent associations.' *Penn. Mut. Life Ins. Co. vs. Mechanics' Savings Bank & Trust Co. (U. S.)*, 72 Fed., 413, 420, 19 C. C. A., 286, 38 L. R. A., 33, 70.

"Mutual associations for the purpose of securing, inter alia, sick benefit and burial expenses, are 'benevolent institutions' in the strictest sense of the term. *State vs. Taylor*, 27 Atl., 797, 798, 56 N. J. Law (27 Vroom), 49.

"Payment of sickness and funeral benefits for members only, out of an income chiefly derived from regular compulsory dues paid by such members, is not a use for a 'benevolent' or 'charitable' purpose, within Pub. St., c. 11, sec. 5, cl. 3, exempting from taxation real estate of societies devoting their entire incomes to benevolent, charitable, and other purposes. *Young Men's Protestant Temperance and Benevolent Soc. vs. City of Fall River*, 36 N. E., 57, 160 Mass., 409.

"A corporation organized for a purpose where pecuniary profit is not an object, but having a fund made up by fees, fines, and assessments of its members, under the control of the association, to be used for benevolent purposes, and in aiding and sustaining those of its members who become sick or distressed, is a benevolent

association. *Pyre vs. Mutual Relief Soc. of French Zouaves*, 27 Pac., 191, 192, 90 Cal., 240.

"The benefits of a mutual fire insurance order are restricted to those who become members, and who agree to do just what they require to be done for themselves upon loss by fire. They all contract for a benefit to themselves in certain contingencies, and pay their money for it. The order is not a 'benevolent' or 'charitable' institution, but an insurance company; and its secretary, whose duty it is to interest himself in behalf of the order by seeking members, and otherwise, to examine buildings on which protection is sought, and see that all questions are answered by the applicant, and present the application to the chairman of the board, collect the membership fee and examination fees, is an insurance agent, and, as such, liable to the payment of the privilege tax enacted of insurance agents. *Co-operative Fire Ins. Order vs. Lewis*, 80 Tenn. (12 Lea), 136, 140, 141.

"A company organized to insure lives on the plan of assessments upon surviving members, without other restrictions than that policyholders shall have an interest in the lives of members, is not a 'beneficial association,' and entitled to the privileges of such organizations, which privileges are extended on account of the limited nature of the life insurance they are authorized to assume, it being confined to insurance for the benefit of the families and heirs of the members. *State vs. Moore*, 38 Ohio St., 7, 10.

"A society organized for the purpose of lending money probably to its own members, however excellent the motives of the associates may be, is not an association within the statute authorizing organizations for benevolent purposes. *McMorris vs. Simpson* (N. Y.), 21 Wend., 610.

"A benevolent or charitable association must be one whose leading purpose is benevolence or charity, and not the pecuniary advantage of its members. The fact that a savings association formed for the pecuniary profit of its stockholders, will, if well managed, promote economy and providence, is a mere incident to its characteristic purposes, and does not render it a benevolent association, since it is carried on for a pecuniary profit, and not for benevolence. *Sheren vs. Mendenhall*, 23 Minn., 92, 93."

And the following from Volume 1, 2nd series, beginning at page 429:

"Comp. Laws, Sections 8258-8263, as originally enacted, was entitled 'An act to provide for the incorporation of benevolent societies' and authorized a corporation to provide for the relief of distressed members, the visitation of the sick, etc., and such other 'benevolent and worthy purposes' and objects as affect the members of the corporation, and gave the corporation power to receive and enjoy property, and to sell, mortgage, and dispose of the same, provided that the proceeds arising from all estate and investments should be devoted exclusively to the benevolent purposes and objects of the corporation. Held, that the word 'benevolent' had a much broader significance than the word 'charity' and includes things which are in no sense charities, and refers to the kind intention of the donor rather than the condition of the donee, meaning in its broader sense liberality and generosity; though its meaning may be circumscribed by the circumstances, and, as used in the statutes, it denotes acts tending to relieve misfortune and confer a benefit on a needy member, though he may not be an actual object of charity, so that a conveyance by the society to all of its members was not a disposition for 'benevolent purposes' and hence was beyond the powers of the society. *German Corp. of Negaunee vs. Negaunee German Aid Society*, 138 N. W., 343, 345, 172 Mich., 650 (quoting Words and Phrases, pages 753-756).

"A cemetery corporation, selling lots to members of the public generally, is not a charitable or benevolent corporation within St. 1909, c. 490, pt. 1, sec. 5, cl. 3, exempting from taxation the property of 'benevolent' and 'charitable' institutions. *Town of Milford vs. Commissioners of Worcester County*, 100 N. E., 60, 213 Mass., 162.

"An association formed to extend aid to sick members and to defray burial expenses of their dead from funds accumulated from initiation fees and monthly dues is not a benevolent or religious society, within a code provision relating to

misdemeanors of treasurers of such societies. *State vs. Dunn*, 46 S. E., 949, 134 N. C., 663."

In the case of *State vs. Dunn*, 134 N. C., 663, 46 S. E., 949, the Supreme Court of North Carolina held that an association formed to extend aid to sick members and to defray burial expenses of their dead from funds accumulated from initiation fees and monthly dues, was not a benevolent or religious society within the meaning of a benevolent or religious society within the meaning of a statute relating to misdemeanors of treasurers of such societies. In deciding the case, the court said:

"In this construction of the statute we cannot concur. The society was organized for the mutual benefit and advantage of its members, and was not 'benevolent,' within the ordinary meaning and acceptation of that word. Webster defines 'benevolent' to mean 'having a disposition to do good; possessing or manifesting love to mankind, and a desire to promote their prosperity and happiness; disposed to give to good objects; kind; charitable.' Substantially the same definition is given in the other standard dictionaries. Black, in his *Law Dictionary*, defines 'benevolence' as the doing a kind or helpful action towards another, under no obligation except an ethical one. He says it will include all gifts prompted by good will or kind feeling towards the recipient, whether an object of charity or not. A benevolent society, of course, is one organized for benevolent purposes. He defines a benefit society as one which receives periodical payments from its members, and holds them as a fund to be loaned or given to those of the members needing pecuniary relief. 'The essential difference between a benevolent association and a beneficial society, in the strict use of those terms, is that the former has for its object the conferring of benefits without requiring an equivalent from the one benefited, and in that sense it may be a charity.' 3 *Am. & Eng. Enc.* (2nd Ed.), p. 1043."

In *Commonwealth vs. Equitable Beneficial Association*, 137 Pa. State, 412, 18 Atl., 1112, the Supreme Court of Pennsylvania drew a distinction between the business of an insurance company and that of benevolent societies, saying:

"The general object or purpose of an insurance company is to afford indemnity or security against loss. Its engagements are not founded in any philanthropic, benevolent, or charitable principle. It is a merely business adventure, in which one, for a stipulated consideration or premium per cent, engages to make up, wholly or in part, or in a certain agreed amount, any specific loss which another may sustain; and it may apply to loss of property, to personal injury, or to the loss of life. To grant indemnity or security against loss for a consideration is not only the design and purpose of an insurance company, but is also the dominant and characteristic feature of the contract of insurance. What is known as a 'beneficial association,' however, has a wholly different object and purpose in view. The great underlying purpose of the organization is not to indemnify or to secure against loss. Its design is to accumulate a fund from the contributions of its members 'for beneficial or protective purposes,' to be used in their own aid or relief in the misfortunes of sickness, injury, or death. The benefits, although secured by contract, and for that reason to a limited extent assimilated to the proceeds of insurance, are not so considered. Such societies are rather of a philanthropic or benevolent character. Their beneficial features may be of a narrow or restricted character. The motives of the members may be to some extent selfish, but the principle upon which they rest is founded in the considerations mentioned. These benefits, by the rule of their organization, are payable to their own unfortunate, out of funds which the members have themselves contributed for the purpose, not as an indemnity or security against loss, but as a protective relief in case of sickness or injury, or to provide the means of a decent burial in the event of death."

In distinguishing between the activities of a benevolent association

and those of a life insurance company, the New Jersey Supreme Court, in *State vs. Taylor*, 56 N. J. L., 49, 27 Atl., 797, said:

"Mutual associations for the purpose of securing, inter alia, sick benefits and burial expenses, are benevolent institutions, in the strictest sense of the term, whereas a contract for life insurance is a mere business undertaking, entirely divorced from all charitable considerations. In my judgment, the one is as plainly outside the purview of the insurance laws as the other is clearly within the scope of their restrictive and supervisory provisions."

The certificate involved in that case, which was held not to be a life insurance policy, entitled the holder to sick benefits and a funeral benefit of one hundred dollars.

In *Portland Hibernian Society*, 30 L. R. A., 167, the Oregon Supreme Court held that a society incorporated for this purpose:

"The objects of this society shall be charity and benevolence, for the purpose of contributing a weekly allowance for sickness and the means of defraying the expenses consequent upon the death of a member and to contribute for the above named purposes such sums as a majority of the members may be pleased to contribute."

And a society to which only certain Irishmen could belong and the constitution and by-laws of which provided that each person who had been a member for six months and whose name was on the list of active members was entitled in case of sickness to receive such sum as the society might direct, not to exceed \$7 per week, and in addition thereto, the society might extend benefit to sick members and upon the death of a member from \$25 to \$75 was paid for funeral expenses, and the widow and orphans were entitled to receive \$25, and if need be in three months a like sum, etc., was a charitable institution within the meaning of the tax exemption law, although it was held in the case that certain property of the association was not exempt because it was used for other and different purposes, although the revenue therefrom was devoted to charitable or benevolent objects. After discussing certain authorities, the court said:

"From an examination of this question and all the authorities within our reach bearing upon it, we take the result to be that an institution organized for benevolent and charitable purposes, free from any element of private or corporate gain, and which devotes its entire revenue to the payment of current expenses and the relief of the poor and needy, is a charitable institution, within the meaning of the law, although it may confine its benefits primarily to its own members and their families."

In *Royal Highlanders vs. State of Nebraska*, 108 N. W., 183, 7 L. R. A. (New Series), 380, the Nebraska Supreme Court held that a fraternal beneficiary association conducted for the mutual benefit of its members and for the purpose of providing a fund, by the payment of stated dues and fees from the members, for the payment of a special amount upon the death of each member to a beneficiary named by him, was not a charitable association and its property and funds were not used exclusively for charitable purposes so as to be exempt from taxation by the laws of the State. We quote the following from the court's opinion:

"Appellant's first contention is that its entire property is exempt from taxation, because it is used exclusively for charitable purposes. This question must be determined, not by what the association professes to be, but by what it really is, and the nature of the business it conducts. The general trend of judicial

opinion in this country is that organizations like the appellant are, in effect, mutual insurance companies. In *State ex rel. Atty. Gen. vs. Northwestern Mut. Live Stock Asso.*, 16 Neb., 549, 20 N. W., 852, it was held that an association which insured only the property of its members by a policy in the form of a certificate of membership, for a premium paid simply as an admission fee, and by assessing its members to pay for the losses sustained by such certificate holders, was, to all intents and purposes, a mutual insurance company. Again, in *State ex rel. Atty. Gen. vs. Farmers & M. Mut. Benev. Asso.*, 18 Neb., 276, 25 N. W., 81, the court, speaking of associations like the appellant, said: 'Courts have, with a great degree of unanimity, treated all such organizations as substantially life insurance companies, applying to them and to the mutual relations of the members the rules and principles applicable to the contract of life insurance.' The appellant classes itself as exclusively a charitable organization, but, from an examination of its by-laws, called 'original edicts,' it appears that it is conducted for the sole benefit of its members and their beneficiaries. Its declared purposes are: 'First, to unite for mutual benefit and fraternal protection all white persons of sound physical health and exemplary character, between the ages of eighteen and sixty-five; and to bestow substantial benefits upon the beneficiaries of its membership, admitted between the ages of eighteen and forty-eight years, who are entitled thereto. Second, to cheer and aid the unfortunate, to comfort and provide for the sick and aged, and to bury with becoming honor the dead of our membership. Third, to educate its members socially, morally, and intellectually, promulgating by ritualistic degrees the principles of prudence, fidelity, and valor. Fourth, to establish and maintain funds for the purpose of paying all benefits provided for the members and their beneficiaries, and to defray the expense of management and promotion.' All of these purposes are confined to its members, and are dependent upon the payment by them of the assessments required by the by-laws. Beneficiary members get what is paid for, and nothing more. If they cease to pay, they cease to receive. Members continue to pay for the benefit of another, not because of any charitable or benevolent impulse, but because they expect, upon their death, that those whom they are interested in, or bound by laws or ties of affection to provide for, will receive the amount which it is agreed in the beneficiary certificate will be paid by the association to such beneficiary. This is neither charity nor benevolence. Payment to the beneficiary does not depend upon his or her financial condition. A wealthy child or widow of the assured member would be entitled to claim the amount named in his certificate, equally with one poor or needy. This benefit is paid because of so much money, and so many assessments, paid by the assured member. This benevolence or charity is purely of a commercial character. It does not seek out the needy, but invites only the able-bodied and healthy. It is a business arrangement. The beneficiary receives payment because of a contract obligation on the part of the association to make such payment. In *State ex rel. Graham vs. Miller*, 66 Iowa, 34, 23 N. W., 241, the court held that the Ancient Order of United Workmen, an association of practically the same character as the appellant, is a life insurance company; that its fraternal character was simply an incident to its many purposes. In *Robinson vs. Templar Lodge*, No. 17, I. O. O. F., 117 Cal., 370, 59 Am. St. Rep., 193, 49 Pac., 170, the court said of an association similar in character and regulations to the appellant, concerning payments to be made to it, that 'these benefits are not charities in the strictest sense. They are dues which the society becomes obliged to pay in certain events. It is a matter of right, and not of grace. A consideration is paid, and the lodge reserves no right to withhold payments when the conditions arise.' It seems clear, therefore, that the appellant is not what may be termed purely or exclusively a charitable organization. It further appears from an examination of its by-laws that its funds are divided into two classes, as follows: 'The finance of the fraternity shall be divided into two funds: The fidelity fund and the general fund.' The fidelity fund of the association is its mortuary fund, and is set apart for the payment of its beneficiary certificates due and to become due, while the general fund is used for organizing, maintaining, and promoting the best interest, growth, and welfare of the fraternity. In other words, for the payment of the expenses of carrying on its business. So we are of opinion that

the property of the appellant is not exempt from taxation by reason of its being used exclusively for charitable purposes."

In a note found in 7 L. R. A. (New Series), page 380, in connection with the case immediately above cited and quoted from, we find this statement:

"The general rule established by the decisions is in accord with the Royal Highlanders vs. State, holding that fraternal benefit societies not organized for profit or gain but purely for the purpose of paying indemnity upon the death of their members for an agreed compensation, are in effect life insurance companies and not charitable or benevolent institutions within the meaning of statutory provisions exempting the property of such institutions from taxation."

The following cases seem to support substantially the above quoted statement:

- National Council K. & L. of S. vs. Phillips, 63 Kan., 799, 66 Pac., 1011.
- Same style of case, 63 Kan., 808, 66 Pac., 1014.
- Jones Estate, 22 Abb., N. C., 50, 2 N. Y. Supp., 671.
- Young Men's Protestant Temperance Benevolent Society vs. Fall River, 160 Mass., 409, 36 N. E., 57.
- Masonic Aid Association vs. Taylor, 2 S. D., 324, 50 N. W., 93.

In Petersburg vs. Petersburg Benevolent Mechanics Association, 78 Va., 431, it was held that the property of a mutual society of which charity is the principal but not sole object is exempt from taxation under a statute exempting the property of Masonic, Odd Fellow and other like benevolent associations which devote the proceeds of their property exclusively to charitable purposes. In this case the court said:

"Its revenues are wholly applied to the payment of its current expenses, the assistance of its indigent members and the families of such of them as may have died in needy circumstances. These are charitable purposes and the relief afforded is none the less charitable because confined to members of the association and the families of deceased members. It is not essential to charity that it shall be universal."

On the other hand, in Masonic Aid Association vs. Taylor, above cited, the court said:

"A society which by contract agrees to pay to the beneficiary of a deceased member a sum of money is an insurance company whatever may be the terms of payment of the consideration by the member or the mode of payment of the sum to be paid in the event of his death."

In State vs. Pittsburgh, etc., Ry. Co., 68 Ohio St., 9, 67 N. E., 93, a suit in quo warranto was brought against the railway company asking for judgment "ousting the defendant from further conducting the business of insurance by means of its relief department, or in any other manner whatever." The association involved was one established by the railway company composed of some or all of its employees, and the company for the purpose of accumulating and maintaining a relief fund created by the voluntary contributions from their wages by employees who apply for membership in said fund and are admitted—the railway company to take charge of and be responsible for the funds, make up deficiencies in the same, supply facilities for conducting the business and pay the operating expenses, supply surgical attendants for injuries received in its service and pay the members or their designated beneficiaries the stated share of the benefit

fund so raised from wages retained by the company. The court held that the railway company was not conducting an insurance business and that the company was acting within its implied powers and that its acts were not ultra vires nor contrary to public policy. The court used the following language in discussing the nature of insurance:

"With this understanding of the general outlines of the origin, purpose, and character of the relief department connected with the defendant, is it guilty of conducting an insurance business in contravention of law? This question suggests another: What is insurance business? Various definitions have been given in brief of counsel, but we are content with the summary given in Bouvier's Law Dictionary (Rawle's Revision), 1068: 'A contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils.' In another form, on the same page, it is said: 'An insurance in relation to property is a contract whereby the insurer becomes bound, for a definite consideration, to indemnify the insured against loss or damage to a certain property named in the policy, by reason of certain perils to which it may be exposed.' Life and accident insurance is a contract whereby one party, for a stipulated consideration, agrees to indemnify another against injuries by accident or death from any cause not excepted in the contract. In the parlance of the business of insurance, ordinarily the contract is called a 'policy'; the consideration paid, the 'premium'; and the events insured against are called 'risks and perils.' In case of injury or destruction, of the property insured, or injury by accident, or liability for death, the liability is called a 'loss.' Policies of this character may be preceded by an application for the same."

The following cases were cited and discussed as being in support of the court's decision in the case immediately preceding:

Commonwealth vs. Equitable Beneficial Association, 137 Pa., 412, 18 Atl., 1112.
 Northwestern Masonic Aid Assn. of Chicago vs. Jones, 154 Pa., 99, 26 Atl., 253, 35 Am. St. Repts., 810.
 Beck vs. The Pa. R. R. Co., 63 N. J. L., 232, 43 Atl., 908, 76 Am. St. Repts., 211.
 Donald vs. C. B. & Q. Ry. Co., 93 Iowa, 284, 61 N. W., 971, 33 L. R. A., 492.
 Maine vs. The C. B. & Q. R. R. Co., 109 Iowa, 260, 70 N. W., 630, 80 N. W., 315.

In *Splawn vs. Chew*, 60 Texas, 532, the Supreme Court of Texas held that a beneficial association (American Legion of Honor of Texas), one of the objects of which as stated in its constitution is to establish a benefit fund to be raised by collecting from parties joining the order before they are received and by assessments made upon members if necessary, and from which fund upon satisfactory proof of the death of a member who has complied with all of the order's lawful requirements a sum of not exceeding \$5000 shall be paid to the family, orphans or dependents as the member may direct the order, in effect and so far as the above provisions are concerned, is a mutual insurance company in which the life of each member is insured by reason of his membership and compliance with the requirements of its constitution and by-laws. See also *American Legion of Honor vs. Larmour*, 81 Texas, 71, 16 S. W., 633; *McCorkle vs. Texas Benevolent Association*, 71 Texas, 149, 8 S. W., 516.

A saving and loan company which confers upon its shareholders only the right to vote at stockholders' meetings and to receive a specified sum on their holdings at a certain period and which limits their liability to the payment of dues, fines and forfeitures, is not a mutual benefit association.

Pioneer Savings, etc., Company vs. Peck, 20 Texas Civil Appeals, 111, 49 S. W., 160, affirmed in 93 Texas, 717, no op.

A corporation organized to provide for its members during life and their families after death, providing in its constitution and by-laws for the payment to the member at death of a certain sum in consideration of the payment of a membership fee and certain future assessments, the member being obliged to be examined by a physician and found to be in good health before becoming a member, the officers and agents of the corporation receiving good salaries, is not a corporation for benevolent purposes within the meaning of Revised Statutes (of 1879), Title 20, but is an insurance company and amenable to all the provisions relating to such companies. Farmer vs. State, 69 Texas, 561, 7 S. W., 220.

We direct special attention to the case just cited. It was decided by our State Supreme Court in 1888. The suit was an information in the nature of a quo warranto instituted for the purpose of ousting appellants from certain corporate franchises which they were claiming to exercise under the name of Masonic Mutual Benefit Association of Texas. The result of the trial in the court below was a judgment of ouster against the appellant upon the ground that they were acting together as an insurance company under the above name without having been incorporated in accordance with the laws of our State regulating the incorporation of insurance companies. The appellants, it seemed, were chartered September 3, 1883, and the charter was amended February 23, 1885, under the corporation statute authorizing the formation of corporations for "the support of any benevolent, charitable, educational or missionary undertaking," which is the same language used in our present statute. See Article 566, subdivision 2, Revised Statutes of 1879. The charter stated the object of the association to be "to provide for its members during life and their families after death by issuing to its members certificates payable from \$1000 to \$3000 at death, and also for the purpose of issuing endowment certificates payable during life at intervals to its members, and other charitable purposes set forth in the constitution and laws governing the body." The only purposes set forth in its constitution were "to give financial aid and benefits to members during life and to their families or those depending upon them after death, and to pay weekly sick benefits to its members," etc.

As disclosing more particularly the nature of the association, we quote the following from the court's opinion:

"The evidence disclosed that the original incorporators were seven in number, and that five of these were, by the charter, made directors. The constitution provides that the incorporators of the association shall be its directors, and that its officers shall be chosen from its incorporators. None others but Master Masons in good standing, or those who had demitted, and their wives, their widows, and unmarried daughters, were made eligible to membership in the association; and if from age or infirmities the husband could not become a member, the wife might do so. The theory of the constitution was that three forms of certificate might be issued, but in practice only two were used. One of those (form 'A'), was issued to each member for \$1000, upon consideration of \$7 cash, and the payment of an advance assessment 30 days thereafter, and an agreement to pay the mortuary assessments for each month thereafter till death. Within 90 days from the required proof of death, payment was to be made to the beneficiaries as follows: If the death occurred within one year,

one-fifth, \$200; if after one and before two years, three-fifths, \$400; if after second but before expiration of third year, \$600. Form 'B' entitled each member to \$200 death benefit fund for his heirs, and permitted him to participate in the 'endowment fund' of \$1000, by installments of \$200 each, during his life from time to time, as the five coupons attached thereto matured. This form, too, seems to have fallen into disuse. No person could become a member who was under 21 or over 60 years of age, or who suffered from age or infirmities. The application for membership provided that it should form part of the contract with the association, and the agreement of the association to make payments is based upon the consideration of the payments made or to be made by the members. The assessments upon these certificates were graduated according to the age of the member holding one, the younger members being required to pay less than those of more advanced age. The same rule was observed in the collection of assessments upon the death of a member. If assessments were not paid within 30 days after notice to a member, he was to be suspended from the benefits of the association. What is termed a 'Permanent Fund' was formed from the admission fees, by taking at the rate of 25 cents out of each assessment paid by a member upon \$1000, and this was to be invested by the directors and used (1) to defray the necessary expenses of management, and (2) to secure stability and perpetuity by paying claims in forms 'A' and 'B,' when the rate of mortality was so great that twelve assessments per annum would not suffice. General traveling agents were to be appointed to solicit members, and the membership fee generally went to pay for their services. Twenty per cent of assessments went to pay expenses of the association, including salaries of officers. The president received a salary of \$40 per month; the secretary, \$60, and the treasurer two and one-half per cent of the money received and paid out. Members totally incapacitated for work from sickness, or who were in actual distress, received \$3 per week, during their sickness, if sick not less than one week nor more than five. Persons applying for membership were required to be examined by a physician, and could not be received unless they certified that they were in good health."

The Supreme Court sustained the court below in holding that this association was not a corporation for benevolent purposes within the meaning of the corporation statute, but, on the other hand, was more in the nature of an insurance company, and was, therefore, amenable to all the provisions of the statutes relating to such companies, and since these statutes had not been complied with by the incorporators, the judgment of ouster should be affirmed.

The court in deciding the case used the following language:

"These are some of the leading features of the association, and the first question we are to determine is whether it was entitled to be incorporated under Title 20 of our Revised Statutes. This title defines corporations to be of three kinds: First, religious; second, corporations for charity or benevolence; and third, corporations for profit. This corporation is not of a religious character, and it is admitted by the appellants that its purposes are not charitable. It is claimed, however, that it was chartered for a *benevolent* object, and its incorporation was therefore legal under this title, and it should be allowed to exist without interruption from the State authorities. It is clear from the division into classes made by the statute, taken in connection with subsequent articles under the same title, that corporations for benevolence are entirely distinct from those whose main object is pecuniary profit. In Article 566 are enumerated in twenty-seven subdivisions the different purposes for which corporations may be chartered under that title. Under the twenty-second subdivision only can the present body claim to be chartered as a benevolent association. In none of the other subdivisions is the subject of benevolence referred to; and in all which relate to corporations of profit the special object of the charter is particularly stated, except in the twenty-seventh subdivision, which seems intended to cover all purposes of mutual profit or benefit not embraced in the preceding portions of the article. This twenty-seventh subdivision was repealed by act of March 27, 1885. In other titles of the Revised Statutes are found special provisions

for the incorporation of insurance and railroad companies, and these must be followed in all cases where it is sought to have these institutions chartered by general law. If the body under consideration is a benevolent institution, it was properly incorporated under Title 20; but if its object is profit, then its incorporation under that title will be valid or not according as it comes under any of the heads named in Article 566, to which we have referred. What then are the purposes of the body under consideration? Its charter makes its object to provide for its members during life, and their families after death. This is apparently a benevolent object, but how is this to be accomplished? The association makes a contract with each member when he joins it, that for the consideration of a certain sum of money paid in cash, and other sums to be paid in future, which he agrees to do, that they will, 90 days after proper proof of his death, pay to certain beneficiaries a certain sum, graduated in amount, according to the length of time he lives, and, of course, according to the amount of assessments he has paid into the treasury. Before any one can enter into such a contract he must undergo a regular examination as to his health, habits, occupation, and as to his family, and how much insurance upon his life, etc. A physician must make an examination as to his bodily condition, and according as he is sufficiently sound and of a certain age is he accepted into the fraternity. This contract has all the features of a life insurance policy. It is a contract by which one party, for a consideration, promises to make a certain payment of money upon the death of the other; and it is well settled that whatever may be the terms of payment of the consideration by the assured, or the mode of estimating or securing payment of the insurance money, it is still a contract of insurance, no matter by what name it may be called. *Com. vs. Wetherbee*, 105 Mass., 149; *State vs. Benevolent Assn.*, 18 Neb., 281, 25 N. W. Rep., 81. It is in effect the ordinary contract made by insurance companies with the assured, differing from it in no important respect. The terms of payment are somewhat different, the amount being greater or less according as the member lives long or dies early; still it is a payment to be made at his death. The assured cannot be forced by suit to pay future premiums; but he loses his membership if he defaults in this respect. It is a common provision in insurance policies that if the assured fails to perform some of the conditions of his contract, that his policy be canceled, and the premiums paid shall, in that event, become forfeited to the company. The provision that membership may be forfeited for non-payment of assessments is in effect the same thing; for the assessments serve the purposes of premiums in an ordinary life policy. The examination, too, which precedes admission into membership is the same as that which occurs before the issuance of a policy, and is intended to secure the society against fraud or imposition; to prevent an unsound person from becoming insured; and to reduce its risks of loss, and increase its chances of profit. It matters not that the member was entitled to benefits in case of sickness. Insurance can be effected upon the health as well as the life of an individual. These benefits, too, are incidental to the main object of the institution, and the certificates issued by it are none the less policies of insurance, though the insured derive sums of money from the contract other than those for which he has specially bargained. We are of opinion, therefore, that the appellants constituted an insurance company within the spirit and true meaning of that term, and not an association conducted in the interest of benevolence, as contemplated by Title 20 of our Revised Statutes. This question has been frequently before the courts of other States, and, so far as we can ascertain, has been universally decided in accordance with the opinion above expressed."

The Supreme Court in the above case cites in support of its decisions, discussing some of them, the following authorities:

- Bolton vs. Bolton*, 73 Me., 299.
- State vs. Critchett*, 32 N. W., 787.
- Com. vs. Wetherbee*, 105 Mass., 149.
- State vs. Benevolent Assn.*, 18 Neb., 281, 25 N. W., 81.
- May, Ins.*, Sec. 550.
- State vs. Citizens Assn.*, 6 Mo. App., 163.

State vs. Merchants, etc., Assn., 72 Mo., 146.

People vs. Wilson, 46 N. Y., 477.

State vs. Life Assn., 38 Ohio St., 281.

Other cases discussed and differentiated by the court are:

League vs. People, 90 Ill., 166.

State vs. Protection Assn., 26 Ohio St., 19.

Com. vs. Aid Assn., 94 Pa. St., 481.

Supreme Council vs. Fairman, 62 How. Pr., 386.

State vs. Bankers Assn., 23 Kan., 499.

In *I. & G. N. Ry. Employees Hospital Assn. vs. Bell*, 224 S. W., 309, the Court of Civil Appeals at Galveston held that said hospital association, which was formed to provide medical and surgical treatment for its members, which included all of the employees of the railway company, was not an insurance company but a mutual benefit association, and its contracts with its several members could not be regarded or construed as contracts of insurance. The court said: "Appellant is not an insurance company but a mutual benefit association and its contracts with its several members cannot be regarded or construed as contracts of insurance. *State vs. Taylor*, 56 N. J. L., 49, 27 Atl., 797."

It is believed by the writer that under the authorities before an association could be held to be charitable or benevolent in its nature within the meaning of the statute, it would have to have for its main object or purpose charity or benevolence as distinguished from ordinary business transactions where the members simply get value received for money expended by them in the form of fees, dues and assessments. We are not prepared to hold that an association providing sick benefits and burial expenses to members who have paid their dues and are in good standing might not be a charitable or benevolent one if this feature should be a mere incident to its main purpose and object of dispensing benevolence or charity. However, it is unnecessary to decide that point in this opinion. It is sufficient to say that the association under consideration is not for the support of a charitable or benevolent undertaking within the meaning of the corporation statute. It has only one object, and that is to secure to each member, or rather to the beneficiary or the estate of each member, a substantial benefit at death in the form of a payment in cash of approximately \$1,000.00. This the member or beneficiary is entitled to whether the member or the beneficiary be rich or poor, the only requisite being that the member pay the fees, dues and assessments as required by the constitution and by-laws. For a stipulated consideration certain benefits are secured to the members and their beneficiaries, and without the consideration no rights or benefits accrue. The obtaining of this substantial and pecuniary benefit is the main, and in fact the sole, object and purpose of the association. It looks more like life insurance than it does benevolence or charity.

It cannot, therefore, be chartered as a charitable or benevolent undertaking and cannot file its charter with the Secretary of State.

We find no provision of the statutes authorizing the formation of a corporation of this kind under our State. It, of course, cannot be chartered as an insurance company because it does not comply with the requirements of the statutes authorizing such companies to incorporate in this State.

It is true that Article 4859, R. C. S., refers to mutual aid associations, "incorporated or unincorporated," but this in itself is not to be considered affirmative authority to incorporate. Other statutes must be looked to to ascertain for what purposes corporations may be formed. The word "incorporated," in Article 4859, probably refers to mutual aid associations conforming to the provisions of said article in respect to being local, etc., and which are also benevolent and charitable associations, for it is entirely possible for a local mutual aid association to be for the support of a charitable or benevolent undertaking, and, therefore, capable of being incorporated. But as before stated, the Home Benefit Association of Dallas does not come within the latter mentioned category.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2431, Bk. 57, P. 137.

INSURANCE AGENTS AND AGENCIES—LIFE INSURANCE AGENTS—BANK SAVINGS AND LIFE INSURANCE PLAN.

Complete Statutes of 1920, Articles 4960, 4961, 4969. Penal Code, 642.

(1) The Commissioner of Insurance and Banking may not approve such life insurance policies or contracts to be consummated in violation of the statutes regulating the insurance business.

(2) The acts and relationship of a bank performing the duties necessary for the establishment and operation of the "Bank Savings and Life Insurance Plan" or "Insured Savings Plan," are such as to constitute the bank an agent of the insurance company within the meaning and definition of the Article 4961, Complete Statutes, 1920.

AUSTIN, TEXAS, May 12, 1922.

Hon. Ed Hall, Commissioner of Insurance and Banking, Capitol.

MY DEAR SIR: Under date of May 11, you have submitted to this Department a question as to whether or not the Commissioner should approve a certain life insurance policy or contract which has been called "Bank Savings and Life Insurance Plan." With your inquiry you have submitted certain exhibits giving a published description of the policy and advertisements used by the banks with whom arrangements have been made for carrying into effect the insurance contract under investigation. Also you enclose a ruling of the Department of Insurance and Banking, holding that such contract for the reason stated may not be filed nor approved by the Commissioner as is provided in Articles 4759-4760, Complete Texas Statutes, 1920. You desire to know whether or not the Commissioner has acted within the scope of the statute regulating life insurance business in Texas.

It goes without saying, the Commissioner of Insurance and Banking, upon whom is imposed the burden of administering the insurance laws of the State and the duty to prevent their violation, would not be authorized nor could he approve a policy or contract of insurance which conflicts with or contravenes any of the statutes affecting

such insurance business. (Section 11, Articles 4493, 4497, 4501, Complete Statutes, 1920.)

The Commissioner has suggested that the proposed policy or contract of insurance which is designated as the "Bank Savings and Life Insurance Plan" cannot be consummated without a violation of Articles 4960, 4961, 4969, Complete Statutes, 1920. In order to determine the question whether the policy referred to violates or causes to be violated the articles referred to, it is essential that the substantial elements, operations and mode of consummation be understood. The insurance per se and its economic good or evil is not for us to examine in this inquiry but only the manner of its consummation. The "Bank Savings and Life Insurance Plan," or "Insured Savings Plan," evidently seeks to combine the idea of bank savings and life insurance and to present these two attractive elements to a proposed client. The insurance is carried byInsurance Company. It is in practice hardly clear whether the insurance is to be sold by an insurance agent in the usual or ordinary way or by and through certain banks, State or National. We find such advertisements as follows by certain banking institutions, as for instance, "These are your life problems. Let us help you solve them *through our Insured Savings Plan*, which will enable you to become financially independent and will also protect your family while you are building an estate." In the same connection it is stated "The insurance under this plan is written by the.....Insurance Company," and in another instance certain banks advertise "We issue a special pass book and a life protection policy on your life is issued by a well known company and a coupon is attached to the ad which reads as follows: 'Mail this coupon—or bring it to the bank today.'"

.....National Bank.

Insured Savings Account Dept.

Please tell me how an INSURED SAVINGS ACCOUNT will pay me 4 per cent interest, protect my life, and guarantee me the money I start out to save, whether I live or die.

My age is.....
 Name.....
 Street address.....
 City..... State.....

We have not been furnished with any written understanding or agreement as to the relationship of a bank and the insurance company whose co-operation is completely necessary for the Bank Savings and Life Insurance Plan of insurance. However, we have certain quoted instructions to the insurance agent who seeks to consummate the insurance contract pursuant to this plan. Briefly, it is agreed that the insured shall direct a letter to a certain bank stating that he desires to make 120 consecutive monthly deposits of a given amount to a special savings account. The bank is authorized to pay on behalf of the insured the premiums and to charge such premiums to the savings account. In case of default by the insured in making deposits for two months or more, the bank is directed to pay the premium for the current policy year, mail the policy to the insured and to deposit the remaining unused portion of the savings account to the credit of the insured. The bank is further instructed to credit the savings account with such dividends as the insurance company pays and it further acts

as agent to hold such life insurance policy and in the event of death to deliver it to the beneficiary. The insured agrees that he shall not withdraw funds deposited in the savings account during the continuance of the policy. Subject to the conditions of the policy, the bank may surrender said policy to the insurance company and receive the cash surrendered value and credit it to the account of the insured. In this letter of instruction to the bank the insured states that it is understood between the insurance company and the bank, both of which are interested in said plan, that neither is in any way responsible for the carrying out of the terms of said plans by the other.

Now, if the bank under this plan is engaging in any of the services mentioned in the following quoted article of the statute, then we feel sure that the Banking and Insurance Commissioner would be justified in refusing to approve the contract of insurance, for Article 4969, Complete Statutes of 1920, directly inhibits the granting of a certificate of authority to act as agent to any corporation or stock company. The first mentioned article defining who are agents above referred to reads as follows:

"Any person who solicits insurance on behalf of any insurance company, whether incorporated under the laws of this or any other State or foreign government, or who takes or transmits other than for himself any application for insurance or any policy of insurance to or from such company, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk, or receive, or collect, or transmit any premium of insurance, or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company other than for himself, or who shall examine into, or adjust or aid in adjusting any loss for or on behalf of any such insurance company, whether any of such acts shall be done at the instance or request or by the employment of such insurance company, or of or by any broker or other person, shall be held to be the agent of the company for which the act is done, or the risk is taken as far as relates to all the liabilities, duties, requirements and penalties set forth in this chapter; provided, that the provisions of this chapter shall not apply to citizens of this State who arbitrate in the adjustment of losses between the insurers and insured, nor to the adjustment of particular or general average losses of vessels or cargoes by marine adjusters who have paid an occupation tax of two hundred dollars for the year in which the adjustment is made; provided, further, that the provisions of this chapter shall not apply to practicing attorneys at law in the State of Texas, acting in the regular transaction of their business as such attorneys at law, and who are not local agents, nor acting as adjusters for any insurance company." (Acts 1879, S. S., p. 32.)

From the brief outline of the Bank Savings and Life Insurance Plan, above stated, it is readily observed that the bank chosen by the insured must perform many and valuable services. If the policies are numerous the clerical work alone to be performed by the bank in no manner can be considered as negligible, and it is difficult to understand as a practical matter how any volume of such business may be done without some agreement or understanding between the insurance company and the bank, but regardless of the relationship established between the bank and the insurance company by agreement, we think, it is without question that the statute above quoted, *proprio vigore*, designates the relationship, that exists under the bank savings and life insurance plan, an agency that constitutes the bank an agent. It cannot be doubted that

a bank under the plan receives or transmits or delivers the policy of insurance nor that the bank receives or collects premiums of insurance and in some instances that certain banks advertise or give notice that such bank will receive and transmit applications for such insurance. Most certainly it is undoubted that the bank does and performs some act or thing in making or consummating the contract for insurance, for as stated above, such plan by its nature cannot exist separate and apart from banks having a savings department. These last mentioned acts and services, which are to be performed by the bank whether at the instance of the insured or insurer come well within the article above quoted and constitute the bank an agent under the statute.

Therefore you are advised that since the Commissioner may issue no certificate of authority to a corporation to become an agent or representative of any life insurance company, and inasmuch as, and to that extent only, the bank savings and life insurance plan policy is to be consummated through any banking corporation, the Commissioner would be acting within his authority in refusing to approve and file such a contract.

Respectfully,

WALACE HAWKINS,
Assistant Attorney General.

Op. No. 2405, Bk. 57, P. 144.

INSURANCE AGENCY DEFINED—REBATING BY DIVIDING COMMISSIONS
PROHIBITED—POWER TO REVOKE LICENSE.

The statute regulating insurance in Texas and defining insurance agents contemplates an agent who represents to some measure the insurance company's interest before the patronizing public and not one whose sole purpose is to procure insurance for himself or an interest he represents.

Article 4960, Revised Statutes, authorizing granting of certificates of authority to agents already made so by bona fide contract and is not the power creating agencies. It cannot be so construed as to evade the purpose of the law in regard to prohibiting rebates of premiums.

A person who represents a large interest and procures an agent's license to solicit insurance for the sale and only purpose of procuring insurance for the property upon which it is his business to procure insurance and to receive a divide of premiums from a bona fide agency who keeps all records and writes the policy, is not himself a bona fide agent and is not entitled to an agent's certificate of authority.

The Insurance Commission has authority, with the advice and consent of the Attorney General, to revoke an agent's certificate of authority for cause enumerated in the statute.

AUSTIN, TEXAS, January 20, 1922.

State Fire Insurance Commission, Capitol.

GENTLEMEN: I am in receipt of your inquiry wherein you submit to this Department for its ruling the question as to whether or not an individual holding an insurance agent's license under Article 4960, Revised Statutes, who writes no insurance except on his own property or property of his employer or associates or of an estate which he represents and who makes no effort to solicit other insurance, is, in fact an agent and entitled to such agent's license. In explanation of this question you

state that a practice has grown up throughout the State for certain large corporations in the State to have a designated representative of such company, or representatives of estates, to procure an agent's certificate of authority to write insurance, and that such insurance is placed through bona fide agents of insurance companies who keep the agent's books, sign the policies, etc., the agents whose status is questioned receiving a divide of the regular agent's commission. It is also stated that such practice is ostensibly for the purpose of evading Article 4897, Revised Statutes, forbidding rebating and fixing penalty.

Replying to this question, I desire to state that any answer must depend upon the facts of each particular case. It is our conclusion that if the agent who holds such license is not interested in the procuring of insurance for the company he purports to represent, but is interested as an employee or otherwise of the insured, and the divide of commissions from the bona fide agent is for the purpose of effecting a rebate of premiums and evading the provisions of the article of the statute above referred to, the person is not a bona fide insurance agent and is not entitled to receive from the Insurance Commission a license authorizing him to write insurance and you have the authority, in the manner hereinafter pointed out, to cancel the certificate of the agent.

Agency is a legal relation founded upon the express or implied contract of parties, or created by law by virtue of which one party, the agent, is employed or authorized to act for another, the principal. (*Harkins vs. Murphy and Balaz*, 112 S. W., 136.) It is a representative relation and in its broadest sense includes every relation in which one person acts and represents another by his authority. (*Int. Harvester Co. vs. Commonwealth*, 145 S. W., 393.) The relation arises when one is authorized to represent another in bringing or to aid in bringing the matter in contractual relation with the third party. (*Keyser vs. Hinkle*, 106 S. W., 98.) Every conception of agency, as that term must have been understood by the Legislature, implies a representation by the agent of the person designated as his principal. Every use of the word by the Legislature, connected with insurance, implies that it had in mind he should be the representative of the insurance company and not of himself or of a third party.

An insurance agent is not synonymous with an insurance broker. An insurance broker is one who brings the insurance company and the prospect for insurance together in single transactions resulting in business for the insurance company and in insurance for the person who is seeking it, confining his representations and his greater interest to that of the individual seeking insurance as distinguished from an agent who may in a measure represent both. (*Good Roads Machinery Company vs. Commonwealth*, 143 S. W., 18.)

A person whose interest is solely the interest of the insured, as must be the instance described by you, when the obvious purpose is to evade the law and secure a rebate of premiums, cannot come within the definition of an agent of the insurance company under the authorities referred to above, or any other authority so far as we are able to ascertain.

I am mindful of an opinion written by Honorable C. M. Cureton, First Assistant Attorney General, of August 2, 1916, in which he holds that an insurance broker in Texas is an agent within the purview of Ar-

title 4961 of the act regulating insurance and defining an agent. This opinion, however, is not at variance with the above statement for the reason that the broker referred to therein confines his representations to the interest of the insurance company and is governed by the statute regulating agents of insurance companies while the former procures insurance at the legal rate, is not regulated by law and cannot receive a divide of the agent's commission.

The purpose of this distinction is to classify the parties about whom you inquire, if possible, in order, in order to determine whether or not they are insurance agents under the authorities. It will be observed that the test is in the interest he represents. Who is the principal? If the insurance company, he would not be a broker purely, but an insurance agent. If his interest is solely the interest of the insured, he is in no sense an insurance agent in contemplation of the statute and would not be entitled to receive the license, nor does he need such license to represent himself or his own interest, nor can he receive a divide of the commissions. We quote Article 4961, in part, as follows:

"Any person who solicits insurance on behalf of any insurance company * * * or who takes or transmits, other than for himself, any application for insurance or any policy of insurance to or from such company or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, * * * or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company other than for himself, * * * whether any of such acts shall be done at the instance or request or by the employment of such insurance company or of by any broker or other person, shall be held to be the agent of the company for which the act is done," etc.

Again Article 4968 designates as agent "any person who shall solicit an application for insurance," etc.

It will be observed that each of the above instances, as in each and every other instance in which the insurance agent is referred to by the act, is referred to as a person who solicits applications for an insurance company or who advertises to do so, etc. The thought being uppermost always that he is acting for and procuring insurance in behalf of the insurance company and for its interest and not for his sole interest and benefit. He is a person who procures insurance from the insured and not for him and he must solicit insurance from some person other than himself and it would necessarily follow, if he is the agent of the company, he is to procure insurance from the patronizing public, and not from himself or from those for whom it is his duty in his regular employment to have insurance written.

Asserting again that it was the chief purpose of the act creating the Insurance Commission to prevent the diving of rebates and to secure to all people having property to insure with the same class of risks the privilege of doing so at the same rate, Article 4896 makes it unlawful for an insurance company to grant rebates on premiums "either directly or indirectly," and Article 4897 makes it unlawful for the insured to receive such rebates "either directly or indirectly." For the purpose of regulating insurance companies, and carrying into effect this regulation, the Insurance Commission is empowered to issue certificates of authority to agents to write insurance as a representative of the insurance companies

and agents are forbidden, under Article 4960, to pursue this occupation without having first procured such certificate of authority. There can be no presumption from this, however, that the granting of the certificate within itself creates the agency, as must be assumed by those following the practice you report. On the contrary, the certificate of authority issued by you authorizes an agent, already made such by reason of his contract with the insurance company, to pursue the business and occupation of soliciting insurance. If he is not a bona fide agent before the issuance of this certificate of authority, he is no more so after its issuance. The certificate creates no agency but authorizes an agency already created to function according to law.

It is a sound principle of law that that which cannot be done under the law directly is forbidden to be done indirectly and in this instance force is added by the language of the statute itself and particularly in Article 4954 forbidding discrimination by insurance companies or agents, as follows:

“* * * nor shall any such company or any officer, agent, solicitor or representative thereof pay, allow or give or offer to pay, allow or give *directly* or *indirectly*, as an inducement to insure, any rebate of premiums, payable on the policy or any special favors or advantage,” etc.

If a person, because of the position which he holds, and through which he controls the placing of insurance for a corporation, individual or estate can be clothed with a certificate of authority to represent an insurance company when he has no intention of engaging in the business of an insurance agent, solicits no insurance and writes none except that in which he is personally interested either because of his property interests or his employment, then a means is discovered by which the purpose of the law may be evaded in the most direct manner. If a few may be permitted to do this, why not many? If many, then why not any, and if any, then cannot an insurance company by this method give to those it favors reduced rates and unfairly compete with honest, conscientious insurance companies and evade entirely the regulation which the act is intended to give?

Another question which you submit is whether or not the Commissioner has the power to revoke the authority already issued to agents who are not bona fide insurance agents. I call your attention to the language of Article 4970 providing that insurance companies shall furnish to the Commission application for authority for its agents. The article closes with this language:

“Such certificate, unless sooner revoked by the Commission for cause, or cancelled at the request of the company employing the holder thereof, shall continue in force until the first day of March next after its issuance and must be renewed annually.”

Article 4971, immediately following this, enumerates the causes for which such authority may be revoked and says it may exist after violation of the insurance laws. If the certificate has been issued to a person not a bona fide agent, but who acts for the purpose of evading the law, and he secures thereby a rebate on his premiums in the division of commissions between himself and a bona fide agency in accordance with the practice you state commonly exists, he has violated the insurance laws and this act would be sufficient upon which to revoke the certificate in

accordance with Article 4899 which provides that the Commissioner of Insurance, upon ascertaining that any company or agent or representative violates any provision of the act, may, with the advice and approval of the Attorney General, revoke the certificate of authority of such company, officer, agent or representative.

Yours very truly,

TOM L. BEAUCHAMP,
Assistant Attorney General.

Op. No. 2275, Bk. 55, P. 51.

INSURANCE AND BANKING COMMISSIONER.

A Class A director of the Federal Reserve Bank at Dallas is not an officer of the government of the United States, he not being appointed by the President, a court or a head of a department of the United States Government.

The position of a director of a Federal Reserve Bank, however, is an employment incompatible with the office of Commissioner of Insurance and Banking of this State, and one person cannot hold such employment and such office at the same time.

AUSTIN, TEXAS, January 18, 1921.

Hon. Ed Hall, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: This Department is in receipt of your letter, reading as follows:

"On or about December 1st I was elected Class A director in the Federal Reserve Bank at Dallas and have since qualified for that position. Since that time the Honorable Pat M. Neff, Governor-elect, has appointed me Commissioner of Insurance and Banking of Texas and I expect to qualify for that position in a few days.

"It is my desire to remain on the board of directors of the Federal Reserve Bank unless there is some law to prevent it, and I would thank your Department to render me a decision on this point at as early a date as convenient. My election to the board of directors of the Federal Reserve Bank was by vote of member banks with a capital of less than \$400,000 and over \$100,000 designated as Group 2. This position of director carries with it a fee of \$20 and per diem of \$10 for each meeting, also all necessary expenses for attendance upon their meetings of once each month.

"If there is nothing that would prevent my holding both positions, I feel that it would be quite an advantage to this department for me to remain on the board of directors."

To prevent one person from holding any number of offices or employments at one and the same time, there must be either some express constitutional or statutory inhibition, or that such offices or employments must be incompatible with each other, because at common law there is no limit to the number of offices which may be held by the same person at one time.

In answering your inquiry, we will first discuss the proposition of constitutional or statutory inhibition, and following that the question of compatibility of the two positions mentioned in your letter.

Section 12 of Article 16 of the Constitution of this State is as follows:

"Sec. 12. Officers not eligible.—No member of Congress, nor person holding or exercising any office of profit or trust, under the United States, or either of them, or under any foreign power, shall be eligible as a member of the Legislature, or hold or exercise any office of profit or trust under this State."

There can be no controversy over whether or not the Commissioner of Insurance and Banking is an officer of the State of Texas. By the terms of the statute creating such position it is made an office. The question then arises: Is a Class A director of the Federal Reserve Bank an officer? By the Federal Reserve Act, Class A directors of the Federal Reserve Bank consist of three members chosen by, and are representatives of the stockholding banks. This method of selecting directors clearly eliminates them as officers of the United States, for the reason that Paragraph 2, Section 2, Article 2, Federal Constitution, vests the power to appoint officers of the United States in the President, with the advice and consent of the Senate, and provides that Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law or in the heads of departments.

U. S. vs. Germaine, 99 U. S., 508.

U. S. vs. Mouap, 124 U. S., 303.

U. S. vs. Smith, 124 U. S., 525.

In the Germaine case above cited, the defendant was indicted under a statute prohibiting and punishing extortion by an officer of the United States, he not having received his appointment from any authority authorized to appoint officers under Article 2, Section 2, of the Constitution of the United States. The court sustained this contention, saying:

"The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt. This Constitution is the supreme law of the land, and no act of Congress is of any validity which does not rest on authority conferred by that instrument. It is, therefore, not to be supposed that Congress, when enacting a criminal law for the punishment of officers of the United States, intended to punish anyone not appointed in one of those modes. If the punishment were designed for others than officers as defined by the Constitution, words to that effect would be used, as servant, agent, person in the service or employment of the government; and this has been done where it was so intended, as in the sixteenth section of the Act of 1846, concerning embezzlement, by which any officer *or agent* of the United States, *and all persons participating in the act*, are made liable."

In this case, the Supreme Court of the United States further held the Commissioner of Pensions, by whom the defendant was appointed, was not the head of a department within the meaning of the constitutional provision authorizing the heads of department to appoint officers. The holding in this case was followed in the two other cases cited above.

We, therefore, hold that Section 12, Article 16, of the Constitution of this State would not prohibit you from holding at the same time the office of Commissioner of Insurance and Banking and a directorship in Class A on the board of directors of the Federal Reserve Bank of Dallas.

This question being out of the way, we will now discuss the compatibility of the two positions under consideration.

It is not only incompatibility of the duties of two offices that is a violation of public policy of the State, but there may exist such incompatibil-

ity between the duties of an office and the duties of an employment that would be repugnant thereto.

The public policy of this State in matters of this character is fixed by Article 572, Revised Statutes, Section 227, Digest State Banking Laws, 1920, prohibiting the Commissioner of Insurance and Banking being financially interested, directly or indirectly, in any State bank or banking and trust company subject to the supervision of the Department of Insurance and Banking, or knowingly being or becoming indebted, either directly or indirectly, to any such State banks or banking and trust company. In other words, the Commissioner must have no private dealings with the banks under his supervision. There is in the law a complete divorcement of the Commissioner from the banks. This being the established policy of the State, then it is apparent that it was in the mind of the Legislature that he should have no interest whatsoever in any institution with which he would deal officially as a commissioner. We are not holding that there is a statutory inhibition against your holding the office of Commissioner and retaining your directorship in the Federal Reserve Bank, but our opinion is that there is such an incompatibility between the duties of the office and the directorship as to render impossible the holding of both. It is the incompatibility of the two that is opposed to the policy of this State. Upon the subject of incompatibility, we quote from Throop on Public Officers as follows:

"A learned American judge, discussing this question, has forcibly said, that it has been erroneously supposed from the remarks of Lord Tenderden in *Rex vs. Jones* (1 B. & Adel., 677), that in order to render two offices incompatible, there must be some such relation between them as that of master and servant—that one must have 'controlment' of the other; or that one must be charged with the duty of auditing or supervising the accounts of the other; or that one must be chosen by, or have the power of removal of the other. But these are only instances of incompatible offices, not definitions; and therefore it does not follow that these are all the instances in which offices are incompatible. Thus a judicial office and a ministerial office are incompatible. And in *Rex vs. Tizzard* (9 B. & C., 416), Bayley, J., gave another instance of incompatibility, when he said 'I think that the two offices are incompatible, when the holder cannot in every instance discharge the duties of each.' In 5th Bacon's Abridgment (Title Offices, K.), we find the rule laid down, upon the authority of Lord Coke, in these words: 'Offices are said to be incompatible and inconsistent, so as not to be executed by the same person, when from the multiplicity of business in them they cannot be executed with care and ability, or when, their being subordinate and interfering with each other, it induces a presumption that they cannot be executed with impartiality and honesty.' And in Dillon on Municipal Corporations (Sec. 166, note), it is said, that incompatibility in offices exists, where the nature and duty of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both."

In the opinion of this office, there will arise innumerable conflicts of duty between your obligation to the State and the State banks under your jurisdiction, and your duty to the Federal Reserve Bank as a director of that organization, and that occasions will arise when it will be impossible for you to act consistently with your duty both to your official position as Commissioner and to your employment as a director. We cite as an illustration of this condition the case where a State bank may be in process of liquidation, which bank is a debtor to the Federal Reserve Bank and has hypothecated securities for such debt. It would be your duty under the State banking laws to value the securities and to classify

the debt due to the Federal Reserve Bank. As director of the Federal Reserve Bank, looking to the best interest of that institution, you might feel called upon to differ from the value fixed by you as a Commissioner and to differ on classification made by you of the claim of the Federal Reserve Bank, or you would at least, acting as a director of the Federal Reserve Bank, be passing upon your own act as Commissioner of Insurance and Banking.

Without burdening this opinion with other instances of such a conflict, we cite the above and advise you that in the opinion of this Department there is such an irreconcilable conflict of duties as to render the office of Commissioner of Insurance and Banking and the employment as a director of the Federal Reserve Bank so incompatible that you could not hold both at the same time.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

Op. No. 2450, Bk. 57, P. 16.

BUILDING AND LOAN ASSOCIATIONS--CANCELLATION FEES.

A building and loan association may not charge to the account of a member, and deduct from his payments on account of stock, the amount of a so-called "cancellation fee" provided for in the contract, in advance of the occurring of the contingency upon which such cancellation fee is to become due.

The question of the right of a corporation to charge such cancellation fee or to charge a membership fee, as a part of its contract with a member, is not decided.

AUSTIN, TEXAS, August 11, 1922.

Hon. Ed Hall, Commissioner of Banking and Insurance, Capitol.

DEAR SIR: Replying to your inquiry regarding the matter of cancellation fees sought to be charged by building and loan associations upon the contracts of members, it is my understanding from a discussion of the matter with Deputy Banking Commissioner Priddie and from the letter of the secretary of the Houston Building and Loan Association (which you submitted to this office), that building and loan associations, in practice, find themselves obliged to charge a membership fee in order to make it possible to take care of the current expenses of their business. These membership fees are provided for in the contracts and are applied by the association to the payment of the commission paid to agents and to other expenses of the business, and usually amount to about one per cent of the contract. They are ordinarily provided for by the by-laws of the association. I understand also that a similar fee designated as a "cancellation fee" which is payable by the member either upon the withdrawal of his contract or its maturity or its forfeiture, is sometimes charged instead.

The letter from the Houston Building and Loan Association quotes as follows:

"The Encyclopedia of Building, Loan and Savings Associations' by Henry S. Rosenthal of Cincinnati, Ohio, the accepted authority on building and loan associations in the United States, describes 'cancellation' fees as follows:

"In one of the western States, where the law is more liberal, a very success-

ful association has adopted the plan of abolishing all fees and fines, except that of a cancellation fee of \$1.00 per share, which is retained by the association from every member's stock when he severs his connection with the association either by withdrawing or by the maturity and payment of his shares. Under this plan *all the money paid in by the member remains to his credit, participating in regular dividends*, so long as he retains his membership. For example, a member subscribes for ten shares of the association's stock, payable in installments of \$10 per month. When he retires from the association, \$10 of his credit is retained by the association as a cancellation fee. * * * *While this reduction is called a cancellation fee, as a matter of practice the first \$10 which the member pays in on his stock is at once credited this fee and carried to the profit and loss account and is available at once for use by the association as an item of profit.*" (Page 118, Fourth Revised Edition.)

You inquire whether it is proper for a building and loan association to at once charge the account of the member with such cancellation fee and thereupon appropriate the money which he pays in and which is to be applied under the terms of the contract to the discharge of his stock, to the different and other purpose of paying the expenses incurred by the company in maintaining its business.

You are advised that the money which the member pays in to the corporation on account of his subscription to its stock is to be credited to his stock account and not to the expenses of the company. To thus apply it, not only departs from the provisions of the contract, but deprives the member of the earning capacity of this money. In addition it deprives all of the members, as a whole, of the earnings of money which is paid into the corporation, not for the purpose of paying expenses, but for the purpose of investing it for the benefit of such members.

The application of such fund for the payment of expenses is also in conflict with Article 1313jj which provides:

"The gross earnings of every building and loan association shall be ascertained at least once in each year, from which shall be deducted a sufficient amount to meet the operating expenses of such association, and *from said earnings only* shall such expenses be paid. * * * After providing for expenses of the association, and the reserve fund as aforesaid, the residue of such earnings shall be transferred and apportioned to the credit of the shareholders as the association by its by-laws shall provide."

The statute does not take cognizance of the subject of charging either membership or cancellation fees and we are not undertaking to determine the question of the right of a building and loan association to enter into a contract with a prospective member where he shall pay to it a sum of money designated either as a membership fee or a cancellation fee which money is to be applied to the expenses of the company and not to the payment of the stock subscribed for by the member, but it is plain that in the event such a concern enters into a contract with a member whereby he shall become liable to pay to it a cancellation fee upon the termination of his contract, such corporation cannot apply to any part of the money which he has paid on account of his stock to the discharge of such cancellation fee, at least in advance of the time when such cancellation fee is "earned" by the terms of the contract.

Yours very respectfully,

EUGENE A. WILSON,
Assistant Attorney General.

Op. No. 2439, Bk. 57, P. 129.

LIFE INSURANCE COMPANIES—VERNON'S SAYLES' STATUTES, ARTICLE 4497, ACTS THIRTY-FIRST LEGISLATURE, CHAPTER 108, SECTION 40.

A foreign life insurance company must show that its authorized capital has been fully paid up before it can be granted a certificate of authority, authorizing it to transact business in Texas.

AUSTIN, TEXAS, June 26, 1922.

Hon. Ed Hall, Commissioner of Insurance and Banking, Capitol.

DEAR SIR: In your letter of the 21st inst. you say:

"I will thank you to advise this department whether or not it is necessary that all of the authorized capital stock of a foreign life insurance company desiring to transact business in this State shall be fully paid up before the company can obtain license to do business in Texas."

You state that your Department has heretofore been acting in this respect by an opinion of the Attorney General dated August 27, 1913, construing Article 4497 of Revised Statutes. In the opinion referred to by you this Department advised you that a foreign insurance company, before it may be granted a permit to do business in this State, must show that *all its authorized capital stock had been paid in*. But it has been suggested in briefs filed in behalf of the Standard Life Insurance Company, Decatur, Illinois, that the former opinion construing this statute is not well taken and that it should not be followed as controlling authority in the matter of the application of the above life insurance company for a license to transact business in Texas. We take the following statement from the brief filed in behalf of the applicant:

"The Standard Life Insurance Company was duly organized under the laws of the State of Illinois, and has its principal or home office at Decatur, Illinois. It has an authorized capital of \$500,000. At the end of December, 1921, the company had stock subscribed, issued and paid up in full to the amount of \$225,000. At this time the company has stock subscribed, issued and paid up to the amount of \$280,000. The company, at the end of December, had more than \$400,000 of apportioned and unapportioned surplus. The company has under the Illinois statutes a perpetual charter; and was incorporated under the provisions of Sections 1, 1a, 1b, and 1c of Chapter 4 of the Life Insurance Laws of Illinois (Compilation of 1919). Section 1d of said laws provides the manner of increase or decrease of the capital stock of the company. We take it for granted that there is no issue involved touching the incorporation of the company under the Illinois statutes as that State has construed all acts of the company as fully complying with all its statutes.

"2. The company has made application to the Commissioner of Insurance and Banking of Texas for a certificate of authority to do business as is provided by Sections 121, 122 and 123, of Chapter 5, of the Insurance Laws of Texas (Digest of 1921 by Insurance Commissioner). Said Section 121 provides that the company shall make a statement containing certain information. Among the requirements of this section we find the following: '(b) *The amount of its capital stock.* (c) *Amount of its capital stock paid up.*' We call your attention to these two provisions of this section at this time because it discloses that your Legislature contemplated that foreign insurance companies would make application for certificates of authority which had *authorized capital stock not subscribed for or issued as distinguished from capital stock subscribed for and paid up or to be paid up*. Said Section 123 contains provisions requiring all foreign life insurance companies to have 'at least \$100,000 of actual paid up in cash money capital invested in such securities as provided under the laws of the State,' etc., where such foreign company is incorporated. It further requires that such foreign company have at least \$100,000 of net

surplus assets invested in securities provided for under the laws of the State of its creation. As above noted the Standard Life Insurance Company requirements as to *capital paid up* and *net surplus invested* far exceeds these requirements; and the company should be admitted under the provisions of these independent statutes which govern the admission of foreign life insurance companies to do business in Texas. We believe that a reasonable construction of these statutes last cited entitle the Standard Life Insurance Company to be admitted to do business in the State of Texas. We find Section 33 of Chapter 2 of the Insurance Laws of Texas (same Digest), contains provisions in respect to the duties of the Commissioner of Insurance and Banking in respect to the issuance of certificates of authority to foreign life insurance companies to do business in Texas. We quote that part of said Section 33 which is germane to the issues here involved, and which provides as follows:

"Should the Commissioner of Insurance and Banking be satisfied that any company applying for a certificate of authority has in all respects fully complied with the law, and that, *if a stock company, its capital stock has been fully paid up*; that it has the required amount of capital or surplus to policyholders, it shall be his duty to issue to such company a certificate of authority under the seal of his office, authorizing such company to transact insurance business, naming therein the particular kind of insurance, for the period of not less than three months nor extending beyond the last day of February next following the date of such certificate."

"Thus it is made plain that the real question at issue is contained in the phrase, *'and that, if a stock company, its capital stock has been fully paid up.'*"

We agree that the real question at issue is contained in the phrase, *"and that, if a stock company, its capital stock has been fully paid up."* The question is now raised as to the meaning of *capital stock*, and as to whether or not the requirement that *"its capital stock has been fully paid up,"* refers to its *authorized* and actual capital stock. And in this connection it is suggested that there is a material difference between *potential* and *actual* stock. The distinction being made that *potential stock* was that part of *authorized stock* not actually subscribed and not subscribed and paid for. It is suggested that the Legislature meant to say by the provisions of Section 40, Chapter 108, of the Acts of the Thirty-fifth Legislature that the *capital stock subscribed* must be fully paid up. It seems to be a rule well recognized that there is in fact a difference between *authorized capital* stock and *actual capital* stock of the corporation. It occurs to us that the Legislature had in mind this distinction in Section 40, Chapter 108, Acts of Thirty-first Legislature.

A brief reference to the history of this legislation more fully treated in the original opinion on this subject may be made to show that this difference was in the minds of the Legislature when this act was passed. Art. 3049, R. S., 1895, did *not* require *all* the capital stock of an insurance company to be paid up before being granted a license to do business in Texas, but when the Thirty-first Legislature came to amend the insurance law they amended Art. 3049, R. S., 1895, so that it now reads as follows:

"Should the Commissioner of Insurance and Banking be satisfied that any company applying for a certificate of authority has in all respects fully complied with the law and that if a stock company, *its capital stock has been fully paid up* that it has the required amount of capital or surplus to policyholders it shall be his duty to issue to such company certificate of authority under the seal of his office, authorizing such company to transact business, naming therein the particular kind of insurance, for the period of not less than three months nor extending beyond the last day of February next following the date of such certificate."

To give any other construction to the section above quoted than that the Legislature required that all of the *authorized capital stock* of such company to be fully paid would be to hold that said section is utterly without meaning, as there would have been no reason whatever for amending the law as it existed at that time and leaving it in effect the same law.

The purpose of any corporation in having a *capital stock* is that said capital stock shall stand as a fund for the protection of its creditors as in the case of an insurance company for the protection of its creditors and policy holders. It was evidently the purpose of the Legislature in passing the above amendment that the creditors of any foreign insurance company, applying for a license to do business in Texas, should be protected not only to the extent of \$100,000 paid up capital as was provided in Art. 3049, but that said creditors and policy holders should be protected to the fully paid amount of the authorized capital.

The various definitions of the capital stock given in the case cited by applicant are recognized to be correct as definitions but we do not believe can be applied in the construction of this article. And we do not believe the application of the rule contained in the case of *Stemple vs. Bruin*, 57 Fla., 173, nor in the case of *London and Lancashire Fire Insurance Company vs. Ludwig*, 86 Ark., 581, obtains in Texas, nor have we been able to find a more satisfactory definition of the phrase "*capital stock has been fully paid in*" than by a Texas court.

In the case of *General Bonding and Casualty Company vs. Moseley*, Seventh Court of Civil Appeals, 174 S. W., 1031, the court holds:

"We think for that reason the Legislature passed the Act of 1909 specially relating to insurance companies requiring subscribers to the capital stock of such corporations organized under it to pay for their stock fully and in good faith before incorporation, and its later and special intent should in such cases prevail over Article 1146, which is an older and a general statute. We think this is also the reason why the act provides that the securities shall be inspected and approved by the Commissioner before incorporation.

"The terms 'capital stock,' 'paid in,' and 'fully paid in,' have a fixed legal meaning, as shown by the following quotations from Words and Phrases:

"'Capital stock' has been defined as follows: 'When applied to the amount subscribed toward the stock of a corporation: 'Capital stock of a corporation, in its primary sense, means the fund, property, or other means contributed or agreed to be contributed by the share owners as the financial basis of the corporation's business, either directly through stock subscriptions or indirectly through the declaration of stock dividends.' The term signifies those resources the dedication of which to the uses of the corporation is made the foundation for the issuance of certificates of capital stock, and which, as the result of the dedication, becomes irrevocably devoted to the satisfaction of all obligations of the corporation. *Stamford Trust Co. vs. Yale & Twone Mfg. Co.*, 75 Atl., 90, 83 Conn., 43.

"The capital stock of a corporation consists of the property and money subscribed and paid in for the purpose of carrying on its business. For *Jones vs. Davis*, 35 Ohio St., 474.

"The term 'capital stock' has a fixed and definite meaning, and designates the amount of capital contributed by the stockholders for the use of the company. *Belvidere Bank vs. Tunis*, 23 N. J. Law (3 Zab.), 546.

"The words 'fully paid in' have been defined as follows:

"The language of Section 1765, R. S., 1898, "capital fully paid in," contains the idea of full payment of the authorized capital, into the corporation, either in money or its equivalent in property, effecting the extinguishment of the subscription to the capital of the corporation; not a mere agreement to con-

tribute to the capital stock. *Williams vs. Brewster*, 93 N. W., 479, 117 Wis., 370.

"Applying this language, which we approve to the facts of this case, it having been shown that defendants in error had not paid for any part of the capital stock at the time it was issued nor since, they are therefore not stockholders in good faith. The execution of the note and mortgage on December 3d did not 'effect an extinguishment of their subscription liability for stock,' and, until the note had been paid, there has been no 'actual addition to the capital of the corporation.' It is simply 'a mere agreement to contribute to the capital stock.'"

It is true that this case was reversed by the Supreme Court in 220 S. W., 517, but the application of the rule in specifically considering Section 40, Chapter 108, Acts of Thirty-first Legislature, was not disturbed and this being the only utterance of a Texas court in the construction of this statute, we believe that this decision should stand.

In the case of *Williams vs. Brewster*, 94 N. W., 479, 117 Wis., 370, the court holds in construing similar statute, "the language of Section 1765, R. S., 1898, *capital fully paid in* contains the idea of full payment of the *authorized* capital into the corporation therein named or its equivalent."

Both of the above cases were cited with approval in the matter of *U. S. vs. N. Y., N. H. & H. Ry.*, 265 Fed., 341. After examination of the authorities we are of the opinion that our former advice to you in a letter of August 27, 1913, gives the correct construction of Article 4497 of the Revised Statute and we see no reason why we should overturn that ruling. You are therefore advised that it is necessary that all of the *authorized capital stock* of the foreign life insurance company, desiring to transact business in this State be fully paid before the company can obtain a license to do business in Texas.

Yours very truly,

F. M. KEMP,
Assistant Attorney General.

Op. No. 2312, Bk. 55, P. 303.

COUNTY DEPOSITORIES—BONDS.

County depository may execute two or more bonds as such depository.

AUSTIN, TEXAS, March 22, 1921.

Hon. Lon A. Smith, Comptroller, Austin, Texas.

DEAR SIR: The Attorney General is in receipt of yours of February 28, 1921, which is as follows:

"In the matter of county depositories, can the commissioners court select two or more banks, letting each qualify for a portion of the amount necessary to be secured, in the event the sum of the various amounts for which the banks qualify, cover the total amount of funds to be secured?"

"Also, can a bank having been selected as the county depository, make two bonds, one with personal sureties, and the other secured by a surety company, the sum of the amounts stipulated in the bonds, covering the full amount of funds to be secured?"

The first question here propounded by you is answered in opinion No. 311, rendered by this Department under date of February 8, 1913, addressed to Honorable Lewis H. Jones, County Attorney of Burnet

County, a copy of which is enclosed herewith. The opinion appears on page 171, Reports and Opinions, Attorney General, 1912-1914. This Department also rendered an opinion to the same effect on January 17, 1913, addressed to W. S. Shipp, County Judge, Belton, Texas, (Rep. Op. Atty. Gen., 1912-1914, p. 157). These opinions are to the effect that there can be but one depository for any one county. On September 28, 1915, this Department rendered another opinion to Honorable Dayton D. Steed, County Judge, Sherman, Texas, to the effect that all county funds, including money derived from the sale of road improvement bonds, must be deposited with the county depository. (Rep. and Op. Atty. Gen., 1914-1916, p. 438.)

As far as we have been able to find the second question here presented by you has never been passed on by this Department nor by any of our appellate courts. The answer to it must be found in a proper construction of Articles 2440 to 2453, inclusive, of the Revised Civil Statutes of 1911, as amended by Chapter 11, page 16, of the General Laws passed by the Regular Session of the Thirty-fifth Legislature.

Article 2443 reads as follows:

"Article 2443. Within five days after the selection of such depository, it shall be the duty of the banking corporation, association or individual banker so selected to execute a bond or bonds, payable to the county judge, and his successors in office, to be approved by the commissioners court of said county, and filed in the office of the county clerk of said county, with not less than five solvent sureties, who shall own unincumbered real estate in this State not exempt from execution under the laws of this State of as great value as the amount of said bond (or of as great value as the amount of all of said bonds when more than one bond); and said bond or bonds shall in no event be for less than the total amount of revenue of such county for the next preceding year for which the same are made; provided, that nothing herein shall prevent the making of such bond or bonds by a surety company or companies, as provided by law, and payable as herein provided. And provided further, that the commissioners court may accept in lieu of such real estate or surety company security, bonds of the United States, or of the State of Texas, or of any county, city, town or independent school district in the State, which shall be deposited as the commissioners court may direct, the penalty of said bond or bonds not to be less than the total amount of the annual revenue of the county for the years for which said bond or bonds are given, and shall be conditioned for the faithful performance of all duties and obligations devolving by law upon such depository, and for the payment upon presentation of all checks drawn upon said depository by the county treasurer of the county and that said county funds shall be faithfully kept by said depository and accounted for according to law. Any suits arising thereon shall be tried in the county for which such depository is selected."

Notwithstanding certain expressions in other articles here referred to that might indicate otherwise we think that this Article 2443 clearly indicates that your second question should be answered in the affirmative. This article plainly provides that, "it shall be the duty of the banking corporation, association or individual banker so selected to execute a bond or bonds * * * with not less than five solvent sureties who shall own unincumbered real estate in this State not exempt from execution under the laws of this State of as great value as the amount of said bond (or of as great value as the amount of all of said bonds when more than one bond); and said bond or bonds shall in no event be for less than the total amount of revenue of such county for the next preceding year for which the same are made; providing that nothing herein shall

prevent the making of such bond or bonds by a surety company or companies * * * the penalty of said bond or bonds must not be less than the total amount of the annual revenue of the county for the years for which said bond or bonds are given * * *"

It seems quite evident, therefore, that the banking corporation, association or individual banker selected as the county depository is authorized to execute, and that the commissioners' court is authorized to accept and approve, two or more bonds executed by the depository so selected, the aggregate penalty of such bond or bonds, of course, in no event to be less than the total amount of revenue of the county for the year next preceding the one for which the bond or bonds are made. These bonds, or any of them, may be executed with personal sureties or by a surety company or surety companies.

You will understand that we are not here passing upon any particular provision or requirement that should be embodied in any of these bonds.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2277, Bk. 55, P. 102.

BANKS AND BANKING.

The Legislature would not have authority to exempt private banks that have been in business for a certain number of years from the operation of a bill regulating and controlling private banks.

The Legislature would have authority to exempt from the provisions of such bill banks executing a bond to secure depositors against loss, such bond to be renewed annually.

AUSTIN, TEXAS, January 24, 1921.

Hon. Paul D. Page, Chairman Senate Committee on Banking and Insurance, Building.

DEAR SIR: At the request of your committee, you have transmitted to this Department S. B. No. 22, pending in the Senate and referred to your committee, the caption of which bill, setting forth the legislation therein, is as follows:

"To regulate the business of banking in this State when conducted by private individuals, partnerships, or association of private individuals or by concerns operating under charters obtained in Texas prior to the adoption of the Constitution of 1876; to require the Commissioner of Banking and Insurance to make periodical examinations and reports of the condition of the affairs of such banks; to provide for the publication of such reports; to compel all such banks to submit to said examinations and reports; and to pay the expenses of same; to define what shall constitute violations of this act and prescribing penalties for the same; to provide for the liquidation of all such banks when insolvent or about to become so; and prescribing the duties of the Attorney General in taking steps to close up and force the liquidation of such banks in certain contingencies, and to forfeit the banking privileges of the charter of any bank so liquidated; to provide that all private banks shall cease to operate in this State after January 1, A. D. 1922, and prescribing penalties for operating such banks after said date; repealing all laws in conflict herewith, and declaring an emergency."

You then propound to the Department two inquiries, as follows:

"First. The committee desires to be informed through you as to the validity and constitutionality of an amendment to the bill in substance exempting from its provisions, all private banks that have been in continuous operation for a definite fixed period prior to the taking effect of the law, say, to wit, from twenty to thirty years. If this provision could be legally incorporated into the law, it would perhaps remove certain opposition to the bill and would at the same time preserve the essential properties of the bill.

"Second. Another matter about which we would like to be advised is this: Can we legally incorporate a provision into the law as proposed, exempting from its operation, all private banks which shall execute a good and sufficient bond in such amount as may be required by the Banking Commissioner, signed by a surety company adequate to cover depositors against loss and to be renewed annually?"

The Constitution of this State, Section 16, Article 16, relating to the banking business, is as follows:

"Sec. 16. Banking corporations.—The Legislature shall by general laws, authorize the incorporation of corporate bodies with banking and discounting privileges, and shall provide for a system of State supervision, regulation and control of such bodies which will adequately protect and secure the depositors and creditors thereof. Each shareholder of such corporate body incorporated in this State, so long as he owns shares therein, and for twelve months after the date of any bona fide transfer thereof, shall be personally liable for all debts of such corporate body existing at the date of such transfer, to an amount additional to the par value of such shares so owned or transferred. No such corporate body shall be chartered until all of the authorized capital stock has been subscribed and paid for in full in cash. Such body corporate shall not be authorized to engage in business at more than one place, which shall be designated in its charter. No foreign corporation, other than national banks of the United States, shall be permitted to exercise banking or discounting privileges in this State."

The above-quoted provision of the Constitution is the amended Section 16, authorizing the incorporation of corporate bodies with banking and discounting privileges under which the Act of 1905 was authorized providing for the incorporation of the State banks of this State. At common law, the business of banking was not a franchise but a common law right of any individual, but under the original Section 16 of Article 16 of the Constitution, no corporation could be formed for such purpose. While banking is a common law privilege, yet the police power of the State extends to the regulation of such business, and the Legislature may in its wisdom provide such regulations under the police power as applied to unincorporated banks. The right to regulate and control such bodies as are incorporated is expressly given in the above-quoted section of the Constitution. The following authorities amply support the right of the Legislature to regulate and control private banks:

Blaker vs. Hood & Kincaids, 24 L. R. A., 854.

Cummins vs. Spaunhorst, 5 Mo. App., 21.

State vs. Woodmanse, 46 N. W., 907.

Indiana vs. Hichereek, 5 L. R. A. (N. S.), 874.

Michie on Banks and Banking, Secs. 1 and 3, and authorities cited.

We, therefore, advise you that the Legislature may pass such act as it sees fit to regulate and control private banks.

We also advise that in our opinion such act may be made to apply to those banking institutions incorporated by special charter prior to 1876. The charter of a corporation is a contract between the incorporators and

the State, and such contract is made subject to such future laws regulating and controlling the institutions.

In the case of *Cummins vs. Spaunhorst*, supra, it was contended that the directors of a banking institution were not amenable to laws enacted subsequent to the issuance of the charter. The court, in denying such contention, said:

"It is next claimed that the directors who are here sued accepted their positions and held them under a special charter, and cannot be affected by a subsequent act which increases their liability. It is claimed that this liability would impair the obligation of the contract between the bank and the State; but in what way, the defendants in error do not show. A certain act is forbidden, and a penalty is imposed upon certain persons who violate the prohibition; and instead of providing that the penalty shall go to the State, or that an informer may sue for and recover it, this clause incidentally affords a remedy to the injured party, as the old statutes often did to the party aggrieved. This has nothing to do with the franchise of the corporation; but it would not matter if the corporation were incidentally affected. This corporation is subject, as are its officers, to the police power of the State, and the provisions of its charter cannot exempt it from regulations made in the exercise of that power. *Thorpe vs. Railroad Co.*, 27 Vt., 140; *Peters vs. Railroad Co.*, 23 Mo., 107; *Cooley's Const. Lim.*, 3d Ed., 573. Nor need the regulations be any more distinctly made, in the exercise of the police power, than as indicating an intent to carry out a policy which the State deems essential for the protection of rights in property; and regulations so made do not, because they incidentally affect it, impair the obligation of a contract. *The State vs. Matthews*, 44 Mo., 523; *Price vs. Insurance Co.*, 5 Mo. App., 262."

Coming now to the specific questions propounded by you, you are advised that in the opinion of this Department the Legislature is powerless to exempt from the provisions of this bill such private banks as have been in continuous operation for any definite fixed period of years prior to the taking effect of the law, for the reason that such would be a discrimination against those banks coming under its provision and in favor of those eliminated therefrom. Legislation of this character to escape the inhibition of the Fourteenth Amendment of the Constitution of the United States must be founded upon a reasonable distinction in principle, otherwise they deny the equal protection of the law guaranteed by the Constitution. The elimination of particular class, it is held, must be reasonable and natural or must be based on such natural principle of public policy. It is also held that the Legislature cannot arbitrarily create a class and when thus created make it binding on the courts so that they would be bound to accept such classification as a particular one. The general rule is stated to be that a classification must always be on some difference which bears a natural, reasonable and just relation to the act in respect to which the classification is proposed, and that a classification will be upheld if it is based on such a foundation. Again it is held that the Legislature cannot take what might be termed a natural class of persons, split that class in two and then arbitrarily designate the dissevered fractions of the original unit as two classes and thereupon enact different rules for the government of each. There is another general rule to the effect that statutes enacting conditions and qualifications for entering into a business, and not imposing such conditions and qualifications on persons previously engaged in such profession in the community for a period of years, are not on that account unconstitutional, for the reason that persons engaged in a profession for a cer-

tain number of years are assumed to have qualifications which others are required to manifest as a result of an examination.

8 Cyc., 1073.

6 R. C. L., Secs. 369 to 392.

Cooley's Constitutional Limitation, 7 Ed., pp. 554 et seq.

Numerous cases have arisen where laws have been enacted regulating different professions, such as physicians and surgeons, dentists and engineers, which laws exempted from the regulation and control therein prescribed persons who had followed the profession for varying periods of years, and we do not find the authorities in complete harmony upon the constitutionality of such acts. For example, in *Williams vs. People*, 11 N. E., 881, the Supreme Court of the State of Illinois upheld such an act. The same holding we find in *State vs. Hathaway*, 21 S. W., 1081, by the Supreme Court of the State of Missouri; while a contrary rule is announced in *State vs. Hinman* by the Supreme Court of New Hampshire, 23 Am. St. Rep., 22, and likewise in the case of *State of New Hampshire vs. Pennoyer*, by the same court. However, we are not without an authority upon this proposition from the Texas courts. In the case of *Pistole vs. State*, 160 S. W., 618, the Court of Criminal Appeals of this State had before it the act regulating the practice of veterinary surgery in this State, which act eliminated from the profession requiring an examination as a condition precedent to the issuance of license, persons who had practiced for a certain period of years prior to the enactment of the legislation. The Court of Criminal Appeals in upholding the constitutionality of this act, said:

"Again, appellant contends that it violates these sections of our Constitution: Section 3, Art. 1, to the effect that all free men have equal rights, and no man or set of men are entitled to exclusive, separate public emoluments or privileges, etc., and Section 17, Art. 1, which provides that no person's property shall be taken, damaged, or destroyed, or applied to public use without adequate compensation being made, and Section 19, Art. 1, which provides that no citizen of this State shall be deprived of property, privileges, or immunities, etc., except by due course of the law of the land. In our opinion none of these provisions are violated by this act, and none of these provisions are applicable. The act in our opinion is a most reasonable regulation in all of its provisions of the subject legislated upon, and, while it makes some classifications of those who have heretofore practiced or who may hereafter desire to practice, they are very reasonable, and, unless they were in the act, a much more plausible claim could be made that its provisions were unreasonable, than with the provisions as they exist in the act. By every provision of it, where classes are made, it is necessary to do so, and each within that class have equal rights with the others, and no exclusive rights or privileges are improperly attempted to be given to one over another. No one's property thereby is taken, damaged, or destroyed, but merely a reasonable and proper police regulation is made of the business legislated upon. Neither is anyone thereby deprived of his life, liberty, property, privileges, or immunities, but the act reasonably, and only reasonably, for the benefit of the whole people, undertakes and does properly regulate the license and practice of a veterinarian."

It will thus be seen that the court held the elimination of those having five years experience in the practice of this profession was not an unjust discrimination, on the other hand, that it was a reasonable classification for the reason as cited in the authorities hereinabove that a person having practiced a profession for the requisite number of years under the statute is presumed to have acquired the knowledge he would have dis-

closed upon examination. We see no analogy, however, between acquiring knowledge by the practice of the profession and the acquiring financial stability by a long period of banking experience. The examination of banking institutions is to determine their solvency, not the banking ability of the managing officials, although such may be considered.

We are therefore of the opinion that to eliminate from the provisions of this bill private banks that have been in operation for any fixed period of years would be a classification based on no principle of public policy. We see no objection, however, to an amendment authorizing the filing of a bond in lieu of the examination. The examination of a bank is for the purpose of ascertaining whether or not it is in a position to meet its obligations. If a bond is executed to secure the payment of its creditors, the same end would be reached.

We, therefore, answer your questions as follows: First, an amendment exempting from the provisions of the bill all private banks that have been in continuous operation for a definite fixed period prior to the taking effect of the act would be unconstitutional and void. Second, we advise in answer to your second question that a provision exempting from the operation of this act private banks that execute a good and sufficient bond, would be valid.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

Op. No. 2405, Bk. 57, P.

INSURANCE AGENCY DEFINED—REBATING BY DIVIDING COMMISSIONS
PROHIBITED—POWER TO REVOKE LICENSE.

The statute regulating insurance in Texas and defining insurance agents contemplates an agent who represents to some measure the insurance company's interest before the patronizing public and not one whose sole purpose is to procure insurance for himself or an interest he represents.

Article 4960, Revised Statutes, authorizing granting of certificates of authority to agents already made so by bona fide contract and is not the power creating agencies. It cannot be so construed as to evade the purpose of the law in regard to prohibiting rebates of premiums.

A person who represents a large interest and procures an agent's license to solicit insurance for the sole and only purpose of procuring insurance for the property upon which it is his business to procure insurance and to receive a divide of premiums from a bona fide agency who keeps all records and writes the policy, is not himself a bona fide agent and is not entitled to an agent's certificate of authority.

The Insurance Commission has authority, with the advice and consent of the Attorney General, to revoke an agent's certificate of authority for cause enumerated in the statute.

AUSTIN, TEXAS, January 20, 1922.

State Fire Insurance Commission, Capitol.

GENTLEMEN: I am in receipt of your inquiry wherein you submit to this Department for its ruling the question as to whether or not an individual holding an insurance agent's license under Article 4960, Revised Statutes, who writes no insurance except on his own property or property of his employer or associates or of an estate which he represents

and who makes no effort to solicit other insurance, is, in fact an agent and entitled to such agent's license. In explanation of this question you state that a practice has grown up throughout the State for certain large corporations in the State to have a designated representative of such company, or representatives of estates, to procure an agent's certificate of authority to write insurance, and that such insurance is placed through bona fide agents of insurance companies who keep the agent's books, sign the policies, etc., the agents whose status is questioned receiving a *divide of the regular agent's commission*. It is also stated that such practice is ostensibly for the purpose of evading Article 4897, Revised Statutes, forbidding rebating and fixing penalty.

Replying to this question, I desire to state that any answer must depend upon the facts of each particular case. It is our conclusion that if the agent who holds such license is not interested in the procuring of insurance for the company he purports to represent, but is interested as an employee or otherwise of the insured, and the *divide of commissions* from the bona fide agents is for the purpose of effecting a rebate of premiums and evading the provisions of the article of the statute above referred to, the person is not a bona fide insurance agent and is not entitled to receive from the Insurance Commission a license authorizing him to write insurance and you have the authority, in the manner hereinafter pointed out, to cancel the certificate of the agent.

Agency is a legal relation founded upon the express or implied contract of parties, or created by law by virtue of which one party, the agent, is employed or authorized to act for another, the principal. (*Hawkins vs. Murphy and Bolaz*, 112 S. W., 156.) It is a representative relation and in its broadest sense includes every relation in which one person acts and represents another by his authority. (*Int. Harvester Co. vs. Commonwealth*, 145 S. W., 393.) The relation arises when one is authorized to represent another in bringing or to aid in bringing the matter in contractual relation with the third party. (*Keyser vs. Hinkle*, 106 S. W., 98.) Every conception of agency, as the term must have been understood by the Legislature, implies a representation by the agent of the person designated as his principal. Every use of the word by the Legislature, connected with insurance, implies that it had in mind he should be the representative of the insurance company and not of himself or of a third party.

An insurance agent is not synonymous with an insurance broker. An insurance broker is one who brings the insurance company and the prospect for insurance together in a single transaction resulting in business for the insurance company and in insurance for the person who is seeking it, confining his representations and his greater interest to that of the individual seeking insurance as distinguished from an agent who may in a measure represent both. (*Good Roads Machinery Company vs. Commonwealth*, 143 S. W., 18.)

A person whose interest is solely the interest of the insured, as must be the instance described by you, when the obvious purpose is to evade the law and secure a rebate of premiums, cannot come within the definition of an agent of the insurance company under the authorities referred to above, or any other authority so far as we are able to ascertain.

I am mindful of an opinion written by Honorable C. M. Cureton, First

Assistant Attorney General, of August 2, 1916, in which he holds that an insurance broker in Texas is an agent within the purview of Article 4961 of the act regulating insurance and defining an agent. This opinion, however, is not at variance with the above statement for the reason that the broker referred to therein confines his representation to the interest of the insurance company and is governed by the statute regulating agents of insurance companies while the former procures insurance at the legal rate, is not regulated by law and cannot receive a divide of the agent's commission.

The purpose of this distinction is to classify the parties about whom you inquire, if possible, in order to determine whether or not they are insurance agents under the authorities. It will be observed that the test is in the interest he represents. Who is the principal? If the insurance company, he would not be a broker purely, but an insurance agent. If his interest is solely the interest of the insured, he is in no sense an insurance agent in contemplation of the statute and would not be entitled to receive the license; nor does he need such license to represent himself or his own interest, nor can he receive a divide of the commissions. We quote Article 4961, in part, as follows:

"Any person who solicits insurance on behalf of any insurance company * * * or who takes or transmits, other than for himself, any application for insurance or any policy of insurance to or from such company or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, * * * or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company other than for himself, * * * whether any of such acts shall be done at the instance or request or by the employment of such insurance company or of or by any broker or other person, shall be held to be the agent of the company for which the act is done," etc.

Again Article 4968 designates as agent "any person who shall solicit an application for insurance," etc.

It will be observed that each of the above instances, as in each and every other instance in which the insurance agent is referred to by the act, is referred to as a person who solicits applications for an insurance company or who advertises to do so, etc. The thought being uppermost always that he is acting for and procuring insurance in behalf of the insurance company and for its interest and not for his sole interest and benefit. He is a person who procures insurance from the insured and not for him and he must solicit insurance from some person other than himself and it would necessarily follow, if he is the agent of the company, he is to procure insurance from the patronizing public, and not from himself or from those for whom it is his duty in his regular employment to have insurance written.

Asserting again that it was the chief purpose of the act creating the Insurance Commission to prevent the giving of rebates and to secure to all people having property to insure with the same class of risks the privilege of doing so at the same rate, Article 4896 makes it unlawful for an insurance company to grant rebates on premiums "either directly or indirectly," and Article 4897 makes it unlawful for the insured to receive such rebates "either directly or indirectly." For the purpose of regulating insurance companies, and carrying into effect this regulation, the

Insurance Commission is empowered to issue certificates of authority to agents to write insurance as a representative of the insurance companies and agents are forbidden, under Article 4960, to pursue this occupation without having first procured such certificate of authority. There can be no presumption from this, however, that the granting of the certificate within itself creates the agency, as must be assumed by those following the practice you report. On the contrary, the certificate of authority issued by you authorizes an agent, already made such by reason of his contract with the insurance company, to pursue the business and occupation of soliciting insurance. If he is not a bona fide agent before the issuance of this certificate of authority, he is no more so after its issuance. The certificate creates no agency but authorizes an agency already created to function according to law.

It is a sound principle of law that that which cannot be done under the law directly is forbidden to be done indirectly and in this instance force is added to the language of the statute itself and particularly in Article 4954 forbidding discriminations by insurance companies or agents, as follows:

"* * * nor shall any such company or any officer, agent, solicitor or representative thereof pay, allow or give or offer to pay, allow or give *directly* or *indirectly*, as an inducement to insure, any rebate of premiums, payable on the policy or any special favors or advantage," etc.

If a person, because of the position which he holds, and through which he controls the placing of insurance for a corporation, individual or estate can be clothed with a certificate of authority to represent an insurance company when he has no intention of engaging in the business of an insurance agent, solicits no insurance and writes none except that in which he is personally interested either because of his property interest or employment, then a means is discovered by which the purpose of the law may be evaded in the most direct manner. If a few may be permitted to do this, why not many? If many, then why not any, and if any, then cannot an insurance company by this method give to those it favors reduced rates and unfairly compete with honest, conscientious insurance companies and evade entirely the regulation which the act is intended to give?

Another question which you submit is whether or not the Commissioner has the power to revoke the authority already issued to agents who are not bona fide insurance agents. I call your attention to the language of Article 4970 providing that insurance companies shall furnish to the Commission application for authority for its agents. The article closes with this language:

"Such certificate, unless sooner revoked by the Commission for cause, or cancelled at the request of the company employing the holder thereof, shall continue in force until the first day of March next after its issuance and must be renewed annually."

Article 4971, immediately following this, enumerates the causes for which such authority may be revoked and says it may exist after violation of any of the insurance laws. If the certificate has been issued to a person not a bona fide agent, but who acts for the purpose of evading the law, and he secures thereby a rebate in his premiums in the division of commissions between himself and a bona fide agency in accordance with

the practice you state commonly exists, he has violated the insurance laws and this act would be sufficient upon which to revoke the certificate in accordance with Article 4899 which provides that the Commissioner of Insurance, upon ascertaining that any company or agent or representative violates any provision of this act, may, with the advice and approval of the Attorney General, revoke the certificate of authority of such company, officer, agent or representative.

Yours very truly,

TOM L. BEAUCHAMP,
Assistant Attorney General.

OPINIONS ON ELECTIONS, SUFFRAGE, CITIZENSHIP

Op. No. 2253, Bk. 54, P. 498.

ELECTIONS—VOTERS—COMMUNITY PROPERTY.

(1) Law in respect to community property qualifies women as property taxpayers.

(2) A married woman who is otherwise qualified as a voter may vote in a bond election if the community property of the husband and wife is within the county or district where the bond election is held.

AUSTIN, TEXAS, October 8, 1920.

Hon. T. S. Johnson, Member of the Legislature, Austin, Texas.

DEAR SIR: You have submitted to this Department the following question:

“Does law of community property qualify women as property taxpayers?”

By Chapter 32, Acts 1913, Regular Session, the same being Article 4622, Vernon's Complete Civil Statutes, 1920, it is provided:

“All property acquired by either the husband or wife during marriage, except that which is the separate property of either one or the other, shall be deemed the common property of the husband and wife. * * *”

In Speer's Law of Marital Rights in Texas, it is declared:

“It is the cherished policy of our laws to regard the married union as a species of partnership in which each partner may own a separate or individual estate, and at the same time share equally in the common gains or acquisitions. It clearly defines what property shall enter into this common fund, and what property, and to what extent, shall remain the separate property of each partner. No effort is made to vest a greater portion of these joint acquisitions in one spouse than in the other. The wife's rights, in point of ownership, are in every respect the equal of those of her husband. They are identical; in short they own the estate in common.” (Section 296.)

In *Terrell vs. Moore*, 104 S. W., 514, it was held by the Dallas Court of Civil Appeals:

“The marriage relation, when once established, continues until dissolved by death or judicial decree, and all property acquired by either the husband or the wife during the marriage, except such as is acquired by gift, devise, or descent, is by statute made their common property. This community of interest is not made to depend upon the acquisition of the property during the time the parties actually live together, nor upon the fact that there was an equal amount of labor or capital contributed by the husband and wife in its accumulation. It is the property acquired ‘during the marriage’ * * * that ‘shall be deemed the common property of the husband and wife, and the right to an equality of enjoyment and division thereof, regardless of whether the one or other has contributed little or nothing in its acquisition,’ is well recognized.”

By Treasury Decision No. 3071, issued by the Commissioner of Internal Revenue, dated September 18, 1920, it is declared:

“The income from community property as defined in Article 4622, Vernon's Sayles' Statutes, is community income, and therefore husband and wife domiciled in Texas, in rendering separate income tax returns, may each report as gross income one-half the total income from such community property.”

It is, therefore, the opinion of this Department:

(1) Law in respect to community property qualifies women as property taxpayers.

(2) A married woman, who is otherwise qualified as a voter under the laws of this State, and who owns property subject to taxation, including the community property jointly owned by herself and husband, should be permitted to vote in a bond election held in the county, or district, as the case may be, in which she resides, if the property is situated within such county or district.

Yours very truly,

W. P. DUMAS,
Assistant Attorney General.

Op. No. 2293, Bk. 55, P. 216.

WORDS AND PHRASES—"ELECTOR" AND "APPOINTED" DEFINED—QUALIFICATION OF CITY SECRETARY.

An "elector" as that term is used in Article 794, Revised Civil Statutes, is synonymous with "qualified voter."

The word "appointed" as used in Article 794, Revised Civil Statutes, is limited to those persons "selected" or "chosen" by the city council as contradistinguished from persons selected by the entire electorate of the city.

The fact that a woman did not pay her poll tax prior to February 1, 1921, would not disqualify her from being a candidate for or from holding the office of city secretary.

Articles 784, 792, 794, Revised Civil Statutes.

Section 5, Chapter 6, Acts Fourth Called Session, Thirty-sixth Legislature.

AUSTIN, TEXAS, February 24, 1921.

Honorable H. R. Young, County Attorney, Kaufman, Texas:

DEAR SIR: I have your letter of February 21st addressed to the Attorney General, asking this Department to advise you whether "a woman residing in a town of 2500 inhabitants and who has not paid her poll tax for this year is eligible to make a race for city secretary, an elective office."

Article 784, Revised Civil Statutes, provides that the city secretary shall be elected by the qualified electors of the city.

Article 792 fixes the qualifications for mayor and aldermen, but nowhere are the qualifications for city secretary set out or defined unless it is in the general language contained in Article 792. This last article is as follows:

"None but resident voters eligible to office.—No person other than an elector, resident of the city, shall be appointed to any office by the city council."

The word "elector" as used in the above article means "qualified voter."

People vs. Dooley, 75 N. Y., 750.

City of Beardstown vs. City of Virginia, 76 Ill., 34.

Appeal of Cusick, 136 Pa., 459.

Bergevin vs. Curtz, 127 Cal., 86.

O'Flaherty vs. City of Bridgeport, 64 Conn., 159.

State vs. Tuttle, 53 Wis., 45.

Bouvier's Law Dictionary.

Webster's Dictionary.

Webster's Dictionary defines the word "elector" to be a person "who elects or has the right of choice; a person who has, by law or constitution, the right of voting for an officer."

A person subject to the payment of a poll tax, but who has failed to pay it, does not have "the right of voting for an officer," and is not an elector.

Bouvier's Law Dictionary defines "elector" to mean "one who has the right to make choice of public officers; one who has the right to vote."

A person who has failed to pay his or her poll tax does not have "the right to vote" and is not an "elector."

"Electors' is synonymous with 'voters' and means those persons who have the qualifications of electors prescribed by the Constitution." (State vs. Tuttle, supra.)

McPherson vs. Blacker, 146 U. S., 1.

Pierce vs. Gugenheimer, 60 N. Y., 703.

State vs. Compson, 34 Ore., 25.

Ried vs. Gorsuch, 67 N. J. Law, 396.

State vs. Williams, 60 Kansas, 837.

State vs. Harrison, 113 Ind., 434.

The Supreme Court of the United States in the case of McPherson vs. Blacker, supra, said:

"It has been said that the word 'appoint' is not the most appropriate word to describe the result of a popular election. Perhaps not, but it is sufficiently comprehensive to cover that mode, and was manifestly used as conveying the broadest power of determination."

In Ried vs. Gorsuch, supra, it was said:

"Discriminating authorities sanction the use of the word 'appointed' in a sense which includes the notion of election by a body as well as selection by an individual, and also the use of the word 'elected' as applied to those who are chosen by the votes of a body limited in numbers."

The Supreme Court of Kansas has held that the term "appointment" is synonymous with the term "elected." (State vs. Williams, supra.)

The Legislature in enacting Article 794, however, has limited the meaning of the word "appointed" by the use of the phrase "by the city council." As used in this article the word means: "selected," "chosen" or "elected" by the city council, as contradistinguished from selection or election by the entire electorate of the city.

In the event of a vacancy in the office of city secretary, the mayor "shall fill such vacancy by appointment to be confirmed by the city council." (Article 797.) When the office of city secretary is filled by appointment the person so appointed must be a resident elector, that is to say, a qualified voter. A person subject to the payment of a poll tax and who did not pay the same before February 1, 1921, is not a qualified voter and cannot be appointed to any city office. We do not pass upon the question of whether a woman is subject to pay a poll tax. But there is no statute providing that the city secretary elected by the people shall be a resident elector or qualified voter.

It may seem paradoxical to say that a person may be elected to an office without regard to whether he is a qualified voter and cannot be appointed to the same office unless he is a qualified voter. It is a heterogeneous situation.

We are strengthened in our conclusion by the fact that Article 792 provides that no person shall be eligible to the office of mayor or aldermen, unless he possesses the qualifications of an "elector," that is to say, the qualifications of a "qualified voter." If the Legislature intended for the city secretary to possess the same qualifications, why did they not include the secretary with the mayor and aldermen? We think this a case in which the maxim "expressio unius exclusio alterius" may be applied, that is to say, the Legislature by naming certain officers in this article by name has expressly excluded all officers from the provisions of this article who are not named.

There is a general article relating only to offices to be filled by appointment, which provides that no person shall be appointed to such office except such a person be a "resident elector," that is, a "qualified voter," and it just so happens that in case of a vacancy in the office of city secretary the office is to be filled by appointment and the person appointed must be a "resident elector," whereas, a person may be elected to the office, even though not a "resident elector."

In view of what has been said, it has not been necessary for this Department, at this time, to pass on the question of whether a woman must have paid a poll tax prior to February 1, 1921, in order to exercise the elective franchise between the last named date and January 31, 1922. The statute says she "must" have done so in order to vote. (Section 5, Chapter 6, Acts Thirty-sixth Legislature, Fourth Called Session.) This statute may or may not be constitutional, we do not decide that question in this opinion for the reason that the woman mentioned in your letter is not disqualified from being a candidate for the office of city secretary in the city referred to in your letter, even though she was subject to the payment of a poll tax and had failed to pay it for the reason that a person may be elected to that office without being a "resident elector" or "qualified voter." When the office is filled by appointment, the person so appointed must be a qualified voter and a person is not a qualified voter, if subject to the payment of a poll tax, unless he has paid the same.

I am, with respect,

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2254, Bk. 54, P. 485.

SUFFRAGE—POLL TAX—CERTIFICATES OF EXEMPTION—ELECTIONS
PRIOR TO FEBRUARY 1, 1921—ACT OF OCTOBER 2, 1920:

As to those entitled to vote in this State at elections, general, special, municipal and primary, held prior to February 1, 1921, in view of the poll tax and suffrage act of October 2, 1920.

AUSTIN, TEXAS, October 8, 1920.

Hon. M. L. Wigington, Comptroller of Public Accounts, Capitol.

DEAR SIR: The Attorney General is in receipt of yours of the 4th instant, requesting a construction by him of Senate Bill No. 1, passed at the recent Fourth Called Session of the Thirty-sixth Legislature, ap-

proved October 2, 1920, relating to the levy of a poll tax on both men and women in this State and to the right of both men and women to vote in this State.

Let it be understood that the Attorney General has at no time passed upon, and is not here passing upon, any constitutional or other question touching the validity or invalidity of this act, but is passing only upon the administrative provisions of the act, as disclosed upon its face.

In passing upon an act of this character, after it has been considered and approved by the Governor, it is not within the province of the Attorney General, nor of any administrative or executive officer, to question its constitutionality, except, possibly, in the case of glaring or patent defects, but it is the duty of all such officers to treat the act, and all its provisions, as constitutional and effective, and faithfully to administer it accordingly. This statement is made only for the purpose of making it clear that the validity of this act, for whatever reason, is in no way considered or passed upon, and not with any thought of raising or suggesting any question as to its validity.

Having in mind this act, as well as other provisions of our law with respect to voting, you are advised that all persons in this State, both men and women, if they are otherwise qualified to vote, who have complied, or who shall comply, with the following requirements, will be entitled to vote at any election, general, special, municipal and primary, including nominating conventions, that may be held in this State at any time before February 1, 1921, that is to say:

1. Those over twenty-one and under sixty years of age on January 1, 1919, both men and women, who are otherwise qualified to vote, *who paid* their poll tax for the year 1919 and obtained proper receipt therefor before February 1, 1920, whether as to men, under the former law requiring the payment of a poll tax by men only, or, as to women, as authorized by Chapter 34, (p. 61), of the General Laws passed by the Fourth Called Session of the Thirty-fifth Legislature, being the act authorizing women to participate in primary elections and nominating conventions, will be entitled to vote at any election, general, special, municipal and primary, held in this State at any time before February 1, 1921. It will not be necessary for such persons, either men or women, to register, or to pay any further or additional tax or fee, or to obtain any further or other receipt or certificate, in order to be entitled to vote in any such election. Nothing further whatever is required of such persons. It will be necessary, however, for such persons to present such poll tax receipts when offering to vote, or to make affidavit as to payment of tax, loss of receipt, etc., just as has been heretofore required. Such payment and receipt, however, will not entitle such persons to vote at any election after February 1, 1921. (Sec. 6. Acts of October 2, 1920.)

2. Those over twenty-one and under sixty years of age on January 1, 1919, both men and women, who are otherwise qualified to vote, *who did not pay* their poll tax for the year 1919 and obtain proper receipt therefor before February 1, 1920, either, as to men, under the former law requiring the payment of a poll tax by men only, or, as to women, as authorized by Chapter 34 (p. 61), of the General Laws passed by the Fourth Called Session of the Thirty-fifth Legislature, being the act authorizing women to participate in primary elections and nominating con-

ventions, but who now pay such tax and obtain proper receipt therefor before October 22, 1920, will be entitled to vote at any election, general, special, municipal and primary, held in this State at any time before February 1, 1921. This is authorized by this new act; that is, this new act extends to such men and women alike this further and additional opportunity to pay their 1919 poll tax and authorizes them to vote on such payment in like manner, and up to the same time, that is, to February 1, 1921, as those who paid this tax and obtained proper receipt therefor before February 1, 1920, but denies to those who now pay this tax, just as was and is denied to those who paid same prior to February 1, 1920, the right to vote, as far as that tax and receipt are concerned, at any election held after February 1, 1921. It will be noted that the poll tax covered by this provision of the new act is the one payable for the year 1919, and not heretofore paid, and those now paying such tax should have issued to them by the tax collector a poll tax receipt for that year. In the issuance of these receipts, which may and should be issued from now until October 22, 1920, but not thereafter, the tax collector should use the same form of poll tax receipt as was issued to those who paid the 1919 poll tax prior to February 1, 1920. Such persons, when offering to vote, should present such receipt or make affidavit as to payment of the tax, loss of receipt, etc., just as has been heretofore required. Such payment and receipt, however, will not entitle such persons to vote at any election held after February 1, 1921. If a poll tax has been assessed against such person for the year 1919, and such tax has not been paid, and such person is otherwise qualified to vote, such person, so far as the right to vote is concerned, is entitled to pay such poll tax and to have issued to him or her a receipt therefore, at any time before October 22, 1920, without the payment by such person of such interest, penalty and costs, as may have accrued against such person by reason of his failure theretofore to pay such poll tax, but such interest, penalty and costs, as may have accrued against such person by reason of the failure previously to pay such poll tax, are not remitted, but remain a charge against such person subject to collection and payment in like manner, as if such poll tax had not been so paid. That is, Section 7, of this new act, provides that such persons "shall have and are hereby granted until October 22, 1920, in which to pay the poll tax of the same amount heretofore collected from male persons only as a prerequisite to voting, * * *" but certain interest and penalties (Art. 2692, R. C. S., 1911; State vs. Fulmore, 71 S. W., 418) have accrued against such person by reason of the failure previously to pay such tax, and it is not clear that this new act relieves such person of the payment of the same, and no other law does so. Hence, we hold that such person has this right to pay this 1919 poll tax, and to have issued to him or her, at any time before October 22, 1920, proper receipt therefor, without the payment of such interest, penalty and costs, and that such interest, penalty and costs are not remitted; but remain a charge upon the tax rolls against such person subject to payment and collection in like manner, as if such poll tax had not been so paid. Such persons, however, as are not otherwise qualified to vote, are not included in this provision, but remain subject to the general law with respect to the payment and collection of taxes from delinquents and insolvents. Another reason for this construction of the

law is that the Constitution requires that taxation be equal and uniform and we do not understand that the Legislature intended that one, otherwise qualified to vote, should thus be relieved of the interest, penalties and costs that may have accrued against him, and, at the same time, not so relieve one who is not otherwise qualified to vote. (Sec. 7, Act October 2, 1920.)

3. Those who have heretofore paid the poll tax for the year 1919, but paid such poll tax after February 1, 1920, are, by reason of such payment, if otherwise qualified to vote, entitled to vote at any election, general, special, municipal and primary, held in this State at any time before February 1, 1921, but not at any election held thereafter, without the payment of any further or other tax or fee, and without having issued to them any other receipt therefor than that authorized and required to be issued in such case. In such case, the person so paying such tax was not entitled to and will not have received the form of tax receipt required to be issued to those paying such tax before February 1, 1920, nor the form of receipt issued to those authorized to pay such tax before October 22, 1920 (Art. 2950, R. C. S., 1911), but was entitled to and should have received a receipt therefor in some other form. Whatever the form of the receipt, such person will nevertheless be entitled to vote, if such tax was in fact paid after February 1, 1920, and before October 2, 1920, and receipted by the tax collector. Such person, when offering to vote, should present such receipt, whatever its form, showing payment of such poll tax, and same should be stamped or marked by the election officers, just as is required in the case of other poll tax receipts. If such receipt is not so produced, such person should be required to make affidavit that he or she paid such poll tax after February 1, 1920, and before October 2, 1920, that such receipt is lost or misplaced, etc., just as is required of those who may have paid the poll tax before February 1, 1920, and between October 2nd and October 22, 1920, and who may have lost or misplaced the same. It should also be made to appear, either by oath of such person so offering to vote, or in some other satisfactory and affirmative way, that such person possesses all other requirements of a qualified voter. Such person, however, will not be entitled to vote on such receipt at any time after February 1, 1921. We reach this conclusion from the general provisions, purpose and intent of our State Constitution and laws with respect to suffrage, and the history and development of same, and the condition brought about with respect to suffrage by reason of the recent adoption of the Nineteenth Amendment to the United States Constitution to the effect that there shall be no discrimination with respect to suffrage on account of sex, and the effect of same upon our suffrage laws, rather than from any specific provisions of our laws with respect to those who may vote.

4. Those who were not twenty-one years of age on January 1, 1920, but who were to become twenty-one years of age after February 1, 1920, and before February 1, 1921, *who obtained* certificates of exemption before February 1, 1920, whether, as to men, under the general law of this State, or, as to women, as authorized by Chapter 34 (p. 61), of the General Laws passed by the Fourth Called Session of the Thirty-fifth Legislature, being the act authorizing women to participate in primary elec-

tions and nominating conventions, will be entitled to vote at any election, general, special, municipal and primary, held in this State at any time before February 1, 1921, if otherwise qualified to vote. It will not be necessary for such persons, either men or women, to register or to pay any poll tax, or to obtain a poll tax receipt, or to obtain any other or further certificate. Nothing further whatever is required of such persons. Such persons, however, should present such certificates, when offering to vote, or must be required to make affidavit that same is lost, etc., just as has been heretofore required. Such certificate, however, will not entitle such persons to vote at any election held after February 1, 1921. (Sec. 6, Act of October 2, 1920.)

5. Those who have become twenty-one years of age since January 1, 1920, *who did not obtain* certificates of exemption before February 1, 1920, either, as to men, under the general law of this State, or, as to women, as authorized by Chapter 34 (p. 61), of the General Laws passed by the Fourth Called Session of the Thirty-fifth Legislature, being the act authorizing women to participate in primary elections and nominating conventions, but who now obtain such certificates before October 22, 1920, will be entitled to vote at any election, general, special, municipal and primary, held in this State at any time before February 1, 1921, if otherwise qualified to vote. This is authorized by this new act; that is, this new act extends to such men and women alike this further and additional opportunity to obtain such certificates of exemption, and authorizes them to vote on same in like manner, and up to the same time, that is, February 1, 1921, as those who obtained such certificates before February 1, 1920, but denies to those who now obtain such certificates, just as was and is denied to those who obtained such certificates prior to February 1, 1920, the right to vote, as far as such certificates are concerned, at any election held after February 1, 1921. In the issuance of these certificates, which may and should be issued until October 22, 1920, but not thereafter, the tax collector should use the same form of certificates as was issued to those obtaining same prior to February 1, 1920. It will be necessary, however, for such person to present such certificate when offering to vote, or to make affidavit as to the loss of same, etc., just as heretofore been required. Such certificate, however, will not entitle such person to vote at any election held after February 1, 1921. (Sec. 8, Act of October 2, 1920.)

6. Those who became twenty-one years of age after January 1, 1919, and before January 1, 1920, are not, and cannot be, required to pay a poll tax for any year, or to obtain a certificate of exemption, as a prerequisite to vote at any election held before February 1, 1921. Such persons, if otherwise qualified to vote, are and will be entitled to vote at any election, general, special, municipal and primary, that may be held in this State at any time before February 1, 1921, without the payment of any poll tax, and without obtaining any certificate of exemption. (*Earnest vs. Woodles*, 208 S. W., 963.)

7. Those who are over sixty-one years of age on January 1, 1920, and those who were more than sixty years of age on January 1, 1919, who do not live in a city of ten thousand inhabitants, or over, who are otherwise qualified to vote, are and will be entitled to vote at any election, general, special, municipal and primary, held at any time hereafter in

this State, without being required to pay any poll tax or other fee or charge, and without obtaining any certificate of exemption. Such of said persons as reside in a city of ten thousand inhabitants, or more, are required to obtain, prior to October 22, 1920, exemption certificates of the same kind as those heretofore authorized and required to be issued to such persons residing in such a city. Upon obtaining such certificates before October 22, 1920, but not otherwise, such persons, so residing in such city, will be entitled to vote at any such election. (Sec. 8, Act of October 2, 1920.)

8. Those who are exempt from the payment of a poll tax, other than those so exempt by reason of being under twenty-one and over sixty years of age, that is, Indians not taxed, persons blind, deaf or dumb, or who have lost one hand or one foot, or who are permanently disabled, and who are otherwise qualified to vote, are and will be entitled to vote poll tax or procuring a certificate of exemption. (Sec. 3, Act of October 2, 1920.)

9. Honorably discharged soldiers, sailors and marines, who have served as such during the recent war with the German Empire, if otherwise qualified to vote, may vote at all elections held within this State during the year 1920, without the payment of a poll tax or procuring a certificate of exemption; but such persons will be required, when offering to vote, to exhibit to the election officer their discharge from the military service or naval service of the United States, showing their service in such war, or, if such discharge is lost, misplaced, or in the hands of the Government, then such persons, when offering to vote, shall make a written affidavit to such fact, stating in the face of the affidavit the unit in which they served at the time of discharge, and, as near as may be, the date and place of their discharge and present place of residence. (Sec. 8, Act of October 2, 1920; Chap. 3, Genl. Laws, First Called Session, Thirty-sixth Legislature.)

10. The law now levies a State poll tax alike upon both men and women, and with like exemptions or exceptions, beginning with the year 1920, in the sum of \$1.50 against each subject thereto, and authorizes counties to levy a poll tax alike against both men and women, subject thereto, of not more than twenty-five cents against each, beginning with the year 1920, and before either men or women will be entitled to vote at any election held in this State at any time after February 1, 1921, and before February 1, 1922, they must have paid their poll tax for the year 1920, if subject thereto, and have obtained proper receipt therefor before February 1, 1921. This is a different poll tax from, and is in addition to, the poll tax required to be paid before October 22, 1920, in order to entitle one to vote at such elections as may be held prior to February 1, 1921.

11. Those who will not be twenty-one years of age on January 1, 1921, but who will become twenty-one years of age before February 1, 1922, both men and women alike, must obtain exemption certificates before February 1, 1921, in order to be entitled to vote at any election held after February 1, 1921, and before February 1, 1922, if otherwise qualified to vote. This is a different certificate from, and is in addition to, the certificate authorized to be issued before October 22, 1920.

12. Those who were over sixty years of age on January 1, 1920, and

who resided in a city of ten thousand inhabitants, or more, both men and women alike, if otherwise qualified to vote, must obtain certificates of exemption before February 1, 1921, in order to be entitled to vote at any election held after February 1, 1921, and before February 1, 1922. Such persons of such age, who do not reside in a city of ten thousand inhabitants, or more, will be entitled to vote without obtaining such certificate, if otherwise qualified to vote.

13. Beginning with January 1, 1920, soldiers, sailors and marines, honorably discharged from service in the recent war with the German Empire, and who are permitted to vote at any election held "during the year 1920" without the payment of a poll tax or obtaining a certificate of exemption, will be subject to the same law with respect to voting as those who were not in such service, that is, to be entitled to vote at any election held after January 1, 1920, it will be necessary for such persons to obtain poll tax receipts or certificates of exemption, as the case may be, not later than February 1, 1921, in like manner as those who were not in such service.

14. Section 7 of this new act extends the time for the payment of the 1919 poll tax "until the 22nd day of October, A. D. 1920." Section 8 of the act authorizes certificates of exemption to be obtained "prior to October 22, 1920." Section 9 of the act provides that poll tax receipts and certificates of exemption shall be issued by the tax collector to those mentioned in Sections 7 and 8 "who apply therefor prior to October 22, 1920." Such receipts and certificates may be issued as late as 12 o'clock midnight, October 21, 1920, but not thereafter.

15. Section 4 of the act makes certain provisions for voting prior to election day by those who expect to be absent from their voting places on election day, but expressly declares that "the right of absentee voting herein given shall apply to any and all primary elections only." This makes no change in the former law on this matter. Absentee voting is not allowed at any election except primary elections. One who desires to vote at a general election, or at any election other than a primary election, must personally appear at the proper voting place and cast his or her ballot in person.

16. Under Article 927 of the Revised Civil Statutes of 1911, certain cities and towns are authorized "to levy and collect an annual poll tax, not to exceed one dollar, on every male inhabitant of said city over the age of twenty-one years (idiots and lunatics excepted), who is a resident thereof at the time of such annual assessment." This law has not been amended so as to authorize the levy of a poll tax by a city against women at all, and as no assessment of such poll tax is authorized she cannot be required to pay the same—in fact could not pay same in such a way as to constitute such a payment by her the payment of a poll tax in a legal sense. This being true, a woman cannot be required to pay a city poll tax as a prerequisite to voting, and since this cannot be required of a woman as a prerequisite to voting, neither can it be required of a man as a prerequisite to voting. To do so would be to require something of a man (the payment of a city poll tax) that cannot be required of a woman, and that as a prerequisite to voting. This would be a clear discrimination (against men), solely on account of sex and therefore clearly prohibited by the Nineteenth Amendment to the United States Constitution.

It follows that no one, neither men nor women, can be required to pay a city poll tax as a prerequisite to voting, and that any person may vote without the payment of a city poll tax, if otherwise qualified to vote. This in no way releases men from the payment of a city poll tax, if in fact liable therefor. The tax remains due and payable by men, as a tax, just the same. It is only that he is not denied the right to vote because of his failure to have paid such tax. It is true that Section 4 of the Act of October 2, 1920, states that "any voter who is subject to pay his or her poll tax under the * * * ordinance of any city or town in this State shall have paid such tax before he or she offers to vote," etc., but this provision can have no present effect for the reason that cities and towns are not authorized to assess a poll tax against women and they are therefore not "subject to pay" such tax.

17. By Section 10 of this new act it is made the duty of the tax collector, at some time after October 22, 1920, and before October 28, 1920, to deliver to the election board (County Judge, County Clerk and Sheriff) of his county, alphabetical lists of the persons in each voting precinct of his county who shall have paid their poll tax or obtained certificates of exemption under this new act between October 2, 1920, and October 22, 1920, properly certified by him, one such list of and for each such precinct. These lists are required to show the same data and information as to each such poll tax payer as was and is required under Article 2961 of the Revised Civil Statutes, and the same blank forms may be used in preparing same, except that the date of issuance of receipts and certificates will be different, but these lists are separate from and in addition to those heretofore prepared and furnished under Article 2961. The election board will furnish these lists to the election judges of their respective counties, just as other such lists have been and will be furnished. Tax collectors are also required to furnish to the county clerks of their counties, on or before October 31, 1920, a report showing how many poll tax receipts and exemption certificates were issued under this new act, to whom issued, and for which voting precinct issued, which report shall become a permanent record of the county.

18. Articles 5841 and 5845 exempting officers and enlisted men of the active militia of this State from the payment of poll taxes, except the State poll tax of one dollar required for the public free schools, provided certain provisions of those articles are complied with, are not changed.

19. The poll tax payable under this new act is the same in amount as that payable under the former law, and the payment of same under this new act should be received, reported, appropriated and disposed of just as has been done with money heretofore received from such source, and the same fees or compensation heretofore allowed, with respect to poll tax payments and receipts, are allowable for like services performed under this new act, and payable in the same way. (Art. 2986, R. C. S.)

20. We have sought to impress both officers and voters with the difference between what is required, in order to entitle one to vote at elections held *prior to February 1, 1921*, and what is required in order to entitle one to vote at elections held *after February 1, 1921*. There is a distinct difference, as indicated herein.

21. We have not undertaken to consider or discuss the general qual-

ifications for voting. They are generally understood by everyone. You will note, however, that the recent act of October 2, 1920, made no changes in these, other than to subject women, as men have been heretofore subjected, to these general requirements, and to place upon women, as was heretofore placed upon men, the privilege and duty of voting at all elections, when legally qualified so to do. The intention is that all citizens, without regard to sex, shall stand as equals so far as legal qualifications are concerned, subject alike to the same legal qualifications and requirements for voting. Other questions will likely arise from time to time, but we have endeavored to anticipate and answer those that are most general and of most pressing importance. Our elections laws pertaining to the qualifications of those entitled to vote present many intricate questions, giving rise to differences of opinion in some points, and more or less doubt as to others, but we have endeavored to resolve these difficulties and doubts in the light of what is felt to be the general spirit and purpose of our law, having special regard to the protection and purity of the ballot box, a fair and honest ascertainment of the judgment of those authorized to express themselves at the polls, as well as a due consideration for those who are charged with duty and responsibility of exercising the franchise, and with whom must rest finally, as it should, free and full choice in governmental matters.

Yours very truly,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2436, Bk. 57, P. 308.

SUFFRAGE—EXEMPTION CERTIFICATES—LIST OF QUALIFIED VOTERS—
CITIES TEN THOUSAND INHABITANTS OR MORE.

One who is sixty years of age or over on the first of January of any year, and who does not at any time prior to the first day of February of the following year reside in a city of ten thousand inhabitants or more, but who on or after the first day of such February becomes a resident of such a city, is not required to have a certificate of exemption from the payment of a poll tax, nor to have his name appear on the list of qualified voters of the precinct of his new residence in such city, as a prerequisite to his right to vote in such precinct, if otherwise qualified to vote.

AUSTIN, TEXAS, June 5, 1922.

Mr. E. E. Murphy, County Attorney, San Angelo, Texas.

DEAR SIR: The Attorney General is in receipt of yours of the 30th ult., enclosing therewith copy of letter addressed to you by Mr. R. H. Hanks, tax collector of your county, under date of May 26, 1922. These letters present the following facts:

That one C. L. Shank, 65 years of age, resided on January 1, 1921, in Voting Precinct No. 6 of Tom Green County, and outside the city limits of the City of San Angelo; that on February 1, 1922, Mr. Shank moved into the corporate limits of and became a resident of the City of San Angelo; that San Angelo is a city of more than ten thousand inhabitants; that on May 25, 1922, Mr. Shank was denied the right to vote at an election held in the City of San Angelo on the ground that he had not been properly transferred to, and that his name did not appear on

the list of qualified voters of the voting precinct of the city of which he had become a resident; that thereafter Mr. Shank made application to the tax collector of your county to be transferred to or to have his name placed upon the list of qualified voters of the voting precinct of his residence in said city, but was unable to have this done for the reason that he did not have either a poll tax receipt or certificate of exemption.

Under this state of facts you desire to know the status of Mr. Shank as a voter, and what the duty of your tax collector is with respect to placing the name of Mr. Shank upon the list of qualified voters of the voting precinct of his new residence.

We do not find that this question has ever been passed upon either by any of our courts or by the Attorney General.

Under the facts stated, Mr. Shank is not subject to the payment of a poll tax and is not required to have paid and to have procured a receipt for the same as a prerequisite to his right to vote. (St. Con., Sec. 1, Art. 8; Sec. 3, Art. 7; Secs. 1 and 2, Art. 6; R. C. S., Arts. 2938, 2939, 2942, 2943 and 7354).

It will be noted that the Constitution nowhere requires one to procure a certificate of exemption from the payment of a poll tax as a prerequisite to vote. The statute, however, requires this of two, and of but only two, classes of persons; namely, minors who will become twenty-one years of age after the first day of February of each year, and who are otherwise qualified to vote, whether residents of a city of ten thousand inhabitants or more, or not (R. C. S., Art. 2954), and all those who are exempt from the payment of a poll tax for whatever reason, and who are in other respects qualified voters, who reside in a city of ten thousand inhabitants or more (R. C. S., Art. 2953).

From the facts here stated it is clear that Mr. Shank does not fall within the former class. Does he fall within the latter? We think not.

Article 2939 of the Revised Civil Statutes, after prescribing certain qualifications for voting, further provides for those so qualified that

“If he is exempt from paying a poll tax and resides in a city of ten thousand inhabitants or more, he must procure a certificate showing his exemption as required by this title.”

When we look to see what is “required by this title” of those who reside in a city of ten thousand inhabitants or more with respect to exemption certificates we find only Article 2953. On this question this article reads as follows:

“Every person who is exempt by law from the payment of a poll tax and who is in other respects a qualified voter, who resides in a city of ten thousand inhabitants or more, shall, after the first of October and before the first day of February following, before he offers to vote, obtain from the tax collector of the county of his residence a certificate showing his exemption from the payment of a poll tax.”

Whatever else the word *resides* may mean as used in Articles 2939 and 2953, we think it evident that it does not apply to one who at no time resides in a city of ten thousand inhabitants or more prior to the first day of February of the year in which the election is held. Such person could not have procured a certificate of exemption at any time prior to that day because not a resident of such a city, nor could he procure such certificate at any time after that day for the reason that such certificates

cannot be legally issued after the 31st day of January of such year. We conclude, then, that Mr. Shank is not required to have a certificate of exemption from the payment of a poll tax in order that he may be entitled to vote during the year 1922 in the voting precinct of his new residence in the City of San Angelo.

Is it not required, however, that his name appear on the certified list of qualified voters of the precinct of his new residence? We do not think so. The only statute that might seem to require this is found in the latter part of Article 2952, but taking this Article as a whole we do not think it so required. In so far as in point this article provides:

"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 any 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. * * * But no such person shall be permitted to vote in a city of ten thousand inhabitants or more, unless he has first presented to the tax collector of his residence a tax receipt or certificate, not less than four days prior to such election or primary election or made affidavit of its loss and stating in such affidavit where he paid such poll tax or received such certificate of exemption; and the collector shall thereupon add his name to the list of qualified voters of the precinct of his new residence; and, unless such voter has done this and his name appears on the certified list of voters of the precinct of his new residence, he shall not vote."

The words "no such person" and "such voter," as used in this article, clearly apply only to those previously mentioned, that is, those who have received, who are required to have procured as a prerequisite to vote, either a poll tax receipt or a certificate of exemption. Since, as we have seen, neither is required of Mr. Shank, it follows that it is not required that his name appear on the list of voters of the precinct of his new residence. In fact, the law provides no method by which his name can be placed upon or added to such list.

In addition to all other requirements Article 788 seeks to require that one must be registered as a qualified voter in a city before being entitled to vote at any election in such city. It is not necessary to discuss this provision for the reason that San Angelo is a city of ten thousand inhabitants or more, and Article 2964, a later enactment than Article 788, expressly provides that

"No registration in cities of ten thousand or more shall be hereafter required as a qualification to vote."

It is our opinion, therefore, that we have no constitutional nor statutory provision requiring that Mr. Shank should have a certificate of exemption from the payment of a poll tax, or that his name should appear on the list of qualified voters of the precinct of his new residence in the City of San Angelo, as a prerequisite to his right to vote at any election held in said city, and that neither can be required of him, and you are so advised.

You will understand, of course, that we are not passing upon Mr. Shank's qualifications generally as a voter, but only upon the one question presented by your inquiry, as herein discussed.

Very truly yours,

W. W. CAVES,
Assistant Attorney General. .

Op. No. 2304, Bk. 55, P. 269.

ELECTIONS—QUALIFICATION OF VOTERS—PAYMENT OF POLL TAX—
MANNER OF PAYING.

In cities of less than ten thousand population, the constitutional right of suffrage does not depend upon the payment by the voter of his poll tax "in person," all that is required being that he shall pay his poll tax on or before a stipulated day, and hence, though the statute relating to the payment of poll taxes as a condition to the right of suffrage directs the voter to pay the tax in person or give a written order therefor, a voter would not be deprived of his right of suffrage by reason of the payment of his tax by another without written order where the receipt obtained by him from the tax collector was regular upon its face and where the statute did not expressly provide that a failure to obtain a receipt in the manner directed by the statute would disfranchise the voter.

AUSTIN, TEXAS, March 8, 1921.

Honorable B. G. Worswick, County Attorney, Dickens, Texas.

DEAR SIR: We have your letter of February 28, 1921, wherein you submit the following question:

"A, B, C, D and E, being subject to the payment of poll tax, by written authority each authorizes F to pay the same, and F, instead of delivering in person the several orders of authority, entrusts the same to G to deliver same to the tax collector. G delivers the same and pays the aggregate amount of the poll tax to the tax collector. The tax collector receipts the same and mails the poll tax receipt to each party entitled to receipt such poll tax receipt; that is, the person subject to the poll tax.

"Kindly advise me as to the legality of votes under the above condition of facts."

Since there is not in Dickens County a city of ten thousand inhabitants or more, each of the above designated persons was authorized under Article 2944, Revised Statutes, to have their poll tax paid by someone duly authorized in writing to pay the same and furnish the collector the information necessary to fill out the blanks in the poll tax receipt. It seems that this provision of the statute was complied with and that the tax collector in turn complied with the provisions of Revised Statutes, Article 2945a, by mailing the tax receipt to the tax payer.

If we should desire to become technical, the question might be raised as to whether or not the party who delivered the authority in writing, signed by the taxpayers, together with their money, for the purpose of paying such tax, was the agent of the taxpayer. However, a principal may either ratify unauthorized acts or contracts made on his behalf by a mere stranger or volunteer who has never been his agent but who has assumed the act as such in the particular transaction, or he may ratify the act of one who is his agent for certain purposes, but who in the particular transaction acted outside the scope of his authority, whereupon the relation of principal and agent is created in respect to matters concerning which none before existed, and the act or contract thereby becomes as effectual as to the principal as though it had been previously authorized.

Williams vs. Moore, 24 Texas Civ. App., 402; 58 S. W., 553.

Garlick vs. Morley, 132 N. W., 601.

Fant vs. Campbell, 58 Pac., 741.

Ramsey vs. Miller, 95 N. E., 35.
Heyn vs. O'Hagen, 21 N. W., 861.

In your letter of above date you state that on the 26th day of March, 1921, there will be an election held in your county to determine the location of a county seat and for these reasons it becomes material as to whether or not the parties herein in question are qualified voters and can legally vote in such election.

In the case of Wallis et al. vs. Williams et al., 110 S. W., 785, this case being based upon a contest of a county seat election, Chief Justice Pleasants of the First Court of Civil Appeals of Texas, used this language:

"The constitutional right of suffrage does not depend upon the payment by the voter of his poll tax 'in person,' all that is required being that he should pay his poll tax on or before a stipulated day, and hence, though the statute relating to the payment of poll taxes as a condition to the right of suffrage directs the voter to pay the tax in person or give a written order therefor, a voter would not be deprived of his right of suffrage by reason of the payment of his tax by another person without written order, where the receipt obtained by him from the tax collector was regular upon its fact, and where the statute did not expressly provide that a failure to obtain his receipt in the manner directed by the statute would disfranchise the voter."

In the case of Linger vs. Balfour, 149 S. W., 807, Mr. Justice Pressler of the Amarillo Court of Appeals of Texas discussed and concurred in the opinion as rendered in the case of Wallis vs. Williams, supra, although Mr. Justice Pressler in the case of Linger vs. Balfour, supra, held that where a party with his own money voluntarily paid the poll tax of another, that the party for whom the poll tax was paid was not a qualified voter.

In the case of Parker vs. Busby, 170 S. W., 1042, certain taxpaying petitioners brought mandamus to compel the tax collector to issue poll tax receipts to them and date them January 30, 1911. It appears that the petitioners had executed an instrument in writing appointing an agent to pay their poll tax and purporting to show that they were qualified voters. The petitioners did not reside in a city of ten thousand or over. However, the tax collector refused to issue poll tax receipts; hence mandamus proceedings were instituted and it was held in this case that

"Where a poll tax is tendered within the time specified, the collector has no discretion but to receive it and issue a receipt therefor, though he is in doubt as to the right of the payer to vote, and, when the tax is paid within the time specified, it is the duty of the collector to issue a receipt as of the date of payment, though on a subsequent date, notwithstanding Article 224 of the Penal Code, providing that the collector shall not issue a poll tax receipt after February first in any year 'bearing a date' prior to February first; the only date to be shown in the form of the receipt prescribed by Article 2549 being the date on which the tax is received.

"Where poll taxes are tendered to the collector before the time for payment has expired, performance of the collector's duty to issue a tax receipt may be compelled by mandamus."

In the case of U. S. vs. Foster, 6 Fed., 247, the Constitution of the State of Virginia provided that in order to entitle a citizen to vote "he shall have paid to the State before the day of election, the capitation tax required by law for the preceding year." The statutes of Virginia pro-

vided that if any person directly or indirectly gives to a voter in any election any money, goods or chattels, *or paid his capitation tax* under an agreement, express or implied, that he would vote for a certain person or measure, such persons shall be punished by fine of not less than \$20 nor more than \$100 and the voter receiving such money, goods or chattels, or having his capitation tax paid in pursuance of such agreement, shall be punished in like manner with the person giving the same. It was held that the payment of such capitation tax by another qualified the citizen to vote, whether the penal code had been violated or not.

It seems that the records of the tax collector of Dickens County would show that the receipts issued by him show no irregularity in the payment of the poll taxes, that they were paid in good faith and with the money of, and at the request of the several persons for whom paid, although not paid by such persons themselves.

As it was said in the case of Wallis vs. Williams, *supra*, the right of suffrage conferred by the Constitution does not depend upon the payment of his poll tax "in person" by the voter. All that is required is that the voter shall pay his poll tax on or before February first next preceding the election, and that he shall have his receipts therefor. The statute upon the subject directs that the voter shall pay the tax in person, or give a written order therefor, but it does not provide that a failure to obtain a receipt in the manner directed by the statute will disfranchise the voter. Each of the voters in question had complied with the provisions of the Constitution as well as the provisions of the statute by paying their poll tax and obtaining a receipt therefor, presumably regular upon its face, and the irregularity, if such it could be termed, in the manner of making the payment and obtaining a receipt would not deprive the voter of his constitutional right of suffrage, and you are so advised.

Yours very truly,

C. L. STONE,
Assistant Attorney General.

Op. 2251, Bk. 54, P. 465.

ELECTION—CANDIDATES—PARTY.

1. A person who affiliates with an organized political party and has been nominated by such party as a candidate for office, and having accepted such nomination, is thereby prohibited from having his name appear on the official ballot, or in any other place on such official ballot, save and except under the head and in the column designated on such official ballot as that of such political party.

2. Both civil and political rights are valuable rights and will be protected by law, and a person who has participated in a primary election is ineligible to become a candidate in opposition to the nominees of such primary election.

3. It only requires five (5%) per cent of the vote cast at the last general election in the commissioner's precinct for candidate for county commissioner to have his name placed upon the official ballot as an independent or non-partisan candidate.

AUSTIN, TEXAS, September 20, 1920.

Honorable C. D. Mims, Secretary of State, Austin, Texas.

DEAR SIR: Your letter of August 24th addressed to the Attorney General, with the other papers attached thereto, has been referred to me

for attention. Among the papers submitted to this Department is to be found the applications of Aubrey Fuller to have his name certified by you, as Secretary of State, to the County Clerk of Galveston County as an independent candidate for the office of Judge of the Sixty-ninth Judicial District of Texas. There is a like application of Geo. N. Defferari wherein he requests that you as Secretary of State, certify his name to the County Clerk of Galveston County as an independent candidate for Representative of the Seventeenth Representative District of Texas. It is to be observed that each of the above named parties have signified their willingness to become independent candidates by filing with you their express consent in writing, as is required by the laws of this State pertaining to such independent or non-partisan candidates. It will be further observed that there is also submitted to this Department the affidavit of George M. Abbott, wherein he makes known the fact that the said Aubrey Fuller and Geo. N. Defferari have been nominated as candidates for the offices of District Judge and Representative, as heretofore mentioned, by an organized political party known and designated as the American Party. It is further shown in the affidavit of George M. Abbott that the same Aubrey Fuller affiliated with and participated in the Democratic Primary held in this State on the 24th day of July, 1920, and in and by so doing solemnly pledged and obligated himself, as required by law, to support the nominees of the Democratic Primary.

After having submitted the above statements of facts, you propounded the following questions:

1. Can a person, who has accepted the nomination and who is a candidate of an organized political party (the American Party) for a certain office, have his name placed upon the official ballot at the general election as an independent candidate for the same office?
2. Can a party, affiliated with the Democratic Party and participating in the Democratic Primary, thereafter become a candidate of another political party in opposition to the nominee of the Democratic Party?
3. Where a party is an independent candidate for the office of county commissioner does it require five (5%) per cent of the entire vote cast in such county, or is it sufficient to obtain five (5%) per cent of the vote cast in such commissioner's precinct at the last general election as mentioned in Revised Statutes, Article 3168?

The above questions will be answered in the order in which they are submitted.

The statutes of this State governing and controlling the first question submitted are Articles 2966 and 2970, Revised Statutes. Article 2966 provides that: "No name shall appear on the official ballot, except that of the candidate who was actually nominated (either as a party nominee, or a non-partisan, or independent candidate) in accordance with the provisions of this title."

The title referred to in the last quoted article does not, nor is there any provision to be found elsewhere in our statutes that authorizes the candidate of an organized political party for a certain office to have his name placed on the official ballot in the column designated on the official ballot for independent or non-partisan candidates.

The very language employed by the Legislature in expressing their

intent and purpose when the provisions of Article 2966 was enacted as a part of the election laws of this State, expressly prohibits a person from having his name appear on the official ballot as a candidate of more than one political party, as the Legislature plainly said that it could appear as a party nominee, thereby meaning that such person who affiliated with some political party could be the nominee of such party and in that way have his name placed upon the official ballot only in the column designated on such official ballot for the names of the candidates of such political party as is provided in Article 2965, Revised Statutes, which reads as follows:

"The name shall appear on the ballot under the title of the party that nominated him, except as otherwise provided by this title."

The words "except as otherwise provided by this title" conveyed no other thought, intent or purpose on the part of the Legislature, save and except that when persons not aligning or affiliating themselves with any organized political party, may have their names placed upon the official ballot as non-partisan or independent candidates for a certain office, as is provided by the Revised Statutes, Articles 2164 to 3167, inclusive. In connection with Article 2966, Revised Statutes, we find that Article 2970 prohibits the name of any candidate from appearing more than once on the official ballot, except as a candidate for two or more offices permitted by the Constitution to be held by the same person, and this Article of our statute last referred to, further provided:

"The name of the candidate nominated by any political party shall appear on the ballot and under the head of the party making such nomination."

Article 2969, Revised Statutes, provides among other things, that:

"The tickets of each political party shall be placed or printed on one ballot, arranged side by side in columns separated by parallel rule. * * * At the head of each ticket shall be printed the name of the party."

The Legislature of this State in providing for primary elections and nominating conventions has adopted the policy of allowing each political party to select its own candidates. Anyone, who has the statutory qualifications to fill an office, may be a candidate for nomination or election to that office, however, it is our opinion that if such person affiliates with a political party, such person can only be the candidate of such political party, and their name can only appear on the official ballot in the column designated for such political party, and the provisions of our statutes heretofore mentioned and quoted, clearly indicate that the Legislature in making such provisions never intended or contemplated that a member of the political party desiring to be a candidate, should ever have his name placed upon the official ballot more than once, and then to be placed in the column under the name of such political party as such candidate affiliated with.

For those persons not aligning themselves with any political party—that is, the voter and the candidate as well—the Legislature has made ample and sufficient provision for the protection and enjoyment of their personal and political rights and privileges when the provisions of Article 2164, Revised Statutes, become a part of the election laws of this State, whereby "the name of a non-partisan or independent candidate may be printed on the official ballot in the column where independent candidates,"

etc., when the further provisions of this article have been complied with in the time and manner prescribed by said article.

It is not necessary in order to preserve the rights of the voter at the general election, or other elections as to that matter, that the name of a candidate should be essential that such candidate should be described on the ballot at the general election as a member of more than one political party. The Legislature has well provided that the average voter shall not be deceived and misled by a statement on the ballot at the general election that a candidate belongs to or affiliates with two opposing and antagonistic political parties. The voter at the general election may vote for whom he pleases, there being a blank space upon the official ballot that he is permitted to write the name of any person for any office, that he might desire to vote for, he may not be deceived by false labels. It surely is within the power of the Legislature to prevent such deception, and we think it as clearly appears that the Legislature has intended and undertaken to do so. We are determining the qualifications for nominating the candidates of a political party, and not the right to be a candidate for election to the office, and under the provisions of our election laws we conclude that one of the necessary qualifications for a candidate of a political party is affiliation with that party, and when this has been met, the name of such candidate cannot appear in the column and under the head of another opposing political party as a candidate for the same or another office. When the Legislature enacted the statutes governing the nomination of candidates for office by the various political parties, they were indeed careful not to deprive the voter of his individual capacity of any right or privilege or to impose unreasonable restrictions, but on the other hand, our Legislature did have in mind, and enacted into law, such regulations as they in their wisdom deemed necessary for the prevention of fraud and corruption, and to promote honesty, fairness and purity in elections in this State. To our minds any other construction of our statutes in this instance would work an unwarranted invasion of the rights of political parties, and this fact merits more than passing notice. No one can be so ignorant as not to appreciate the value, indeed the necessity, of opposing political parties in a government like ours. No one, it would seem, can be so thoughtless as not to realize that government by the people is a progressive institution, which seeks to give expression and effect to the wisest and best ideas of its members. It cannot be denied that electors holding certain political principles in common may freely assemble and organize themselves into a political party and use all legitimate means to carry their principles of government into active operation through the suffrage of their fellows. Such a right is fundamental and is inherent in the very form and substance of our government, and to hold otherwise would mean the disruption, if not the destruction, of all organized political parties.

In *Thatcher vs. Brodigan*, 142 Pac. 520, it was held that a candidate at a primary election shall declare in his nomination papers that he intends to support the principles of the party of which he is a candidate, and that he voted for a majority of the candidates of such party at the last election. One who has filed nominating papers as a candidate of a designated party at the primary election cannot file another nomination

paper designating himself as a candidate of another party for the same office.

You are therefore advised that you have no authority to certify the name or names of any candidate or candidates of an organized political party to the county clerk of any county of this State, save and except as the candidate of the political party having made the nomination, and such nomination having been accepted or acquiesced in by the candidate, as the name of such candidate can only appear upon the official ballot once, and this must be in the column and under the head or name of the political party with which such candidate affiliates and has been nominated by.

In response to the question, which is as follows:

Can a party, affiliated with the Democratic Party and participating in the Democratic primary, thereafter become a candidate of another political party in opposition to the nominee of the Democratic Party?

The facts, as shown by the attached affidavits that brought about the submission of this question, are these: Mr. Aubrey Fuller, resident of Galveston County, Texas, and as such voted in the Democratic primary election held in this State on the 24th day of July, 1920. The official ballot he used had on it at or near the head of such ballot the following: "I am a Democrat and pledge myself to support the nominees of this primary." This is a requirement made mandatory by the provisions of Article 3095, Revised Statutes. The same Mr. Fuller afterwards was nominated by the American Party and accepted such nomination, and thereby became a candidate for the office of Judge of the Fifty-sixth Judicial District of Texas in opposition to the Democratic nominee for Judge of the Fifty-sixth Judicial District of Texas. Having participated in the Democratic primary, and in that way performed a very solemn duty under the sanction of a sacred pledge, he became instrumental in the selection of such Democratic nominee, and by this sanction he is bound, and in our opinion, is ineligible to become a candidate against the nominee of a party that he helped to make, and is pledged to support his declaration and pledge constituting a contract between him and all other voters entering into such primary, to the effect that he and they were Democrats and would abide by such pledge and support the nominee of that primary. The right thus conferred upon the Democratic nominee is not only a valuable right but is a legal right in which such Democratic nominee is entitled to be protected, is the effect of the decisions of the courts of this State in *Gilmore vs. Waples*, 108 Texas, 169, 189 S. W., 122, 108 S. W., 1037.

There could arise no question but that the compact entered into by the Democratic voters at a Democratic primary, evidenced by the pledge, inures to the benefit of the Democratic nominee, who has a legal right to be protected from injuries consequence of a violation of such compact or agreement. The Democratic nominee for District Judge in this instance is entitled to Mr. Fuller's support under the latter's pledge agreement, and although Mr. Fuller might have voted against such Democratic nominee in the general election without incurring any lawful penalty, yet, the law would protect such Democratic nominee in his legal and equitable right, to the extent of restraining Mr. Fuller from becoming an opposing candidate. If this be not the plain reason and meaning of the

law, then the primary, which is a governmental institution, would become of no binding effect and would be a mere farce and illusion. Article 3166, Revised Statutes, provides that under the sanction and penalty of an oath that a voter who participated in a primary election cannot sign a petition or application of an independent or non-partisan candidate, and since our Legislature so diligently protected our political parties against invasion and disruption as to the voter who participated in the primary election, then does it not surely and plainly appear that it would apply with much stronger and greater force to one who had voted in the primary election and thereafter undertook to become an opposing candidate to a party nominee, and in whose nomination he himself had played an important part?

In case of *Britton vs. Election Commissioners*, 129 Cal., 357; 51 L. R. A., 115, 61 Pac., 1115, the Supreme Court of California (in bank) used the following language:

"A primary election law permitting a voter without regard to party affiliation to vote at a primary election for delegates to the political convention of any party that he chooses to select, whether he is a member of that party or not, or ever intends to become such, gives an opportunity for disruption and destruction of political parties by its opponents, and is therefore void as a violation of the reserved rights of the people which the Constitution declares shall not be impaired. * * * Active political parties—parties in opposition to the dominant political parties are, as has been said, essential to the very existence of our government. The right of any number of men holding common political beliefs of governmental principles to advocate them through party organization cannot be denied. As has been said, 'self-preservation is an inherent right of political parties as well as individuals,' *Whipple vs. Broad*, 55 Pac., 172, a law which will destroy such party organization or permit it fraudulently to pass into the hands of its political nominees, cannot be upheld. * * * The result is apparent, the control of the party and of its officers, the promulgation and advocacy of its principles, are taken from the hands of its honest members and turned over to the venal and corrupt members of other political parties, or of none at all. * * * A law which thus permits the disruptions and misrepresentation of a political party is an invasion of these reserved rights."

In case of *Minnesota vs. Moore*, 59 L. R. A., 448, the Supreme Court of Minnesota says:

"It would seem proper that any candidate, who seeks the assistance of the primary election law to aid him in securing party support, should be bound by the obligation of good faith and the dictates of fair play, to which he voluntarily subjected himself."

This, of course, would clearly apply to the voter who assumes the obligation of such a pledge as ours. The law will not permit him to break faith by violating his obligation to the detriment of a nominee who has a legal right to insist upon the compliance with the pledge or, at least, an abstention from opposition by the party taking such pledge as an opposing candidate for the office against his own nominee and that a political party whose nominees he has pledged to select and make by his own accord and voluntary participation in a Democratic primary. In case of *State ex rel. Murphy vs. Graves* (Ohio, Oct. 15, 1914), 109 N. E., 590, was a case in which a question similar to the one before us was decided, and it was held that under the provisions for primary election, a voter who affiliated with one party cannot be nominated as a candidate for office upon a ticket of any other party. He was required to take the pledge that he would abide by the principles of his political party. He

received a few votes for Judge of the Supreme Court on a Progressive ticket, but the Secretary of State refused to certify that he was legally nominated for the position, because of the fact that he had voted in the Republican primary under the pledge stated, and therefore, could not be a nominee of an opposing party. The court, however, held that his name might be written in a blank space provided for independent candidates on the official ballot. *Walling vs. Landson*, Supreme Court of Idaho, 97 Pac., 396, is in line with other cases determining that every right conferred upon a voter at a primary election held on the Idaho law is a legal right, which may be protected, defended and enforced by proper legal methods in the courts of this State.

The same case quotes from *People vs. Board of Election Commissioners of Chicago*, 221 Ill., p. 77; N. E., 321, in these words:

"The right to choose candidates for public offices, whose name will be placed on the official ballot, is as valuable as the right to vote for them after they are chosen; and is of precisely the same nature. There is scarcely a possibility under this system unless he shall be chosen at a primary election, and this statute which provides the method by which that shall be done, and prescribes and limits the right of voters and of parties, must be regarded as an integral part of the process of choosing public officers, and as an election law."

It was held by the Supreme Court of New York in *Brown vs. Cole*, 104 N. Y. Supp., 109, as follows:

"There no longer remains any distinction, so far as enforcement is concerned, between civil and political rights of citizens; but it will be presumed that every right recognized or conferred by statutes may be enforced by a proper legal method, and that every wrong, whether civil or political, has its remedy."

By a careful and considerate construction of our statutes that pertain to this question, coupled with the holdings of the courts of this State, together with the decisions of the courts of other states, we are forced to the conclusion that a party who has participated in a Democratic primary, and thereby and to that extent affiliated with the Democratic Party, is ineligible to become an opposing candidate of the nominees of the Democratic Party, and you are therefore advised that the name of Aubrey Fuller should not be certified to the County Clerk of Galveston County as a candidate for the office of Judge of the Judicial District of Texas or any other office.

In response to the third question, you are respectfully advised that it is the holding of this Department that an independent candidate for the office of county commissioner has to secure five (5%) per cent of the entire vote cast in such commissioners' precinct at the last general election, as required by Article 3168, Revised Statutes of this State, and it is not necessary or mandatory that an independent candidate for the office of county commissioner shall secure to his petition the signatures of five (5%) per cent of the entire vote cast in such county at the last general election.

Yours very truly,

C. L. STONE,
Assistant Attorney General.

Op. No. 2432, Bk. 57, P. 104.

ELECTIONS—PRIMARY ELECTIONS—CAMPAIGN EXPENSES OF CANDIDATES FOR UNITED STATES SENATOR—MAKING REPORTS.

In making reports of campaign expenditures, candidates for nomination for the office of United States Senator are governed by Chapter 88, General Laws, Regular Session, Thirty-sixth Legislature, the same being an act regulating and limiting campaign expenditures in primary elections, and are not governed by Chapter 39, General Laws, First Called Session, Thirty-third Legislature, which is an act providing for the election of United States Senators by a direct vote of the people, and incidentally regulating and limiting campaign expenses of candidates for United States Senator.

AUSTIN, TEXAS, May 17, 1922.

Honorable S. L. Staples, Secretary of State, Capitol.

DEAR SIR: The Attorney General is in receipt of your letter of May 6, 1922, in which you request an opinion as to whether in making reports of campaign expenses, candidates for nomination in the general Democratic primary election to be held in July of this year are governed by Chapter 88, General Laws, Regular Session, Thirty-sixth Legislature, which is an act regulating and limiting campaign expenditures in primary elections in this State, or whether such candidates will be governed by the act providing for election of United States senators by a direct vote of the people passed in 1913, the latter being Chapter 39, General Laws, First Called Session, Thirty-third Legislature.

The question hinges on whether the act of the Thirty-sixth Legislature repeals by implication the act of the Thirty-third Legislature, insofar as these reports as to campaign expenses are concerned.

It is proper to state in substance the established rule of statutory construction insofar as material and relevant to our inquiry. Mr. Sutherland in his work on Statutory Construction, Second Edition, Volume 1, Section 274, states the rule as follows:

"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."

It will be seen that it is a question of intention on the part of the Legislature. This leads us to a careful examination of each of the above mentioned statutes, in order to arrive at the legislative intent.

The act of 1913 is an act providing for the election of United States senators from Texas to the Congress of the United States; providing for the appointment of United States senators by the Governor under certain conditions, and providing for the selection and nomination of candidates therefor; defining violations of the act, fixing the punishment therefor, and limiting the campaign expenses of candidates for United States senators, and declaring an emergency. The act applies to general elections as well as to primary elections. If there were no other statute upon the subject, this act would, of course, govern and control at this time as to campaign expenses of candidates for the United States Senate in primary elections in this State.

The act of the Thirty-sixth Legislature is an act relating only to pri-

mary elections. Its declared purpose is "An Act to prevent the control of primary elections by the use of money and to regulate and limit the expenditure of money to promote or defeat the candidacy of persons for nomination for office in primary elections in this State, and providing penalties for violation of this Act and declaring an emergency." Without going into details, it may be stated that the act purports to limit and regulate the expenditure of money in campaigns for nomination in primary elections in this State.

Nominations are divided into three classes; that is, "county nominations," "district nominations," and "State nominations." Each of these terms is defined and the expression "State nomination" is defined "as referring to the nomination for any office to be filled by the choice of the voters of the entire State."

Standing alone, therefore, the words "State nomination" are broad enough as defined in the act to include nominations in primary elections for the office of United States senator. If there were no further indication, however, of the intention of the Legislature to repeal the former act insofar as it relates to making reports of expenditures by candidates for the United States Senate, there would be room for arguing that this general statute as to campaign expenditures in primary elections in this State does not have the effect of repealing the particular provisions of the prior act as to campaign expenses of candidates for the United States Senate. But, as before stated, the intention of the Legislature governs, and if we can reach the conclusion from a reading of the entire act passed by the Thirty-sixth Legislature that it was the intention to cover the entire field and provide regulations and limitations as to campaign expenditures in all primary elections in this State, including primary elections for nominations of candidates for the United States Senate, then this intention controls and the last act in point of time governs.

As above shown, the act is broad enough in its terms, standing alone, to include the candidates for the United States Senate. In addition to this, we find conclusive proof that candidates for the United States Senate were in the mind of the Legislature, in that it specifically mentions such candidates in Section 3 of the act. After laying down certain rules as to what kind of expenditures may be made by "candidates for any nomination to be determined by a primary election," we find in Section 3 a provision as to the maximum amount that may be expended "by any candidate or campaign manager," and among others, we find that the maximum amount that may be expended in campaigns for nomination "for United States Senator" as provided in this act is ten thousand dollars. This discloses to our minds that the Legislature had United States senators in mind when it made provisions and regulations as to campaign expenditures of "candidates" and that it had candidates for the United States Senate in mind when it defined the expression "State nomination" to be nomination for any office to be filled by choice of the voters of the entire State.

Reading the entire act together, we are of the opinion that the Legislature intended to prescribe a rule as to candidates for the United States Senate with respect to reports of campaign expenditures.

You are, therefore, respectfully advised that in the opinion of this

Department candidates for nomination for United States senator in the primary election to be held in July of this year will be governed by Chapter 88, General Laws, Regular Session, Thirty-sixth Legislature, in making reports of campaign expenditures, and that a compliance with this act as to such reports is sufficient, notwithstanding the provisions of the Act of 1913.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2443, Bk. 57, P. 92.

ELECTIONS—PRIMARY ELECTIONS—CONGRESSMAN—MAJORITY OR PLURALITY.

A member of the House of Representatives of the United States Congress elected from a congressional district holds a district office within the meaning of Article 3086, Revised Civil Statutes, as amended by Chapter 90, General Laws, Fourth Called Session, Thirty-fifth Legislature, which provides "that no person shall be declared the nominee of any political party, at any primary election for any State or district office unless he has complied with every requirement of this chapter and all other laws applicable to primary and other elections, and has received a majority of all the votes cast at such primary elections, for all candidates for such office."

This provision requiring majority nominations as to State and district offices is mandatory, and therefore a candidate for congressman in a congressional district cannot be declared the nominee unless he receives a majority of all the votes cast at the primary election for all candidates for such office in the district.

In the event no candidate receives a majority in the first primary, a run-off is necessary, and this without the necessity of anyone, or any committee, deciding in favor of a run-off. The law itself determines this and has not delegated it to a committee as in the case of county candidates.

AUSTIN, TEXAS, July 18, 1922.

Mr. Emil P. Pesek, Yoakum, Texas.

DEAR SIR: We have yours of the 6th instant, as follows:

"Hon. W. A. Keeling, Attorney General of Texas, Austin, Texas.

"Dear Sir: Following up the phone conversation held today with your Mr. Sutton regarding the majority and plurality nominations, I am propounding the following question:

"Suppose in the congressional primary election for nomination of representative to the United States Congress, no candidate receives a majority of all the votes cast in such primary election held in the State of Texas, will there have to be a run-off by a second primary by the two candidates receiving the highest number of votes? Who determines that the run-off shall be had?

"This is important in this: there are several candidates for nomination in the primary election next coming in the Ninth Congressional District and I am inviting an early reply.

"Yours sincerely,

(Signed) "EMIL P. PESEK."

The question presented is purely one of statutory interpretation, for I presume it is not contended that the Legislature does not have power to prescribe a rule as to majority nominations of a political party as to congressmen. And if the law is silent on the question, a plurality is

sufficient. (20 C. J., 205.) Congress has not, so far as we know, passed any law dealing with this subject. So that no question could arise upon that score.

The statute involved is Article 3086, Revised Civil Statutes of 1911, as amended by Chapter 90, General Laws, Fourth Called Session, Thirty-fifth Legislature, which reads as follows:

"The fourth Saturday in July, 1918, and every two years thereafter shall be general primary election day, and primary elections to nominate candidates for a general election shall be held on no other day, except when specially authorized. No person shall be declared the nominee of any political party, at any primary election for any State or district office unless he has complied with every requirement of this chapter and all other laws applicable to primary and other elections, and has received a majority of all the votes cast at such primary elections, for all candidates for such office. If at the general primary election for any political party, no candidate becomes the nominee for any State or district office under this article, a second primary election shall be held by such political party, in the State or such district, or districts, as the case may be, on the fourth Saturday in August succeeding such general primary election, and only the name of the two candidates who received the highest number of votes for any office for which nomination was made at the general election shall be placed on the official ballot, as candidates for such office at such second primary. The second primary election shall be conducted according to the law prescribed for conducting the general primary election, and the candidates receiving a majority of all votes cast for the office to which they aspire shall be declared the nominee for their respective offices. Any political party may hold a second primary election on the fourth Saturday in August to nominate candidates for any county or precinct office, where a majority vote is required to make nomination; but at such second primary, only the two candidates who received the highest number of votes at the general primary for the same office shall have their names placed upon the official ballot. Nominations of candidates to be voted for at any special election shall be made at a primary election at such time as the party executive committee shall determine, but no such committee shall ever have the power to make such nominations; provided that all precincts in the same county and all counties in the same district shall vote on the same day. Nominations of party candidates for offices to be filled in a city or town shall be made not less than ten days prior to the city or town election at which they are to be chosen, in such manner as the party executive committee for such city or town shall direct, and all laws prescribing the method for conducting county primary elections shall apply to them. (Id., Sec. 105; Acts 1918, 4th C. S., Ch. 90, Sec. 1.)"

Prior to the passage of Chapter 90, General Laws, Fourth Called Session of the Thirty-fifth Legislature, above mentioned, no more than a plurality was necessary to nominate for State and district offices. We had prior to that time a majority statute for party nominations of United States Senators and also a statute authorizing county executive committees of parties to require majority nominations in counties and portions of counties. The general purpose of the act of the Thirty-fifth Legislature was, as disclosed by the caption and emergency clause, and disclosed by the body of the act, to require majority nominations as to State and district offices. A rule having been prescribed with respect to United States senators and county officers, it is believed the Legislature intended to cover the entire field when it declared for the majority rule in all primary nominations for State and district nominations. By referring to the statutes, it will be observed that the various officers are divided into three groups, to wit: (1) State, (2) district and (3) county and less than county. This division is noticeable in Articles 3098, 3100 and 3101,

where provision is made for getting names of candidates on the official ballot. Article 3098 is as to State offices, 3100 as to district offices and 3091 and 3092 relate to county offices. Article 3100 reads as follows:

"Art. 3100. Ballot, primary, candidate for district office placed on how; certification.—Any person desiring his name to appear on the official ballot as a candidate for the nomination for Chief Justice or Associate Justice of the Court of Civil Appeals, or for Representative in Congress, or for State Senator, or for representative, or district judge, or district attorney, in representative or judicial districts composed of more than one county, shall file with the chairman of the executive committee of the party for the district, the request prescribed in this chapter, with reference to the candidate for State nominations, or, if there be no chairman of such district executive committee, then with the chairman of each county composing such district, not later than the first Monday in June preceding the general primary. Such requests may likewise be filed not later than said date by any twenty-five qualified voters resident within such district, signed and acknowledged by such voters in the manner prescribed respecting such request signed by a candidate named therein. Immediately after said date it shall be the duty of each such district chairman to certify the names of all persons for whom such requests have been filed to the county chairman of each county composing such district; and each county committee shall determine by lot the order in which the names of all candidates for each such district office shall be printed upon the official ballot. (Id., Sec. 110.)"

Here the Legislature has associated in one paragraph offices which are commonly known to be district offices and among them is mentioned "representative in congress." It will be noted also that the heading, which was included in the official revision of 1911, designates these offices district offices. This article provides for getting the names on the official ballot as candidates for chief justice or associate justice of the Court of Civil Appeals, or for representative in Congress, or for State senator, or for representative or district judge, or district attorney, in representative or judicial districts composed of more than one county. As a matter of common knowledge, these officers are district officers, at least within the meaning of the statute. Particular attention is called to the fact that the latter part of this article refers to these offices as "district offices." It says: "and each county committee shall determine by lot the order in which the names of all candidates for each such district office shall be printed upon the official ballot." It seems to us that whatever doubt there could be as to whether a congressman is a district officer or not is set at rest by the fact that this statute expressly refers to all these officers, including congressmen, as district officers. This article with reference to getting the names of candidates on the official ballot is a part of the general primary election law and in fact it is a part of the same chapter that contains Article 3086, which is the article containing the language now under consideration; and we do not believe that we are justified in assuming that the term "district office" is used in a different sense in Article 3086 from that in which it is used in Article 3100.

The statute itself, therefore, places the office of congressman in a congressional district in the category of "district offices."

Again, the statute regulating campaign expenses in primaries divides the offices into "State nominations," "district nominations" and "county nominations"; and it will be seen that "district members of congress" are included within the provisions of this law. (See Article 3174½ et seq., Vernon's 1920 Statutes.) The definition in this act of "district nomination" places district congressmen in the class of district nomina-

tions, which is not entitled to much weight in determining what the term "district office" means as used in Article 3086, but it does show that the Legislature has covered the entire field in mentioning the three classes of officers and tends, at least, to exclude the idea that there was any intention to leave congressmen out in dealing with the subject generally.

Finally, we refer to the fact that our State is by law divided into congressional districts, each bearing a number and each composed of a number of counties. It is but natural to call an officer elected in a district a district officer, and we think the Legislature meant to include district congressmen in the expression district officer or district office.

The statute is clearly mandatory in requiring a majority, and does not leave it to the discretion of anyone to determine this question. Therefore, there must be a majority to nominate a candidate for congress in your district. In case no candidate gets a majority in the first primary, as provided by the statute, then there must be a run-off.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2314, Book 55, P. 318.

ELECTIONS—CONVENTIONS—POLITICAL PARTIES—CITY CONVENTIONS.

1. A notice or call for a city convention of a political party is not invalid though the name of the chairman does not appear thereon, if regular in other essential respects. The notice as actually printed and published held to be a substantial compliance with that authorized by the chairman and the committee as well as the statute.
2. The Democratic Party through a duly authorized agency has authority to exact a pledge as a condition precedent to admittance and participation in a city convention that those admitted are Democrats and will support the nominees of the convention. It is not the province of the Attorney General to determine as a fact whether such a rule was duly adopted in this instance.
3. The law does not require that a city convention be called to order by the chairman of the city executive committee, and in the absence of a statute on the subject the party may decide how the meeting shall be called to order.
4. The Democratic Party has the privilege of nominating a Republican as a candidate for public office. The fact that participants in a Democratic convention are alleged to be adherents to another party would not be sufficient to invalidate the convention. The fact that Democrats participated in another convention would not invalidate the Democratic convention.
5. The certificate showing nominations made by a city Democratic convention is in all things *prima facie* evidence of the regularity and legality of nominations made at such convention, and is conclusive as to matters not controlled by written law. Held, that sufficient undisputed facts have not been presented for this Department to hold as a matter of law that the nominees of the city Democratic convention of Dallas should not be placed upon the official ballot by the city secretary.
6. Article 3170 expressly authorizes "mass conventions" of political parties in cities, as distinguished from conventions composed of "delegates."

AUSTIN, TEXAS, March 22, 1921.

Hon. June Peak, Chairman, Democratic Executive Committee, Dallas, Texas.

DEAR SIR: Yours of the 12th instant, addressed to the Attorney

General, was referred to me for attention. Your communication is as follows:

"As chairman of the city Democratic executive committee of Dallas, I respectfully submit to you the following queries:

"First.

"On March 1, 1921, a petition purporting to contain the names of twenty-five per cent of the Democratic voters of the city of Dallas as shown by the last general State election was presented to me, asking that I call a mass convention for the purpose of nominating candidates for mayor and commissioners for the city of Dallas and I thereupon wrote out a call as follows:

"To the Democratic Voters of the City of Dallas:

"You are hereby requested to attend a mass meeting to be held in the Criminal Court Building on March 2, 1921, at 8 p. m. for the purpose of nominating candidates for mayor and commissioners of the city of Dallas and transacting such other business as may come before it.

(Sgd.) "JUNE PEAK, Chairman."

"I instructed the executive committeeman to whom I delivered this call to have it published in full but said call was not published. Instead, there appeared the following:

"Mass Meeting.

"There will be a mass meeting of Democratic voters at the Criminal Court Building tonight at 8 o'clock, held for the purpose of nominating candidates for the coming municipal campaign. If you are a Democrat, come help select the candidates and draft a platform.

"CITY DEMOCRATIC EXECUTIVE COMMITTEE."

"In this connection you will recall that Article No. 3170 of the Revised Statutes, the same being Section 261 of the Revised Election Laws of Texas, provides among other things, as follows:

"The executive committee herein provided for may decide whether or not nominations shall be made by such political party in such city or town, provided that upon petition being made to said city or county chairman, signed by twenty-five per cent of the voters of the party of such city, as shown by the last general State election requesting that party nominations be made for said officers, then said city executive committee through an order of *its chairman shall order a primary election or mass meeting convention* of the qualified voters of the party as may be petitioned for by the voters presenting said petition and it shall thereupon be the duty of said city executive committee to grant such request as shall be contained in such petition and such primary election or mass convention shall be ordered, *and it shall be mandatory upon such city or county chairman to order such election or mass convention*, to be held within ten days from the time such petition is presented."

"Does not the failure to publish my formal call in compliance with the statute invalidate this so-called convention?"

"Second.

"So far as I know, the executive committee had at no time, prior to this so-called Democratic meeting, adopted any pledge for the participants therein, but when I endeavored to enter the hall where said meeting was held, it was demanded of me that before being admitted I sign the following pledge: 'I am a Democrat and will support the nominees of this convention.' I did not deem this pledge legal for the following reasons: (a) Some had not been previously authorized by the executive committee; (b) the executive committee had no authority to exact a pledge of this kind; (c) same was therefore purely an effort of some individuals to dominate said convention in the interests of their particular ticket, without authority of the executive committee or of law.

"Third.

"Under the party custom, if not by virtue of specific law, it is the province and duty of the chairman of the executive committee to call any Democratic convention to order as its temporary presiding officer. As stated above, I was

excluded from said meeting by show of physical force because I refused to sign what I regarded as an illegal pledge. Is a convention held under these circumstances legal?

"Fourth.

"At this so-called Democratic meeting, there was nominated for mayor of the city of Dallas a Republican who had been previously agreed upon by certain members of the executive committee who later manipulated said convention. Prior to this meeting there had been formed a so-called Independent party under the name of the Voters Independent League. The majority of the Democratic executive committee of Dallas had met formally or informally with the executive committee of the Voters Independent League and agreed upon a mutual ticket in order to get, if possible, two places upon the official ballot side by side for the same candidates. When said so-called Democratic meeting was held a large number of the members affiliating with said Voters Independent League participated in said so-called convention and actively assisted in nominating the so-called Democratic ticket headed by a Republican. A few nights later this same crowd, composed of so-called Democrats and Independents, went to another hall in Dallas, under the name of the Voters Independent League mass meeting and nominated the same ticket.

"Is a convention styled 'Democratic' held under these circumstances legal?

"Fifth.

"Is the city secretary authorized under the circumstances indicated above to refuse to place such a ticket upon the official ballot under the head 'Democratic Party'?

"An early reply will be greatly appreciated.

"Yours very truly,

(Signed) "JUNE PEAK,

"Chairman Democratic Executive Committee of City of Dallas."

Your inquiries are answered as follows:

First. The statute governing calls for conventions by political parties in cities and towns is Article 3170, Revised Civil Statutes of 1911, as amended. The material part of this article is quoted in your inquiry which we have set out in full in the beginning of this opinion. The statute says the city executive committee, through an order of its chairman, shall order a primary election or mass convention * * * and it shall thereupon be the duty of said city executive committee to grant such request as shall be contained in such petition and such primary election or mass convention shall be ordered, and it shall be mandatory upon such city or county chairman to order such election or mass convention.

The notice that was published was not in the precise language of the notice furnished by the chairman. However, it is all but identical in meaning. We believe that in form it is sufficient to notify the members of the party that the meeting was to be held and that such notice was a substantial compliance with the copy of the notice furnished by the chairman. Under the facts as you state them it appears to us that the meeting was ordered in substantial compliance with the statute so far as the form of the notice is concerned.

Second. The second inquiry is as to the pledge. In the absence of constitutional or statutory provisions to the contrary the proper authority of a political party may, in accordance with party usage, make and enforce reasonable regulations. (20 Corpus Juris, 104.)

Certainly the Democratic Party would have the authority to exact a pledge of its members to the effect that such members are Democrats. An executive committee would, in our opinion, have the authority to

exact such a pledge. A pledge required to be taken by a Democrat to the effect that he is a Democrat and will support the nominees of the convention would likewise in our opinion be a reasonable regulation; and therefore if duly made by the proper authority of the party could be exacted as a condition precedent to admittance and participation in a Democratic convention for the purpose of nominating candidates.

Now as to whether the Democratic Party of the City of Dallas had adopted such a rule, we do not attempt to say. If no such rule had been adopted by the party through a duly authorized agency, then of course any Democrat residing in the City of Dallas was entitled to be admitted to the convention, even though he refused to subscribe to the pledge. The fact as to whether the executive committee had passed such a rule has been denied by those representing the executive committee. As before stated we do not pretend to say what the fact upon this point may be. We are inclined to the opinion, however, that any irregularity as to this would be one within the party upon a matter not controlled by statute, and that therefore it would be a political question beyond the power or authority of the courts to pass upon. (See *Gilmore vs. Waples*, 188 S. W., 1037.)

Third. We find no statute requiring that a city convention shall be called to order by the chairman of the executive committee as its temporary presiding officer. This is the custom, it is true. But in the absence of a statute making it mandatory that a convention of this kind be called to order in a particular manner, the convention may be called to order in any manner the party may see fit to adopt.

Fourth. There is no law inhibiting the Democratic Party from nominating a Republican as a candidate for office. In the absence of a statute to the contrary, the party would have this right.

The facts as stated by you relative to the participation in the Democratic convention by members of another party, to wit, the Independent Voters League, and as to the composition of the convention of the Voters Independent League, are denied by those representing the Democratic Party and the Independent Voters League of the City of Dallas. As to the facts, we express no opinion. In a separate opinion this Department is today passing upon the question as to whether a person has the right to have his name appear more than once upon the official ballot as a candidate of more than one political party.

You are respectfully advised that sufficient undisputed facts have not been presented to us to justify us in holding as a matter of law that the convention of the Democratic Party was invalid.

Fifth. It has been held by the Supreme Court of this State that under laws of 1905, p. 550, Section 120, providing that the result of a nominating convention of a district shall be certified by the chairman thereof to the county clerks of the counties composing such district, the certification of the chairman is conclusive and the propriety of his action can not be reviewed by the party executive committee for the district, so that mandamus will not be awarded in favor of a contestant. (*Mays vs. Cobb*, 100 Tex., 131; 96 S. W., 1079.)

However, it is believed that the correct rule is that a certificate of nomination from a political convention is prima facie correct in all things and is conclusively correct as to irregularities in procedure not

controlled by statute. This it seems to the writer is the necessary effect of the later decisions of the Supreme Court.

Gilmore vs. Waples, 188 S. W., 1038.

Westerman vs. Mims, 227 S. W., 178.

Morris vs. Mims, 224 S. W., 587.

The Supreme Court of this State, in the case of Gilmore vs. Waples, supra, held that where the written law regulates party affairs rights conferred are to be regarded as legal rights and that it can not be said that matters thus controlled are beyond the power of the courts to adjudicate as being political. The other cases tacitly recognize this doctrine.

In the case of Westerman vs. Mims, the Supreme Court said:

"It is not the law that the writ of mandamus must be granted in every case upon a showing by relators that Articles 3164, 3165 and 3166 of the Revised Statutes have been complied with. If the court were under any such compulsion, then the writ would have to be awarded, though the candidate named were confessedly ineligible to hold the designated office. It is elementary that a mandamus will not be issued to compel the doing of that which the law forbids, and Chapter 13 of the General Laws of the Thirty-sixth Legislature, p. 17, expressly forbids the placing of the name of an ineligible person on the ballot at a primary or general election. Manifestly one who seeks relief through this extraordinary proceeding must show himself entitled thereto under all applicable law, no matter where embodied."

Answering your fifth question, therefore, beg to advise that sufficient undisputed facts have not been presented to us for us to hold as a matter of law that the City Secretary would be justified in refusing to place the names of the candidates of the Democratic convention upon the official ballot. We do not say, however, that such facts do not exist; for we are not in a position to know the facts. Under the decisions, and in reason, the City Secretary would not be called upon to place the name of a candidate upon the ballot contrary to written law, but the question whether statute law has been violated in making the nominations is one of fact. Suffice it to say that we have not been presented with sufficient undisputed facts for us to say that the secretary would be justified in refusing to place the names of the Democratic nominees upon the ballot.

Sixth. I understand another question you desire answered is whether a "mass convention" is authorized to be held under Article 3170 as distinguished from a convention composed of delegates from the different divisions of the city. The statute clearly authorizes mass conventions. This Department has recently held to this effect; that is, that a mass convention composed of members of the party "at large" in a city is legally constituted.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2438, Bk. 57, P. 109.

ELECTIONS, PRIMARY.

In re right of person to withdraw name from executive committee as a candidate for Democratic nomination.

AUSTIN, TEXAS, June 26, 1922.

Hon. Jos. W. Hale, Secretary State Democratic Executive Committee, Waco, Texas.

DEAR SIR: Your letter of the 23rd inst., addressed to Attorney General Keeling, has been referred to the writer for attention and reply.

You desire an opinion as to whether the State Democratic Executive Committee has authority to instruct various county committees to omit the name of Mrs. Miriam A. Ferguson, and not place it upon the official ballot as a candidate for the Democratic nomination for United States Senator. You state that Mrs. Ferguson made application, in due form, to the State committee and that the committee has certified her name to the county chairmen as such candidate, as provided by law; and that Mrs. Ferguson has notified the committee that she has decided to withdraw from the race, and has requested your committee to instruct the county chairmen to leave her name off of the ballot.

The holding of public office, under our system of government, is a privilege which may, or may not, be availed of by those meeting the prescribed qualifications, as they choose. There might arise situations in which the rights of third parties would be affected, where a person already in office might be compelled to perform official duties until the selection of a successor, but this is a free country and no person will be compelled to accept an office, or remain a candidate for one, against his will. Much less could we force a person to remain a candidate for the nomination of a political party. There was a time when the individual was not supposed to have any rights, except as a member of the de facto government, and he could not refuse to accept office, nor could he resign without the consent of the government. The same necessity does not now exist for such a rule. Compulsion need not be resorted to to fill our public offices. The reason for the rule having vanished, the rule itself no longer obtains. Ours is a government to protect the personal rights and liberties of the individual as distinguished from the paternalistic form of government. We have this form, both in theory and in fact. The right of the individual is not restricted except to the extent necessary to secure the rights of others. Hence, the right or privilege to offer for public preferment will not be interfered with when the exercise of such option does not encroach upon the rights of anyone else. The official ballots have not at this time been prepared and printed by local committees and no inconvenience will result to others in withdrawing Mrs. Ferguson's name. Mrs. Ferguson's wishes, therefore, should be complied with. The central committee, to whom Mrs. Ferguson made her application in the first place, is the proper agency through which to have her name withdrawn.

You are, therefore, respectfully advised that it will be proper for

your committee to notify the various chairmen, advise them of Mrs. Ferguson's wishes, and instruct them to leave her name off of the official ballot as a candidate for the Democratic nomination for United States Senator.

Respectfully,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2435, Bk. 57, P. 112.

ELECTIONS—OFFICERS—CRIMINAL DISTRICT ATTORNEY—DISTRICT
JUDGE—DISTRICT CLERK—MAJORITY NOMINATION.

The office of criminal district attorney of Dallas County is a district office within the meaning of the primary election law declaring that no person shall be declared the nominee of any political party, at any primary election for any *State* or *district* office unless he has received a majority of all the votes cast at such primary election for all candidates for such office and providing that the county executive committee shall decide whether the nomination of *county officers* shall be by majority or plurality vote.

Therefore, the nomination of a candidate in the general Democratic primary election for the office of criminal district attorney of Dallas County must be by a majority vote and the county executive committee has no authority to decide otherwise.

The Department holds, also, that the district judge in a judicial district composed of one county is a district officer within the meaning of the majority nomination statute, but that the district clerk is a county officer in the purview of such statute.

Arts. 3086, 3091, Vernon's 1920 Statutes.

AUSTIN, TEXAS, JUNE 2, 1922.

Honorable Maury Hughes, District Attorney, Dallas, Texas.

DEAR SIR: Under date of May 22, 1922, your office submitted to the Attorney General the question whether the district clerk and the criminal district attorney of Dallas County are *district* or *county officers* within the meaning of the majority nomination statute governing in reference to primary elections in this State.

Article 3086, Vernon's Complete Statutes of 1920, in so far as material to your inquiry, provides as follows:

"The fourth Saturday in July, 1918, and every two years thereafter shall be general primary election day, and primary elections to nominate candidates for a general election shall be held on no other day, except when specially authorized. No person shall be declared the nominee of any political party, at any primary election for any State or district office unless he has complied with every requirement of this chapter and all other laws applicable to primary and other elections, and has received a majority of all the votes cast at such primary elections, for all candidates for such office. If at the general primary election for any political party, no candidate becomes the nominee for any State or district office under this article, a second primary election shall be held by such political party, in the State or such district, or districts, as the case may be, on the fourth Saturday in August succeeding such general primary election, and only the name of the two candidates who received the highest number of votes for any office for which nomination was made at the general election shall be placed on the official ballot, as candidates for such office at such second primary. The second primary election shall be conducted according to the law prescribed for conducting the general primary election, and the candidates re-

ceiving a majority of all votes cast for the office to which they aspire shall be declared the nominee for their respective offices. Any political party may hold a second primary election on the fourth Saturday in August to nominate candidates for any county or precinct office, where a majority vote is required to make nomination; but at such second primary, only the two candidates who received the highest number of votes at the general primary for the same office shall have their names placed upon the official ballot. Nominations of candidates to be voted for at any special election shall be made at a primary election at such time as the party executive committee shall determine, but no such committee shall ever have the power to make such nominations; provided that all precincts in the same county and all counties in the same district shall vote on the same day. Nominations of party candidates for offices to be filled in a city or town shall be made not less than ten days prior to the city or town election at which they are to be chosen, in such manner as the party executive committee for such city or town shall direct, and all laws prescribing the method for conducting county primary elections shall apply to them."

Article 3091, same book, reads as follows:

"The county executive committee shall decide whether the nomination of county officers shall be by majority or plurality vote, and, if by majority vote, the committee shall call as many such elections as may be necessary to make such nomination, and, in case the committee fails to so decide, then the nomination of all such officers shall be by a plurality of the votes cast at such election."

It is readily apparent that the questions presented hinge on whether these officers are district officers or county officers within the contemplation of the statutes above quoted from. It would scarcely be contended that either is a State officer as here understood.

We have already answered your question as to the district clerk, but for the purpose of our records we make reference to the matter again. On May 23, 1922, the writer mailed you a copy of our opinion number 1849, dated December 13, 1917, addressed to Honorable Jas. A. Harley, then Adjutant General, which opinion also appears at page 449 of the printed Report and Opinions of the Attorney General for 1916-18; and on the authority of that opinion advised you that within the meaning of Articles 3086 and 3091, Vernon's Complete Statutes of 1920, the district clerk of Dallas County is a county officer. This, of course, means that, as to the district clerk of your county, it is within the province of the county executive committee to decide whether the nomination in the July primary shall be by majority vote. If the committee makes no decision either way, the nomination will be by plurality.

This Department has been advising that district judges in districts composed of only one county are district officers and that nominations in general primary elections must be by majority vote as provided in Article 3086. We have advised similarly (though no extended or formal opinion, it would seem, has been prepared) in respect to criminal district attorneys in districts which are composed of one county.

An opinion as to the district judge of a district composed of Bowie County, created in an act providing for a criminal district court, was handed down by Honorable B. F. Looney, then Attorney General, on April 19, 1918. (Page 276, L. B., 220.) It does not appear in the printed volumes and it may not be amiss to copy it in full here:

"April 19, 1918.

"Hon. Sam H. Smelser, Member County Democratic Executive Committee, Texarkana, Texas.

"Dear Sir: I have yours of the 15th inst., reading as follows:

"If I am entitled, as a member of the county Democratic executive committee, I would respectfully ask your opinion as to law recently passed by the Legislature creating a criminal district court for this county.

"The point about which there appears to be some diversity of opinion is as to whether this should be classed as a "county" or district office. If a "district" office, of course, under law passed at same Legislature, it would require majority to nominate. If "county" the executive committee would have the power to determine whether majority or plurality.'

"The majority nominations act, recently passed, provides that—

"No person shall be declared the nominee of any political party, at any primary election for any *State or district office* unless he has complied with every requirement of this chapter and all other laws applicable to primary and other elections, and has received a majority of all the votes cast at such primary elections, for all candidates for such office.'

"The county executive committee shall decide whether the nomination of *county officers* shall be by majority or plurality vote. Art. 3091, R. S.

"House bill 56, approved March 22, 1918, creates the Criminal District Court of Bowie County, and I assume from your letter that you desire to be advised as to whether the judge of the court is a county officer as distinguished from a district officer, within the meaning of the statutes above referred to.

"I am of the opinion that within the meaning of these statutes he is a district officer.

"It is true that the new court is vested with the criminal jurisdiction heretofore exercised by the county court, and that its jurisdiction is co-extensive with the limits of the county. But upon the whole it is essentially a district court.

"In the first place, it is designated a criminal *district court*; it shall have and exercise original and exclusive jurisdiction over all criminal cases of the grade of felony in the County of Bowie of which *district courts*, under the Constitution and laws of this State, have original and exclusive jurisdiction; it shall have jurisdiction over all bail bonds and recognizances and may enter forfeitures thereof and final judgments and enforce the collection of the same by proper process in the same manner as provided by law in *district courts*; it shall have a seal similar to the seal of the *district court*; the practice and the rules of pleading and evidence shall be the same as in *district courts*; laws governing the selection of jurors in the *district courts* shall govern in this court; the *district attorney* for the Fifth Judicial District shall represent the pleas of the State in all felony cases and such other duties shall be performed by him in this court as shall be imposed by law; the sheriff and the district clerk of Bowie County shall be the sheriff and clerk, respectively, of said criminal district court; their fees shall be the same as those prescribed for services rendered in the *district courts*; in all such matters over which said criminal district court has jurisdiction, it shall have the same power within said *district* as is conferred by law upon the *district court*, and shall be governed by the same rules in the exercise of said power; appeals and writs of error may be prosecuted from said criminal district court to the Court of Criminal Appeals in criminal cases and to the Courts of Civil Appeals in the same manner and form as from *district courts* in like cases; the judge of the criminal district court shall possess the same qualifications as are required of judges of the district courts, and shall receive the same salary; he shall exchange *districts* with or hold court for any district judge, as provided by law in cases of district judges, and in case of disqualification or absence of a judge, a special judge may be selected and qualify, as provided for *district courts*.

"Finally, I call your attention to a circumstance which, to my mind, conclusively shows that the Legislature was of the opinion and intended that the judge of this court is a district officer; that is to say, the act provides that the judge of the Criminal District Court of Bowie County 'shall hold his office until his successor shall have been elected and qualified.'

"The Constitution declares that the duration of all offices not fixed by this Constitution shall never exceed two years; Art. 16, Sec. 30; but the term of office of the *district judge* is fixed in the same instrument at four years. Art. 5, Sec. 7.

"Hence, it is reasonable to conclude that the Legislature deemed the judge of the Criminal District Court of Bowie County a *district judge*, from the fact that in this act his term is fixed at four years. It is not to be presumed that the Legislature intended to place in an act a provision which is invalid and of no effect.

"Therefore, I beg to express it as my opinion that within the meaning of the majority nominations act, recently passed, the judge of the Criminal Court of Bowie County is a district officer.

"Yours truly,

(Signed) B. F. LOONEY,
"Attorney General."

Recently inquiry was made by Honorable Jno. W. Hill, of Breckenridge, as to the necessity of a majority to nominate a candidate for district judge in the judicial district composed of Stephens County. In answer we said in part:

"In reply thereto, beg to advise that this is not the first time this question has been presented to this Department for an opinion. We have heretofore held that within the meaning of the majority nomination law a district judge in a district composed of only one county is a district officer. We reached the conclusion that one district judge is the same kind of an officer that another one is, and that the mere fact that a district is composed of only one county would not change the nature of the office of a district judge. It is a district none the less because its boundaries are the same as the boundaries of the county."

On May 1, 1920, we advised Honorable Jesse M. Brown, at Fort Worth, with reference to the office of Criminal District Attorney of Tarrant County, as follows:

"Replying to yours of the 28th ult., beg to advise that this Department has rendered an opinion holding that a district judge, in a judicial district composed of one county only is a district officer as distinguished from a county officer within the meaning of the majority nomination statute and that, therefore, a majority is required to nominate a candidate for district judge in the democratic primary election to be held in July.

"The question propounded is entirely analogous to the one above mentioned. You are, therefore, respectfully advised that the criminal district attorney of a district which is co-extensive with a county is a district officer within the meaning of that part of the primary election law requiring a majority to nominate candidates for district offices."

It is believed that these opinions are decisive of your question; for we do not consider the statute providing for the criminal district attorney of Dallas County essentially different from the other criminal district court acts heretofore considered, so far as the question under consideration is concerned.

An examination of the Constitution and statutes leads us to the conclusion that for the purpose of the majority nomination statute this is a district office. Section 21 of Article 5, State Constitution, reads as follows:

"A county attorney, for counties in which there is not a resident criminal district attorney, shall be elected by the qualified voters of each county, who shall be commissioned by the Governor, and hold his office for the term of two years. In case of vacancy the commissioners court of the county shall have power to appoint a county attorney until the next general election. The county attorneys shall represent the State in all cases in the district and inferior courts

in their respective counties; but, if any county shall be included in a district in which there shall be a district attorney, the respective duties of district attorneys and county attorneys shall, in such counties, be regulated by the Legislature. The Legislature may provide for the election of district attorneys in such districts, as may be deemed necessary, and make provision for the compensation of district attorneys, and county attorneys; provided, district attorneys shall receive an annual salary of five hundred dollars, to be paid by the State, and such fees, commissions and perquisites as may be provided by law. County attorneys shall receive as compensation only such fees, commissions and perquisites as may be prescribed by law."

We note that this section provides for the election of county attorneys except in counties where there is no resident criminal district attorney. This tends to negative the idea that the criminal district attorney shall be considered a county officer. It rather indicates that there is no longer any necessity of having the county office, since the criminal district attorney can perform the duties usually performed by the county attorney. This is precisely what the Dallas County act provides.

The criminal district attorney of Dallas County, it is true, in addition to his ordinary duties as district attorney, performs the duties which would otherwise be those of a county attorney. But within the contemplation of this provision of the primary election law, he can not be both a county officer and a district officer. We think he is a district officer with additional duties imposed upon him. The territory involved is none the less a *district* because it is co-extensive with the county of Dallas. It is difficult to perceive how it could be said that a district attorney for a district composed of one county is a different kind of officer from a district attorney in a district made up of several counties. The one-county district is a district just the same, and the fact that the criminal district attorney performs additional duties, usually imposed on a county officer, is insufficient to change the nature of his office from *district* to *county*.

The statute creating this office will be found as Chapter 3A of Vernon's Code of Criminal Procedure of 1920. Article 97ggg of that chapter is as follows:

"There is hereby created and established a Criminal District of Dallas County, Texas, to be composed of the County of Dallas, Texas, alone, and the Criminal District Court of Dallas County, and the Criminal District Court No. 2 of Dallas County, Texas, shall have and exercise all the criminal jurisdiction of such courts, of and for said Criminal District of Dallas County, Texas, that are now conferred by law on said criminal district courts."

Article 97lll is in the following language:

"There shall be elected by the qualified electors of the Criminal Judicial District of Dallas County, Texas, an attorney for said district, who shall be styled the 'Criminal District Attorney of Dallas County,' and who shall hold his office for a period of two years and until his successor is elected and qualified. The said criminal district attorney shall possess all the qualifications and take the oath and give the bond required by the Constitution and laws of this State, of other district attorneys. (Acts 1917, Ch. 121, Sec. 2.)

"It shall be the duty of said criminal district attorney or his assistants, as hereinafter provided to be in attendance upon each term of the 'Criminal Court of Dallas County' and to represent the State in all matters pending before said courts. And he shall have exclusive control of all criminal cases wherever pending, or in whatever court in Dallas County that now has jurisdiction of criminal cases, as well as any or all courts that may hereafter be created and

given jurisdiction in criminal cases, and he shall have the fees therefor fixed by law. He shall also have control of any and all cases heard on habeas corpus before any civil district court of Dallas County, as well as before the criminal court of said county. The criminal district attorney of Dallas County shall have and exercise in addition to the specific powers given and the duties imposed upon him by this act, all such powers, duties and privileges within said criminal district of Dallas County as are by law now conferred, or which may hereafter be conferred upon district and county attorneys in the various counties and judicial districts of this State.

"It is further provided that he and his assistants shall have the exclusive right and it shall be their sole duty to perform the duties provided for in this act, except in cases of absence from the county of the criminal district attorney and his assistants, or their inability or refusal to act; and no other person shall have the power to perform the duties provided for in this act, or to represent the State in any criminal case in Dallas County, except in case of the absence from Dallas County, or the inability or refusal to act of the criminal district attorney and his assistants. (Id., Sec. 3.)

"The said criminal district attorney of Dallas County shall be commissioned by the Governor and shall receive a salary of \$500 per annum, to be paid by the State, and in addition thereto shall receive the following fees in felony cases, to be paid by the State; for each conviction of felonious homicide, where the defendant does not appeal or dies, or escapes after appeal and before final judgment of the Court of Criminal Appeals, or where, upon appeal, the judgment is affirmed, the sum of forty dollars. For all other convictions in felony cases, where the defendant does not appeal, or dies, or escapes, after appeal, and before final judgment of the Court of Criminal Appeals, or where, upon appeal, the judgment is affirmed, the sum of thirty dollars; provided, that in all convictions of felony, in which punishment is fixed by the verdict and judgment by confinement in the house of correction and reformatory, his fee shall be fifteen dollars. For representing the State in each case of habeas corpus where the defendant is charged with felony, the sum of twenty dollars. For representing the State in examining trials, in felony cases, where indictment is returned, in each case, the sum of five dollars. The criminal district attorney shall also receive such fees for other services rendered by him as is now, or may hereafter be authorized by law to be paid to other district and county attorneys in this State for such services. (Id., Sec. 4.)

"The criminal district attorney of Dallas County shall retain out of the fees earned and collected by him the sum of three thousand five hundred dollars per annum and in addition thereto one-fourth of the gross excess of all such fees in excess of three thousand five hundred dollars per annum to an amount not in excess of two thousand dollars. The three-fourths remaining to be applied first to the payment of the salaries of the assistant district attorneys and extra assistant district attorneys and stenographer as hereinafter provided for. The remainder to be paid into the treasury of Dallas County; provided, that in arriving at the amount collected by him he shall include the fees arising from all classes of criminal cases whether felony or misdemeanor arising in any of the courts in Dallas County now existing, or which may hereafter be created, including habeas corpus hearing and fines and forfeitures; provided that after the 30th day of November and before the first day of January following of each year, he shall make a full and complete report and accounting to the county judge of Dallas County of all of such fees so collected by him; provided, that in addition to the above he shall receive ten per cent for the collection of delinquent fees as is now provided by law relating to the collection of delinquent fees by county and district attorneys. Such fees, however, to be included in the reports herein provided for and to be taken into consideration in arriving at the total maximum compensation provided in this act. (Id., Sec. 5.)

"The criminal district attorney of Dallas County may appoint two assistants criminal district attorneys who shall each receive a salary of not to exceed eighteen hundred dollars per annum payable monthly, and four additional assistant district attorneys who shall each receive a salary of not to exceed fifteen hundred dollars a year payable monthly. He may appoint a stenographer

who shall receive a salary of not more than twelve hundred dollars per annum payable monthly.

"In addition to the assistant criminal district attorneys and stenographer above provided for, said criminal district attorney of Dallas County may, with the approval of the county judge and commissioners court of Dallas County, appoint as many additional extra assistant district attorneys as may be necessary to properly administer the affairs of the office of criminal district attorney and enforce the law, upon the criminal district attorney making application under oath addressed to the county judge of Dallas County, setting out the need therefor; provided, the county judge, with the approval of the commissioners court, may discontinue the services of any one or more of said extra assistant criminal district attorneys so appointed, the salary of said extra assistant criminal district attorney to be fixed by the commissioners court of Dallas County. (Id., Sec. 6.)

"The assistant criminal district attorneys and the extra assistant criminal district attorneys above provided for, when so appointed, shall take oath of office and be authorized to represent the State before said criminal district court, and in all other courts of Dallas County, in which the criminal district attorney of Dallas County is authorized by this act to represent the State, such authority to be exercised under the direction of said criminal district attorney, and which said assistants shall be subject to removal at the will of the said criminal district attorney. Each of said assistant criminal district attorneys shall be authorized to administer oaths, file information, examine witnesses before the grand jury and generally perform any duty devolving upon the criminal district attorney of Dallas County, and to exercise any power conferred by law upon the said criminal district attorney when by him so authorized. The criminal district attorney of Dallas County shall be paid the same fees for services rendered by his assistants as he would be entitled to receive if the services shall have been rendered by himself. (Id., Sec. 7.)

"The criminal district attorney of Dallas County is authorized, with the consent of the county judge and county commissioners of Dallas County, to appoint not to exceed two assistants in addition to his regular assistant criminal district attorneys, provided for in this act, which two assistants shall not be required to possess the qualifications prescribed by law for district or county attorneys, and who shall perform such duties as may be assigned to them by the criminal district attorney, and who shall receive as their compensation one hundred dollars per month each, to be paid in monthly installments out of the county funds of Dallas County, Texas, by warrants drawn on such county fund; and provided further, that the criminal district attorney of Dallas County shall be allowed a sum of money by order of said commissioners court of Dallas County, as in the judgment of the commissioners court may be deemed necessary, to the proper administration of the duties of such office not to exceed, however, the amount of fifty dollars per month. Such amount as may be thus necessarily incurred shall be paid by the commissioners court upon affidavit made by the criminal district attorney of Dallas County, showing the necessity for such expenditure and for what the same was incurred. The commissioners court may also require any other evidence as in their opinion may be necessary to show the necessity for such expenditure, but they shall be the sole judge as to the necessity for such expenditure and their judgment allowing same shall be final. (Id., Sec. 8.)

"The criminal district attorney shall at the close of each month of the tenure of such office make, as a part of the report required by this act, an itemized and sworn statement of the actual and necessary expenses incurred by him in the conduct of his said office, such as stamps, stationery, books, telephone, traveling expenses and other necessary expenses. If such expenses be incurred in connection with any particular case such statement shall name such case. Such expense account shall be subject to the audit of the county auditor and if it appears that any item of such expenses was not incurred by such officer or that such item was not necessary thereto, such item may be by the said auditor rejected, in which case the correction of such item may be adjudicated in any court of competent jurisdiction. The amount of such expense shall be deducted by the criminal district attorney of Dallas County in making such a report from

the amount, if any, due by him to the county under the provisions of this act. (Id., Sec. 9.)

"The criminal district attorney of Dallas County, as provided for in this act, shall be elected by the qualified electors of the criminal judicial district of Dallas County at the next general election, and it is provided and directed that the present county attorney of Dallas County, Texas, shall continue in office and assume the duties and be known as the criminal district attorney of Dallas County, Texas, and proceed to organize and arrange the affairs of the office of criminal district attorney of Dallas County, and appoint assistants as provided for in this act and receive the fees provided for in this act for such office until the next general election and until the criminal district attorney of Dallas County shall be elected and qualified. (Id., Sec. 10.)"

Here we have a "criminal judicial district" created and a criminal district attorney "for said district" provided for. The act also gives the criminal district attorney a salary of five hundred dollars per annum, to be paid by the State; which is the same as provided for district attorneys in the State Constitution. (See Sec. 21, Art. 5.)

In this instance the Legislature saw fit to create a district officer and impose on him duties ordinarily performed by a county officer. The fact that he has such additional duties is insufficient to change the nature of his office for the purpose of our inquiry.

It may be remarked that while he has some duties usually imposed on the county attorney, yet the criminal cases are not tried in a county court, but on the other hand in a *district* tribunal called a "criminal *district* court." So that as distinguished from county duties the duties of this officer might be said to be district duties.

It would not avail much to speculate on what actuated the Legislature in enacting a law with respect to nominations different as applied to county offices from that applicable to district offices, but whatever might have been the cause it would seem that as much reason exists for majority nominations of district attorneys in one-county districts as of district attorneys in other districts. At any rate, in view of the language of the statute, we think no intention is expressed to prescribe a different rule in the two cases.

We, therefore, advise you that in our opinion, the criminal district attorney of Dallas County is a district officer and that the county executive committee has no authority to decide that a plurality nomination may be made in the general Democratic primary election to be held next month.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2313, Bk. 55, P. 307.

ELECTIONS—PARTY NOMINATIONS—CONVENTIONS—EXECUTIVE
COMMITTEES.

1. This Department follows the Supreme Court's recent decision in holding that Article 2970, Revised Civil Statutes of 1911, inhibits the name of a candidate for office being printed in more than one column on an official ballot.

2. Article 3170, Revised Civil Statutes of 1911, as amended, prescribes the number of members an executive committee of a political party in a city or town may have and such statute controls. Those appointed in excess of the

authorized number would not be members of the committee and could not participate in the actions of the committee. The acts of the authorized members would be valid if ascertainable.

3. That part of Article 3086 requiring nominations of candidates for office in cities and towns to be made in such manner as the party executive committee may direct not less than ten days prior to the city or town election, applies only to political parties casting 100,000 votes or more at the last general election.

4. That portion of Article 3170, Revised Civil Statutes of 1911, as amended, requiring primary elections to be held at least thirty days prior to city elections applies to other political parties than those casting 100,000 votes or more at the last general election, but does not require "mass conventions" to be held thirty days prior to such city election. Hence, nominations made by "mass conventions" of political parties other than those casting 100,000 votes or more at the last general election need not be made thirty days prior to city regular elections.

AUSTIN, TEXAS, March 22, 1921.

Honorable J. E. Gilbert, Chairman Executive Committee, Citizens' Association of the City of Dallas, Dallas, Texas.

DEAR SIR: Yours of the 12th instant addressed to the Attorney General has been referred to me for attention. Your communication reads as follows:

"As chairman of the Executive Committee of the Citizens Association of the city of Dallas, I beg leave to submit to you the following questions, an early reply to which I will deeply appreciate:

"First: Can the same set of candidates nominated for mayor and board of commissioners of the city of Dallas by two different political parties appear upon the ballot under the label of each party? In other words, can the candidates of one political party accept the nomination of another political party and thereby secure two places upon the official ballot? Can the names of candidates for mayor and board of commissioners appear more than once upon the official ballot?

"Second: Under Article No. 3170 of the Revised Statutes, it is provided that any party making local nomination shall have an executive committee composed of one member from each ward in the city where such city is divided into wards for election or political purposes and shall have a chairman of such committee. Is any party legal which has an executive committee composed of more than one member from each ward and a city chairman?

"Third: There seems to be some conflict between Article No. 3170 and Article No. 3086 concerning the time parties may make nominations for said offices. Are these nominations required to be made at least thirty days prior to the regular city election or may same be made not less than ten days prior to such election?"

Answering your first inquiry, beg to advise as follows:

The Supreme Court of Texas in the case of *Westerman vs. Mims*, 227 S. W., 178, has written an opinion which construes this article of the statute and which apparently supersedes any opinion of this Department to the contrary which may have been rendered. In the opinion of the Supreme Court referred to, that court held that Revised Statutes, Article 2970, prevents a candidate from having his name upon the official ballot in two places. However, in following the opinion of the Supreme Court in this construction we desire to be understood that we have not passed upon the constitutionality of this statute and do not feel that it is the character of statute which we would be called upon to consider from a constitutional standpoint after its enactment by the Legislature and approval by the Governor.

Second. The language of Article 3170, Revised Civil Statutes, so far as material to your second inquiry, is as follows:

"In each of said cities and towns there shall be an executive committee for each political party, consisting of a city chairman and one member for each ward in such city or town, and in case such city or town is not divided into wards, for either political or election purposes, then there shall be selected four members of said committee, in addition to the city chairman. If any city or town shall be divided into wards, for either political or election purposes, or both, then such party executive committee shall consist of one member from each ward and a city chairman of such executive committee. Provided, however, that no city or town in this State shall have a smaller number than four executive committeemen and a chairman of such executive committee."

There can be no doubt as to the authority of the Legislature to regulate the holding of primary elections and nominating conventions, and when the law undertakes regulation within constitutional limitations, regulatory statutes will be enforced by the courts. A political party is free to regulate its own affairs until the law regulates them. (9 R. C. L., 1072; *Waples vs. Morrast*, 184 S. W., 180; *Gilmore vs. Waples*, 188 S. W., 1037; 20 C. J., 104.)

The Legislature in this State has prescribed the number of committeemen that shall constitute an executive committee in cities and towns; and if the statutes are to be treated as law we must hold that such a committee cannot be composed of any other number than that which the statute prescribes. To hold otherwise would be to nullify plain provisions of written law; and it has not been suggested that the statute in this respect is unconstitutional.

It has been held in Pennsylvania that a committee in exercising the power of nomination must be legally constituted and must act as a body. (*In re Corry's Nomination*, 10 Pa. Dist., 716; 25 Pa. Co., 525; 20 C. J., 109.)

Statutes relative to eligibility of committeemen will be upheld. Under the election law of the State of New York that each member of a county committee shall be an enrolled voter of the party and shall serve until election of his successor; one not enrolled at the time of his election as committeeman is not eligible. (*In re Worther*, 158 N. Y. S., 321; 94 Miss. Rep., 681.)

Nor are such matters beyond the power of courts to determine as being political, where there is a statutory law regulating same. This was the holding in *Gilmore vs. Waples* case, reported in 188 S. W., 1037. The Supreme Court of Texas, in its opinion in that case, goes into the matter fully. In discussing the decisions upon this point, the court said:

"Because the rights of plaintiffs in these several cases arose under and were protected by a statute, the reason of these decisions is that they could no longer be regarded as purely political rights, for the protection of which against illegal action by the party authorities only equity afforded an adequate remedy, notwithstanding the management and methods of a political party were involved and the action of the party authorities thus subjected to review by the courts."

The court quoted approvingly from a New York case:

"From this review of such legislation I conclude that the old doctrine that political rights were beyond the domain of judicial investigation and determination has been swept away, and that there no longer remains any distinction between the civil and political rights of citizens, and that the courts may not

shut their doors against the enforcement of any such rights. It will be presumed that every right recognized or conferred by statute may be protected, defended, and enforced by an appropriate legal method and that every wrong has its remedy."

Further along in the opinion our Supreme Court says:

"But we are unwilling to give our concurrence to the holding that a right conferred by the statute law of this State is not a legal right. To hold that such rights are not legal rights in our judgment decreases the force of the statute law."

In the *Gilmore vs. Waples* case the court reviews the authorities and shows conclusively that statutes prescribing methods of making nominations by political parties must be obeyed.

Thus it was held in *Brown vs. Committee*, 119 Ky., 720; 68 S. W., 622, that a candidate in an election was entitled to an injunction to restrain a committee from holding an election in a manner in violation of statute prescribing how such election should be held.

The conclusion to be reached is that where a valid statute prescribes how nominations shall be made, or an election or convention held, such statute controls. So that where a statute sets out in express language that a committee shall be composed of a certain number, a committee cannot be made up of any other number of committeemen.

We are not prepared to say, however, that a committee is absolutely illegal under such circumstances. If one for each ward was chosen and later others were erroneously added and there is any way to ascertain which are the ones first chosen, we think those first chosen would constitute the committee and all others would have no status as committeemen. The acts of those legally chosen, if ascertainable, would be legal.

In *State vs. Benton*, 34 Pac., 301, the Supreme Court of Montana made a holding consistent with the foregoing statement. The court said:

"The committee was empowered to add to their number persons from other precincts. Holmes and Wales, each from Great Falls, and not from other precincts, became members of the committee, or acted as such, by some method not appearing. But, if they were added to the committee without direct authority from the convention, I cannot understand that such action would destroy the life of the committee, or nullify the authority given it by the convention. Moreover, it does not appear that it was required that the secretary of the committee should be a member thereof. I cannot understand how, if the duly constituted members of the committee should act as authorized by the convention, their acts would be void by reason of the presence of two more persons who were not regular members of the committee, and who were not required to make a quorum or majority, which quorum or majority determined upon an act of the committee which was afterwards attacked."

Third. Your third question presents a rather difficult problem of a statutory construction. Article 3086 is a part of Chapter 10, Title 49, which said Chapter 10 is headed "Nominations by parties of 100,000 voters or over." It has never been supposed by this Department or contended by anyone so far as we know, that Chapter 10 applies to political parties except such as cast 100,000 votes or more at the last general election. The original Terrell Election Law was subdivided in the same manner as is the Revised Civil Statutes.

Article 3086 contains this language:

"Nominations of party candidates for offices to be filled in a city or town shall be made not less than ten days prior to the city or town election at which they are to be chosen, in such manner as the party executive committee for such city or town shall direct, and all laws prescribing the method of conducting county primary elections shall apply to them."

Standing alone, this language is in direct conflict with Article 3170. Both statutes cannot be the law relative to the same political party. It is axiomatic that we must give effect to both statutes if possible. We think there is no doubt that Article 3086 applies to political parties casting 100,000 votes or over at the last general election so far as the time within nominations shall be made is concerned, and that upon this point Article 3170 applies to other political parties. This construction gives effect to both statutes.

Article 3170 reads as follows:

"Art. 3170. Each and every incorporated city or town in the State of Texas, whether incorporated under the general or special laws, may make nominations for office in the following manner: In each of said cities and towns there shall be an executive committee for each political party, consisting of a city chairman and one member for each ward in such city or town, and in case such city or town is not divided into wards, for either political or election purposes, then there shall be selected four members of said committee, in addition to the city chairman. If any city or town shall be divided into wards, for either political or election purposes, or both, then such party executive committee shall consist of one member from each ward and a city chairman of such executive committee. Provided, however, that no city or town in this State shall have a smaller number than four executive committeemen and a chairman of such executive committee. In all cities and towns which now have no executive committee, the county chairman of the party desiring to make nominations in such cities and towns shall appoint an executive committee to serve until the next city election shall be held, and in each city and town in this State in which a political party may desire to make nominations, there shall be held at least thirty days prior to the regular city election, an election at which there may be nominated by such political party, officers to be elected at the next city election, and at which before there shall be selected the executive committee for such party in said city and town herein provided for, and in all such city primary elections, and the provisions of the law relating to primary elections and general elections shall be observed. The executive committee herein provided for may decide whether or not nominations shall be made by such political party in such city or town; provided, that upon petition being made to said city or county chairman, signed by twenty-five per cent of the voters of the party in such city, as shown by the last general State election, requesting that party nominations be made for city officers, then said city executive committee, through an order of its chairman, shall order a primary election or mass convention of the qualified voters of the party, as may be petitioned for by the voters presenting said petition, and it shall thereupon be the duty of said city executive committee to grant such request as shall be contained in such petition, and such primary election or mass convention shall be ordered, and it shall be mandatory upon such city or county chairman to order such election or mass convention to be held within ten days from the time such petition is presented. At such primary election or mass convention a new executive committee shall be selected to serve during the ensuing term; provided, that this act shall not be construed so as to prevent independent candidates for city offices from having their names upon the official ballot, as provided for in Section 99 of this act (Arts. 3159-3163.) Provided further, that this act shall not repeal the provisions of any charter heretofore or hereafter granted to any city in this State."

Does this statute require nominations to be made thirty days prior

to the regular city election where such nominations are made by a party convention as distinguished from a party primary election?

If such nomination must be made thirty days prior to the regular election it is by virtue of the language, "and in each city and town in this State in which a political party may desire to make nominations, there shall be held, at least thirty days prior to the regular city election, an election at which there may be nominated by such political party officers to be elected at the next city election and at which election there shall be selected the executive committee for such party in said city and town herein provided for, and in all such city primary elections, the provisions of the law relating to primary elections and general elections shall be observed."

In order to hold that nominating conventions must be held thirty days prior to the city regular election we would have to hold that such convention is an "election" and also a "city primary election."

It is conceivable that under certain circumstances the word "election" or even "primary election" might be held to include a convention. It would depend in each instance upon the intention of the Legislature as disclosed by the entire act and the connection in which the expression is used. In this instance it is proper to consider the history of the statute in order to come to a correct conclusion.

Article 3170, as contained in the Revised Civil Statutes of 1911, did not include the language in italic letters above. It was evidently the opinion of the Legislature that prior to this amendment the statute did not control as to mass conventions, for the amendment provides for the calling of "mass conventions" as well as "primary elections," the latter being mentioned in the statute prior to the enactment of the amendment. Reading together our statutes relative to primary elections and nominating conventions in this State, the writer does not believe there is doubt as to what is meant by the term "primary election" or "nominating convention" or "mass convention." The very fact that in this article the Legislature considered it necessary to use the expression "mass convention" in addition to the expression "primary election" shows there was a distinction to be made between the two terms. The Legislature added this amendment knowing that the thirty day clause applied only to primary elections and in enacting statutory law not theretofore existing as to the calling of mass conventions, it stands to reason that if it had been the intention of the Legislature to require mass conventions to be held at least thirty days prior to a regular city election, it would have said so in plain terms.

We conclude that the expression "primary election" in this instance cannot be held to include "mass conventions" and that therefore mass conventions of parties affected by this article are not required to be held thirty days prior to the regular city election.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2383, Bk. 56, P. 142.

CONVICTS—LABOR CANNOT BE SOLD.

The Prison Commission does not have the authority to make a contract that in effect sells the labor of not less than 300 convicts for a period of not less than five years and that may be extended by the purchaser of this labor for ten years.

AUSTIN, TEXAS, September 19, 1921.

Board of Prison Commissioners, Huntsville, Texas.

GENTLEMEN: The Attorney General has been furnished a copy of a certain contemplated contract wherein the Prison Commission is to be the party of the first part, and Eli H. Brown, Jr., attorney, is the party of the second part. You desire to be advised before executing this contract as to your authority to make such a contract.

Briefly stated, this contract provides that the party of the second part shall furnish and install in the prison building at Huntsville all necessary machinery for the manufacture of work shirts, dresses and aprons, children's play suits and overalls. He also agrees to teach the convicts to operate this machinery and he further agrees to furnish all the raw material necessary to manufacture the articles of wearing apparel above named. He then agrees to pay the Prison Commission so much per dozen for the above articles when they are satisfactorily completed.

The Prison Commission on its part agrees to furnish necessary buildings, work-tables, etc., and further agrees to employ in this factory "a minimum of three hundred inmates to be furnished as soon after the execution of this contract as said number becomes available and a maximum of five hundred inmates." The contract to continue in force for five years from its date, and the party of the second part has the option of renewing the contract for a further period of five years. The contract may be assigned by the party of the second part to some corporation that he may organize or to some corporation now in existence.

It is apparent that Mr. Brown is acting for and in behalf not of himself but of some other party or parties whose identity is not disclosed. Such an extremely important contract as this involving large business operations for a period of not less than five years, and possibly for ten years, should, under no circumstances, be made unless the Prison Commission is fully advised as to who the party of the second part is ultimately to be.

This contract calls for the labor of a minimum of three hundred convicts for a period of five years and at the will of the party of the second part, can be extended for a total of ten years. Article 6174, Revised Civil Statutes, provides that "in no event shall the labor of a prisoner be sold to any contractor." This contract is adroitly worded, but its actual effect is that the Prison Commission is to furnish the labor of not less than three hundred convicts to manufacture certain articles for Mr. Brown, or his assignee,—that is to say, the effect of this contract is to sell the labor of not less than three hundred convicts for a period of not less than five years and perhaps for ten years.

Article 6183, Revised Civil Statutes, provides:

"The Prison Commission shall have the power to purchase, or cause to be

purchased, with such funds as may be at their disposal, any lands, buildings, machinery, tools or supplies for the benefit of said Prison System, and may establish such factories as in their judgment may be practicable and that will afford useful and proper employment to prisoners confined in the State prison, under such regulations, conditions and restrictions as may be deemed best for the welfare of the State and the prisoners, it being the purpose of this title to clothe said Board of Prison Commissioners with all power and authority necessary for the proper management of the Prison System of this State."

This means that the Prison Commission has the authority to buy the necessary machinery, tools and supplies that may be necessary to establish such factories as in the judgment of the Prison Commission may be practicable. The language used indicates an intention on the part of the Legislature to exclude the establishment of a factory in any other manner. Of course, the Prison Commission could buy a factory already established, but the language of this article would seem to exclude the establishment of a factory in the manner contemplated in the contract under examination.

You are therefore advised that in the opinion of this Department the contract under examination is not such a contract as the Prison Commission is authorized and empowered to make.

I am, with respect,

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2416, Bk. 57, P. 126.

EMPLOYER'S LIABILITY ACT—WHEN COMPENSATION SHALL BE PAID.

Compensation under the Employer's Liability Act shall be paid "from week to week" to the injured employee except in certain cases expressly provided for in the act.

AUSTIN, TEXAS, March 6, 1922.

The Industrial Accident Board, Capitol.

GENTLEMEN: You have requested this Department to advise you as to whether or not an insurance association operating under the Employer's Liability Act has the legal right to pay the compensation provided for in said act once each month in advance in lieu of weekly payments.

Replying to your inquiry, your attention is respectfully directed to Section 18 of Part I of said Act, which reads as follows:

"It is the purpose of this act that the compensation herein provided for shall be paid from week to week and as it accrues and directly to the person entitled thereto, unless the liability is redeemed as in such cases provided elsewhere herein, and, if the association wilfully fails or refuses to pay compensation as and when the same matures and accrues, the board shall notify said association that such is the course it is pursuing, and if after such notice the association continues to wilfully refuse and fail to meet these payments of compensation as provided for in this act, the board shall have the power to hold that such association is not complying with the provisions of this act. And shall certify such fact to the Commissioner of Insurance and Banking, and said certificate shall be sufficient cause to justify said Commissioner of Insurance and Banking to revoke or forfeit the license or permit of such association to do business in Texas, provided said power of the board shall not be held to deny the associa-

tion the right to bring suit or suits to set aside any ruling, order or decision of the board."

Section 5 of Part IV of said act reads as follows:

"In cases of emergency or impending necessity the association may make advanced payments of compensation to any employee during the period of his incapacity or to his beneficiaries within the terms of this act, and when the same is either directed or approved by the board it shall be credited as against any unaccrued compensation due said employe or beneficiaries."

In Section 15 of Part I, provision is made "in cases where death or total permanent incapacity results from an injury, the liability of the association may be redeemed by payment of a lump sum by agreement of the parties thereto, subject to the approval of the Industrial Accident Board."

In Section 15a of Part I, the Industrial Accident Board is given the power in certain cases "to increase the amount of compensation by correspondingly decreasing the number of weeks for which the same is to be paid."

From these provisions of the law it appears that the real purpose of the Act was to provide for the payment of compensation "from week to week," except in exceptional cases, and for these exceptional cases express provision is made. There is no authority in the law for substituting monthly payments made in advance for weekly payments.

An insurance association operating under this act which makes monthly payments in lieu of weekly payments is not paying compensation "as and when same matures and accrues." And if after notification of such fact by the Industrial Accident Board, it continues to make monthly payment, its license or permit to do business in Texas is subject to revocation or forfeiture under Section 18, supra.

The Texas Employer's Insurance Association was created by the act under consideration, and of course, its actions are governed by the provisions of the act. Section 2 of Part III provides that certain other companies "shall have the same right to insure the liability and pay the compensation provided for in Part I of this act" as the Texas Employer's Insurance Association; and when such company "insures such payment of compensation, it shall be subject to the provisions of Parts I, II, and IV, and of Sections 10, 17, 18a, and 21 of Part III of this Act." Therefore, the question of the right of contract between an insurance association and the injured employee is not necessarily involved. It is the duty of the insurance association to comply with the terms of the act, and the act requires payment to be made "from week to week," except in certain cases expressly provided for in the act.

You are therefore advised that in the opinion of this Department, an insurance association does not have the legal right to pay the compensation provided for in said act once each month in advance in lieu of weekly payments.

I am with respect,

Yours truly,

E. F. SMITH,
First Assistant Attorney General.

Op. No. 2407, Bk. 57, P. 266.

PERSONAL INJURIES—EMPLOYEES OF THE STATE GOVERNMENT.

The Board of Regents of the University of Texas is not authorized to set aside funds for the purpose of paying damages for personal injuries received by an employee or employees and under the present state of the law has no authority to take out employers' liability insurance.

AUSTIN, TEXAS, December 7, 1921.

Honorable Robert E. Vinson, President University of Texas, Austin, Texas.

DEAR SIR: I have yours of November 1, 1921, addressed to Honorable C. M. Cureton, then Attorney General, enclosing a petition of Mr. Allen P. Roberts for remuneration on account of a personal injury alleged to have occurred to him while employed as a carpenter at the University of Texas. It seems that Mr. Roberts was regularly employed as carpenter at the University and that it became his duty in the course of his employment to lift and place marble slabs weighing from one hundred and fifty to two hundred pounds each. The lifting of these slabs he alleges caused personal injury to him and he is asking the Board of Regents of the University of Texas to pay him for the injury, the total sum of \$5,465.

Your letter accompanying this petition reads as follows:

"I am sending you attached a certain petition addressed to the Board of Regents of the University of Texas by Mr. Allen P. Roberts, a former employee of the University. The Board of Regents has requested me to secure from you an opinion upon the following matters:

"1. Is the University of Texas legally liable for injury to its employees, either in the manner described in this petition, or for injury suffered otherwise during the period of employment?

"2. In the event the University of Texas is liable, would it be possible for the Board of Regents to set aside any funds for the purpose of paying damages under the terms of the present appropriation bill for the legislative biennium, September 1, 1921, to August 31, 1923?

"3. Further, in the event of liability, would it be possible for the University of Texas to secure employers' liability insurance which might cover such cases as this?"

In view of the advice we are giving you in this opinion I believe that you will agree that it is not necessary for us to answer unequivocally your first question. Granting that facts could arise which would render the State liable in connection with a personal injury suffered by an employe at the State University, it would still be a mixed question of law and fact as to whether there was liability in a particular case. In order to hold that the University authorities would have authority to compensate an employee for personal injuries it would be necessary to hold that they have authority to find as a fact and under the law that it was liability in a particular case. Even assuming that the State might under certain circumstances be liable, we are of the opinion that authority has not been conferred upon the Board of Regents of the University or any other official connected therewith to adjudicate and find that there is liability in a particular case for personal injuries to an employee, and under the present state of the law we do

not believe that there is any authority to use University funds to pay such damages or to set aside a fund to be used for such purpose from time to time.

Even if under a particular state of facts there should be liability on the part of the State, the claimant could not sue the State without its permission and permission must be given by legislative enactment. Therefore, until the claimant procures such permission and gets a judgment for damage suffered by reason of personal injuries, and the Legislature makes an appropriation to pay such damages, we are inclined to the opinion and respectfully advise you that University funds cannot be used for the purpose mentioned in your letter.

The above holding makes it necessary for us to answer your third question in the negative.

The matter presented by you is one which should receive the attention of the Legislature if it is thought that some provision should be made for the compensation of employees of the State government for personal injuries received in the course of their employment.

We are returning herewith Mr. Allen P. Roberts' petition.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2422, Bk. 57, P. 314.

SUFFRAGE—MARRIED WOMEN CITIZENSHIP.

1. A woman who, although otherwise an alien, is the wife of a man who is a citizen of the United States, is thereby herself a citizen of the United States and entitled to vote in this State, if otherwise qualified, so long as such marital relation continues and her husband remains a citizen of the United States, if such woman is of a race or class of people who are permitted to become citizens of the United States.

(a) The citizenship of such woman, and her right to vote in this State if otherwise qualified, will continue after the termination of such marital relation if she, being a resident of the United States at the time, shall continue to reside in the United States, and does not make formal renunciation of her citizenship before a court having jurisdiction to naturalize aliens, or if she, being a resident abroad at the time, shall within one year after the termination of such marital relation, register as a citizen of the United States before a consul of the United States; unless, of course, she thereafter becomes the wife of a man who is not a citizen of the United States.

(b) If such woman, however, after the termination of such marital relation, she being a resident of the United States at the time, shall not continue to reside in the United States, or if she makes formal renunciation of her citizenship before a court having jurisdiction to naturalize aliens, or if she, being a resident abroad, shall fail to register as a citizen of the United States before a consul of the United States within one year from the termination of such marital relation, or if she thereafter becomes the wife of a man who is not a citizen of the United States, her status as a citizen will cease and she will no longer be entitled to vote at any election in this State.

2. A woman who, although otherwise a citizen of the United States, is the wife of a man who is not a citizen of the United States, is thereby herself an alien, not a citizen of the United States, and not entitled to vote in this State so long as such marital relation continues and her husband remains an alien.

(a) Such woman will remain an alien, and not entitled to vote in this State, even after the termination of such marital relation, if she, being at the time a

resident of the United States, shall not continue to reside in the United States, or if she, being a resident abroad at the time, shall not return to reside in the United States, or shall not within one year from the termination of such marital relation register as a citizen of the United States before a consul of the United States; unless, of course, she thereafter becomes the wife of a man who is a citizen of the United States.

(b) Such woman, however, upon the termination of such marital relation, may resume her status as a citizen of the United States by continuing to reside in the United States if she at the time be a resident of the United States, or, if residing abroad at the time, by returning to reside in the United States, or by registering as a citizen of the United States with a consul of the United States within one year from the termination of such marital relation, or upon becoming the wife of a man who is a citizen of the United States, and in either such case, having so resumed her status as a citizen of the United States, such woman is thereupon entitled to vote at any election in this State, if otherwise qualified.

AUSTIN, TEXAS, March 28, 1922.

Honorable C. D. Works, County Attorney, Spearman, Texas.

DEAR SIR: This is in reply to your inquiry of the 10th instant addressed to the Attorney General.

All those who are citizens of the United States, and who are otherwise qualified, and no others, are now entitled to vote at any election held in the State for any purpose. This was made so by the amendment to Section 2 of Article 6 of our State Constitution, adopted at an election held July 23, 1921. This amendment also eliminated the word "male" from our State Constitution with respect to suffrage. By its terms, this amendment is made "self-enacting without the necessity of further legislation." (Gen. Laws, Reg. Ses., Thirty-seventh Leg., p. 275.)

On August 26, 1921, the nineteenth amendment to the Constitution of the United States was certified and declared to have become on that date a part of that constitution. (Fed. St., Ann. 2nd Ed., 1920, Sup., p. 821.) This amendment reads as follows:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation."

By an amendment adopted at an election held November 2, 1920, the word "male" was eliminated from Section 3 of Article 7 of our State Constitution with respect to the State poll tax. (Gen. Laws, Reg. Ses., Thirty-sixth Leg., p. 356.)

Pursuant to these constitutional amendments, the Legislature of this State, on October 2, 1920, amended certain statutes of this State, the purpose of which amendments was to confer equal suffrage in this State upon both men and women who are citizens of the United States. (Ch. 6, p. 10, Gen. Laws, Fourth Called Session, Thirty-sixth Legislature.)

We thus find that all "citizens of the United States," but only "citizens of the United States," both men and women alike, who are otherwise qualified, are now entitled to vote at all elections in this State. Your inquiry relates only to the citizenship of women who are or have been married, and their right as such citizens to vote, if otherwise qualified.

As a preliminary to answering your inquiries, it will be noted that

the status of citizens of women who are not and have never been married is determined or fixed by the same law and facts as is the status of men as citizens. These are fairly well known to everyone and are not included in your inquiry. Furthermore, we do not discuss the citizenship for all purposes of women who are or have been married, but only with respect to suffrage.

The status of persons, whether male or female, as citizens or aliens, depends entirely upon the Constitution of the United States and the acts of Congress pursuant thereto. (*Johnson vs. U. S.* (1893), 29 Ct., Cl. 1; *McKenzie vs. Hare* (1913), 134 Pac., 713, 165 Cal., 776, Ann. Cas. 1915B, 261, 339 U. S., 299; *People vs. Newell* (N. Y., 1884), 1 How. Pr. (U. S.), 8; *People vs. Newell* (N. Y., 1885), 38 Hun., 78; *Chiswell vs. Noble* (1908), 113 N. Y. S., 954, 61 Misc. Rep., 483; *Kane vs. McCarthy* (1869), 63 N. C., 299; *U. S. vs. Williams* (D. C., 1909), 173 Fed., 626; *In re Nicole* (1911), 184 Fed., 322, 106 C. C. A., 464, 28 Op. Atty. Gen. (1910), 504; *In re Moratorano*, 159 Fed., 1010.

It is not within the power of the State, by legislation or otherwise, to say who of its inhabitants are or are not citizens of the United States. By our State Constitution we say that all those who are citizens of the United States, and who are otherwise qualified, and no others, shall be entitled to vote. At the same time the United States government, and not the State, determines who are citizens of the United States, and we have written into the Constitution of the United States the provision hereinbefore referred to, that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." Whoever, therefore, is now or hereafter becomes a citizen of the United States under the Constitution and laws of the United States, and who is otherwise qualified, whether man or woman, is entitled to vote in this State, and his or her right to do so "shall not be denied or abridged * * * on account of sex," and he or she who is not a citizen of the United States, regardless of other qualifications, is not entitled to vote in this State. Hence we must turn to the Constitution of the United States, and the acts of Congress thereunder, in order to ascertain who of the inhabitants of this State are citizens of the United States and, to that extent, in order to determine who may and who may not vote in this State.

Chapter 71, 10 St. at L., 604, taken from the Act of February 10, 1855, reads as follows:

"Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen." Fed. St., Ann., 2d Ed., Vol. 2, p. 117, Sec. 1994; U. S. Com. St., 1916, Vol. 4, p. 4819, Sec. 3948.

There being no other statute on this subject prior to March 2, 1907, there existed prior to that time some confusion and diversity of opinion as to the status of women as citizens who, being otherwise citizens, had intermarried with aliens, and particularly as to the status of married women as citizens after the marriage relation had terminated. The Act of March 2, 1907, however, seems to cover these matters fully. Section 4 of this act reads as follows:

"Any foreigner who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital

relation if she continues to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation." Act March 2, 1907, Sec. 4, Ch. 2534: 34 St. at L., 1228, Fed. St., Ann., 2d Ed., Vol. 2, p. 124; U. S. Com. St., 1916, Vol. 4, p. 4834, Sec. 3961.

A woman, therefore, who becomes a citizen of the United States by marriage with a man who is, or who while such woman is his wife becomes, a citizen of the United States, remains a citizen of the United States after the dissolution of the marriage relation, whether by divorce or by the death of the husband, if, being a resident of the United States at the time, she continues to reside in the United States, unless she makes formal renunciation of such citizenship before a court having jurisdiction to naturalize aliens, or, if residing abroad, she registers as a citizen of the United States before a United States consul within one year from the termination of such marital relation; unless, of course, she thereafter becomes the wife of another man who is not a citizen of the United States.

This brings us to a consideration of the status as a citizen of a woman who, being otherwise a citizen of the United States, whether by birth, by having been the wife of a man who was a citizen of the United States, or otherwise, intermarries with a man who is not a citizen of the United States. The status of women in such case, as in the foregoing instance, must be determined by the laws of the United States, and not by State laws. Section 3 of the Act of March 2, 1907, reads as follows:

"Any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein." Act March 2, 1907, Ch. 2534, Sec. 3, 34 St. at L., 1228; Fed. St., Ann., 2d Ed., Vol. 2, p. 123; U. S. Com. St., 1916, Vol. 4, p. 4833, Sec. 3960.

The case of McKenzie vs. Hare, 165 Cal., 776, 134 Pac., 713, Ann. Cas., 1915B, p. 261, decided by the Supreme Court of California on August 5, 1913, and later carried to and passed upon by the Supreme Court of the United States, is a leading and well considered case here in point. In that case a woman who, prior to and but for her marriage with an alien, was a citizen of the United States by birth, was refused the right to register as a voter in the State of California on the ground that by her marriage to an alien she herself thereby became an alien and was not, while that marriage relation continued, a citizen of the United States. The constitution of California at that time accorded the right to vote to "every native citizen of the United States." This woman made application to the Supreme Court of California for a writ of mandamus against the proper officer to require him to permit her to register as a voter, claiming to be a "native citizen of the United States," attacking the constitutionality of this act, and contending that she remained a "native citizen of the United States" notwithstanding her marriage with an alien. In a well considered opinion in which many authorities are cited and discussed, the court held this act constitutional and valid, held that the woman because of her

marriage with an alien became herself an alien and no longer a citizen of the United States, and denied the writ. This disposition of the case by the Supreme Court of California was affirmed by the Supreme Court of the United States in an opinion handed down December 6, 1915. (*McKenzie vs. Hare*, 239 U. S., 299.) These opinions are interesting but no good purpose would be served by quoting from them here.

We must say, then, as, indeed, the statute itself says, that any American woman, that is, any woman who by birth or otherwise is a citizen of the United States, who intermarries with and is the wife of a foreigner thereby becomes herself an alien in law and no longer a citizen of the United States so long as such marital relation continues; and even though such marital relation be terminated, whether by divorce or by death of the husband, such woman nevertheless remains an alien, and not a citizen of the United States, unless, if residing abroad at the time, she registers as an American citizen with a United States consul within one year from the termination of such marital relation, or, if residing in the United States, unless she continues to reside in the United States, or, of course, unless she thereafter becomes the wife of a man who is a citizen of the United States.

You are, therefore, advised as follows:

1. A woman, although otherwise an alien, is the wife of a man who is a citizen of the United States, is thereby herself a citizen of the United States and entitled to vote in this State, if otherwise qualified, so long as such marital relation continues and her husband remains a citizen of the United States, if such woman is of a race or class of people who are permitted to become citizens of the United States.

(a) The citizenship of such woman, and her right to vote in this State if otherwise qualified, will continue after the termination of such marital relation if she, being a resident of the United States at the time, shall continue to reside in the United States and does not make formal renunciation of her citizenship before a court having jurisdiction to naturalize aliens, or if she, being a resident abroad at the time, shall within one year after the termination of such marital relation, register as a citizen of the United States; unless, of course, she thereafter becomes the wife of a man who is not a citizen of the United States.

(b) If such woman, however, after the termination of such marital relation, she being a resident of the United States at the time, shall not continue to reside in the United States, or if she makes formal renunciation of her citizenship before a court having jurisdiction to naturalize aliens, or if she, being a resident abroad, shall fail to register as a citizen of the United States before a consul of the United States within one year from the termination of such marital relation, or if she thereafter becomes the wife of a man who is not a citizen of the United States, her status as a citizen will cease and she will no longer be entitled to vote at any election in this State.

2. A woman who, although otherwise a citizen of the United States, is the wife of a man who is not a citizen of the United States, is thereby herself an alien, not a citizen of the United States, and not entitled to

vote in this State so long as such marital relation continues and her husband remains an alien.

(a) Such woman will remain an alien, and not entitled to vote in this State, even after the termination of such marital relation, if she, being at the time a resident of the United States, shall not continue to reside in the United States, or if she, being a resident abroad at the time, shall not return to reside in the United States, or shall not within one year from the termination of such marital relation register as a citizen of the United States before a consul of the United States; unless, of course, she thereafter becomes the wife of a man who is a citizen of the United States.

(b) Such woman, however, upon the termination of such marital relation, may resume her status as a citizen of the United States by continuing to reside in the United States, if she at the time be a resident of the United States, or, if residing abroad at the time, by returning to reside in the United States, or by registering as a citizen of the United States with a consul of the United States within one year from the termination of such marital relation, or upon becoming the wife of a man who is a citizen of the United States, and in either such case, having so resumed her status as a citizen of the United States, such woman is thereupon entitled to vote at any election in this State, if otherwise qualified.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

(NOTE: Since the foregoing opinion was rendered, we understand Congress has amended the naturalization laws so as to change the rule as to naturalization of women. The new act, if there is one, is not available to us at this time.)

OPINIONS ON PUBLIC LANDS AND MINERAL RIGHTS

Op. No. 2270, Bk. 55, P. 31.

PUBLIC LANDS—ATTORNEY GENERAL, DUTIES OF.

Constitution of 1866, Art. X, Sec. 9.
 Acts of Leg., 1866, 5th Gammel's Laws, 1257.
 Acts of Leg., 1873, 7th Gammel's Laws, 676.
 Acts of Leg., 1873, 7th Gammel's Laws, 1106.
 Acts of Leg., 1879, 9th Gammel's Laws, 7.

1. State of facts relative to grant of lands to Bayland Orphans' Home, held not to constitute a sufficient basis for legal demand upon the owners of said lands for repossession by the State.

AUSTIN, TEXAS, January 11, 1921.

Honorable S. B. Cowell, Chairman, State Board of Control, Capitol.

DEAR SIR: Sometime ago you formally transmitted to this Department a communication concerning some 48,635 acres of land. In your communication you forwarded us a brief prepared for the Supreme Court of Texas on a motion for rehearing in a cause styled L. D. Brooks vs. J. T. Robison et al., also a supplementary brief, containing additional argument and further citations with reference to the case.

Referring to those who prepared the briefs referred to, you state, "These gentlemen are of the opinion that the State of Texas has a valuable interest in 48,635 acres of land which was donated to Bayland Orphan Home by a former Legislature of this State."

You request an opinion of this Department as to the legal status of this matter and as to whether or not the purported facts constitute a sufficient basis for a legal demand upon the present owners of said land for repossession by the State. In plain words, your communication directs our attention to this matter, with a request as to whether or not in our opinion the Attorney General of the State should file suit against the present occupants of these lands for repossession by the State of Texas.

The subject matter of your communication has been in the Department at various times, both under the administration of Attorney General Looney and myself. We have gone into the matter quite carefully and herewith beg to present our conclusions.

On August 30, 1856, an Act of the Legislature of this State was approved, which directed the setting apart of 100,000 acres of land each for a lunatic asylum, a deaf and dumb asylum, a blind asylum and an orphan asylum. An appropriation was made for the survey, with directions to the Governor to cause the survey to be made. (4th Gammel's Laws of Texas, page 494.)

Section 9 of Article X, of the Constitution of 1866, declared that the 400,000 acres of land that had been surveyed and set apart under the provisions of this law just referred to for the benefit of a lunatic asylum, a deaf and dumb asylum, a blind asylum and an orphan asylum, should constitute a fund for the support of such institutions,

one-fourth part for each, and that each fund should never be diverted for any other purpose, etc. (Fifth Gammel's Laws, p. 884.)

By an act approved September 4, 1866, the Orphans' Home at Bayland, in Harris County, Texas, was incorporated. In Section 5 of the Articles of Incorporation, it was declared that the institution should be open to all denominations and that all indigent white children should be educated, boarded, lodged and clothed, free of charge, and that none others should enjoy the privileges accruing under the charter, or receive subscriptions in behalf of the home. (Fifth Gammel's Laws, p. 1257.)

On March 19, 1873, the Legislature of the State of Texas passed a joint resolution ratifying an amendment to Section 6 of Article X of the Constitution of the State of Texas, the amendment having theretofore been adopted by the people at a general election in 1872.

Section 6 of the then Constitution of the State as then amended, reads as follows:

"Sec. 6. The Legislature of the State of Texas shall not hereafter grant lands except for the purposes of internal improvement, to any person or persons, nor shall any certificate for land be sold at the Land Office except to actual settlers upon the same, and in lots not exceeding one hundred and sixty acres; provided, that the Legislature shall not grant, out of the public domain, more than twenty sections of land for each mile of completed work, in aid of the construction of which land may be granted; and provided further, that nothing in the foregoing proviso shall affect any rights granted or secured by laws passed prior to the final adoption of this amendment" (7th Gammel's Laws of Texas, pp. 676-677).

By an act approved May 8, 1873, some six weeks after the ratification and adoption of the foregoing amendment to the Constitution, the Legislature of the State of Texas passed an act which read substantially as follows:

"An Act to aid the Bayland Orphans' Home, situate on Galveston Bay, in Harris County, Texas.

"Section 1. Be it enacted by the Legislature of the State of Texas, that there be and is hereby set apart out of lands heretofore granted and surveyed for orphan asylums, the following tracts, to-wit: seven thousand, three hundred and eighty-eight acres in Buchanan County; fourteen thousand and fifty-nine acres in Shackelford County; and twenty-seven thousand one hundred and eighty-eight acres in Callahan County.

"Sec. 2. Be it further enacted, that the Commissioner of the General Land Office be and is hereby authorized and directed to issue patents to the assignees of the board of trustees, in quantities of three hundred and twenty acres each, until the amount of forty-eight thousand six hundred and thirty-five acres are absorbed.

"Sec. 3. Be it further enacted, that said lands and the proceeds arising therefrom shall never be used for any other purpose than for the fostering care and support of said orphans' home. Should said orphans' home cease to exist, at any time before the alienation and disposition of said lands, the same shall revert to the State.

"Sec. 4. Be it further enacted, that said lands shall not be alienated for a less sum than two-thirds of the appraised value, said appraisal to be made within six months next preceding said sale, to be made by two disinterested persons, one chosen by said trustees, and one by the county court of the county where the lands are situated; should they fail to agree, they shall select some disinterested person to act as an umpire.

"Sec. 5. That this act take effect from its passage. Approved May 8, 1873." (7th Gammel's Laws, pp. 1106-1107.)

It is to be observed by this act that the Legislature granted some 48,365 acres of land to Bayland Orphans' Home, which land now lies in Shackelford, Stephens, and as we understand, Callahan Counties. A large portion of the land lies in Stephens County and is said to be valuable oil lands. The whole of the land would appear to be in what we might call oil territory. It is assumed, therefore, that this land is exceedingly valuable and of great interest to the State, if it belongs to the State.

By an act approved March 20, 1879, the Legislature of the State of Texas directed the issuance of patents to the land referred to by the Commissioner of the General Land Office of this State. This act reads substantially as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas, that the Commissioner of the General Land Office be authorized and required to issue patents to the Bayland Orphans' Home, situated on Galveston Bay, Harris County, Texas, to the amount of forty-eight thousand six hundred and thirty-five acres donated to said Bayland Orphans' Home by the act of the Legislature of 1873, in accordance with the field notes and plats of the subdivision of such lands now on file in the General Land Office.

"Sec. 2. That so much of the act of the Legislature of 1873 as requires the patenting of said lands to said Bayland Orphans' Home in tracts of three hundred and twenty acres each be and the same is hereby repealed.

"Sec. 3. Whereas, it is indispensable that this act take effect immediately to prevent the dissolution of the Bayland Orphans' Home, an emergency exists, this act shall go into effect immediately after its passage; owing to the fact that this session of the Legislature is near its close, there is an imperative public necessity requiring the reading of this bill for three several days be dispensed with. Approved March 20, A. D. 1879. Takes effect from and after its passage." (Gammel's Laws, 9th Vol., p. 7.)

It is contended that these various legislative acts under the Constitution of the State, including the Constitution of 1876, were not sufficient to vest title in Bayland Orphans' Home to the lands granted by the act of 1873 and that the patents issued to that institution or granted to it were and are void. None of the land referred to is now owned by Bayland Orphans' Home, but has been sold and passed into the hands of probably hundreds of citizens of the State who had no actual knowledge that there could be any possible defect in the emanation of the title from the State. It has been some forty-eight years since the grant of this land was made by Bayland Orphans' Home and some forty-two years since the patents were directed to be issued by the Legislature or were actually issued by the Commissioner of the General Land Office. We are informed that from time to time Attorney Generals of this State have been requested to bring suits for this land but no suit has ever been brought, and it is now insisted that this Department should bring suit for this land and thereby question and disturb the titles thereto claimed by hundreds of the citizens of the State whose fortunes and life's savings would be destroyed, for the State to be successful.

In the first instance it may be a matter of some doubt as to whether or not the original act of 1873, making the grant to Bayland Orphan's Home, was constitutional. But the Legislature which made the grant, within a few weeks after the adoption of the constitutional amendment permitting grants of public lands for internal improvements, be-

came a part of the then existing Constitution, thought it was constitutional; and the Governor who signed it was evidently of the same opinion.

Notwithstanding the provisions of the Constitution of 1876, the Legislature of this State in 1879 directed the issuance of the patents to this land granted to Bayland Orphans' Home. This Legislature, therefore evidently thought that the Act of 1873 was constitutional and that their act of 1879 would not contravene the Constitution of 1876. The patents were issued and the land has passed into the hands of individual settlers the same as other public lands of the State, and although approximately a half century has elapsed since the original grant, the constitutionality of these acts has never been questioned by any public officer having authority to deal therewith. The only instance, so far as we are advised, where the matter has reached the courts was quite recent, and within the last preceding year. Certain parties attempted to obtain from the Commissioner of the General Land Office permits to prospect for minerals on this land. The Commissioner of the General Land Office declined to issue the permits, stating that "the land is patented and the records do not show the State has any interest in the minerals." The parties referred to thereupon attempted to bring a mandamus suit against Mr. Robison, the Land Commissioner, and tendered to the Supreme Court for filing a petition for such purpose, supported by a very able brief. The Supreme Court declined to issue the mandamus, whereupon the parties again attempted to bring the matter before the court by motion for reconsideration, but the Supreme Court again did not act favorably to their contention. The Supreme Court did not permit the filing of petition for mandamus and therefore did not write an opinion on the question.

We are returning to you herewith the various papers, briefs, etc., relating to this matter, which you enclosed to us. We will forward you as soon as we can have made a copy of the petition of the parties referred to, tendered the Supreme Court, together with the brief presented by them in support of the same.

You will observe, therefore, that in the only instance where a court has been called upon to pass upon this matter, the Supreme Court has declined to require the Commissioner of the General Land Office to issue a permit to the interested parties to prospect for minerals.

It is to be observed that the constitutional amendment adopted in 1872 and ratified and made effective in 1873 by the Legislature some six weeks before the grant of lands to Bayland Orphans' Home, and which amendment we have quoted in this opinion, authorized the Legislature to grant lands to any person or persons "for the purposes of internal improvement." It is evident to this Department that the grant to Bayland Orphans' Home, having been made within a few weeks after the adoption of the constitutional amendment, was considered by the Legislature as a grant for purposes of internal improvement and that the Legislature had the right to make the grant out of lands previously set apart for an orphan asylum.

Our view of the matter that orphan asylums and other institutions which we would commonly designate "eleemosynary institutions" are

within the meaning of the phrase internal improvement. (State vs. Froehlich, 58 L. R. A., 757; In re Internal Improvement Fund, 48 Pac., 807-808.)

It may be said generally that state houses, railroads, roads, public buildings, grist mills, waterwork systems, pipe line companies and pipe lines are regarded by various courts as internal improvements, as well as asylums, schools for the blind, hospitals, etc. (Bridge Association vs. Scherwin, 6 Neb., 48; Traver vs. Merrick County, 45 Am. Rep., 111; Burlington, etc. vs. Beasley, 94 U. S., 310; West Virginia Transportation Co. vs. Volcanic Oil and Coal Co., 5 W. Va., 382; Lewis vs. Sherman County Commissioners, 5 Federal, 269; City of Savannah vs. Kelley, 108 U. S., 184; Yesler vs. City of Seattle, 25 Pac., 1014; Cline vs. Stock, 102 N. W., 265; Blair vs. Cumming County, 111 U. S., 363.)

There may be some difference of opinion among authorities as to what would be embraced within the term "internal improvement," but we believe that the phrase is sufficiently broad to embrace within its meaning the granting of lands to Bayland Orphans' Home, which was purely a charitable institution, for the purpose of caring for the orphans of the State, without charge or discrimination.

As to whether or not the making of this grant to Bayland Orphans' Home under the provisions of the Constitution was prohibited by another provision of the Constitution, or as to whether or not the Constitution of 1876 had the effect of invalidating the grant of 1873 and of prohibiting the legislative act of 1897 directing that patents issue to Bayland Orphans' Home land, we have no means of definitely deciding, but we do know that the public officers of the State have for this long period of time failed to challenge in any respect the constitutionality of the grant to Bayland Orphans' Home, and the issuance of patents therefor.

If we say that we are in doubt as to the constitutionality of the grant to Bayland Orphans' Home, and of the legislative act directing the issuance of patents as evidence thereof, then it seems that we are bound to resolve that doubt in favor of the constitutionality of the legislative acts.

Judge Cooley, in his work on constitutional limitations, says: "But when all the legitimate lights for ascertaining the meaning of the constitution have been made use of, it may still happen that the construction remains a matter of doubt. In such a case it seems clear that every one called upon to act where, in his opinion, the proposed action would be of doubtful constitutionality, is bound upon the doubt alone to abstain from acting" (Cooley's Constitutional Limitations, 7th Edition, page 109).

In this, with respect to the constitutional provisions and laws now under consideration, it must be said that the legislative department of the government in two instances, towit, in 1873 and in 1879, passed upon the identical constitutional questions which are now before this Department, that the Governor in signing the act of 1873, also passed upon the constitutional question that the Commissioner of the General Land Office in issuing the patents to Bayland Orphans' Home lands, likewise passed upon these constitutional questions. We may also say

that the legal department of the State from 1873 on down has, by its acquiescence, or certainly in some instances in fact, passed upon these constitutional questions. By the long series of governmental acts on the part of the legislative and executive officers of the State, and by the long acquiescence on the part of the land and law departments of the State, it may be said that these departments have already determined that the grant to Bayland Orphans' Home was constitutional. That their conclusion in this respect is correct would appear to be shown by the action of the Supreme Court in declining to grant a writ of mandamus against the Commissioner of the General Land Office last year in the petition for which the constitutionality of the Bayland Orphans' Home grant was raised.

It is quite elementary that in dealing with the Constitution that it should receive a uniform construction.

Judge Cooley, in his work on Constitutional Limitations, lays down the rule as follows:

"A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A Constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed." (Cooley's Constitutional Limitations, Seventh Edition, p. 88.)

The fairness of this rule of construction referred to in the quotation from Judge Cooley is illustrated in the present case: The Legislature of the State, the Governor of the State and the various executive officers of the State whose duty it is to deal with the subject, have construed the grant to Bayland Orphans' Home to be constitutional. This is the meaning they have given the Constitution, and particularly at the time the grant was made. The quotation from Judge Cooley says that the Constitution should not be made to mean one thing at one time and another thing at another time when circumstances render it important that it should be made to mean other things. In the present case, if the Constitution is to receive the construction given it in 1873 and in 1879 by the Governor and the Legislature, then the titles to the hundreds of people who occupy the lands granted to Bayland Orphans' Home become, so far as the State is concerned, valid titles; but if the construction of the Constitution is to be changed, the titles to these lands will be annulled, and hundreds, perhaps thousands, of people who have trusted to the previous interpretation and construction of the Constitution, will lose their lands. It is true that the destruction of these titles would be of immense financial value to the State, but in our opinion, regardless of the financial equation, the State should abide by the construction given its own Constitution by its own legislative and executive departments at the time the grant was made and before the people now occupying these lands had invested their life's savings in them. It is a rule of universal application that the contem-

poraneous and practical construction of a constitution is to be given great weight. Concerning this rule, Judge Cooley says:

"An important question which now suggests itself is this: How far the contemporaneous interpretation, or the subsequent practical construction of any particular provision of the Constitution is to have weight with the courts when the time arrives at which a judicial decision becomes necessary. Contemporaneous interpretation may indicate merely the understanding with which the people received it at the time, or it may be accompanied by acts done in putting the instrument in operation, and which necessarily assume that it is to be construed in a particular way. In the first case it can have very little force, because the evidences of the public understanding, when nothing has been done under the provisions in question, must always of necessity be vague and indecisive. But where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the Constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention. And where this has been given by officers in the discharge of their official duty, and rights have accrued in reliance upon it, which would be divested by a decision that the construction was erroneous, the argument *ab inconvenienti* is sometimes allowed to have very great weight. * * * Great deference has been paid in all cases to the action of the executive department, where its officers have been called upon, under the responsibilities of their official oaths, to inaugurate a new system, and where it is to be presumed they have carefully and conscientiously weighed all considerations, and endeavored to keep within the letter and the spirit of the Constitution. If the question involved is really one of doubt, the force of their judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale in the judicial mind." (Cooley's Constitutional Limitations, Seventh Edition, pp. 102, 104.)

It must be understood that these acts of the Legislature in making this grant to Bayland Orphans' Home are in law presumed to be constitutional. In other words, the invalidity and unconstitutionality of these acts must be manifested beyond a reasonable doubt before the courts would hold them so. (*M. K. & T. Railway Co. vs. State*, 109 S. W., 867.)

(See many cases cited, Vol. 15, of Michie's Digest of Texas Reports, page 948.)

Taking into consideration the acts themselves, together with the various constitutional provisions which we have mentioned, as well as all those referred to in the briefs of interested parties who sought the mandamus in the Supreme Court of this State, and taking into consideration the rules of construction which govern in determining the validity or constitutionality of the acts of the Legislature, and following the rule of contemporaneous and practical construction of legislative acts, and bearing in mind the long period of time which has elapsed since these legislative acts making the grants referred to were passed, and considering the fact that the Supreme Court has only recently refused a mandamus on a petition raising the constitutionality of these acts of the Legislature, we have reached the conclusion that this Department ought not to file such suit against those who now reside upon and claim the lands formerly granted to Bayland Orphans' Home.

We therefore advise that the "purported facts" do not "constitute a sufficient basis for a legal demand upon the owners of said land for repossession by the State."

Very respectfully,

(Signed) C. M. CURETON,
Attorney General.

Op. No. 2423, Bk. 57, P. 180.

MINERAL PERMITS—ANNUAL RENTALS—STATUTORY CONSTRUCTION.

Where the time limit in which to complete development work under a mineral permit is extended beyond three years by reason of a combination of permits the owner shall at the beginning of the fourth year pay to the State in advance a rental of ten cents per acre.

When necessary to give effect to a law where the intent is plain, contradictory words or repugnant words may be eliminated, or if a clause in the law which appears to have been inserted through inadvertence or mistake is repugnant to the rest of the act and tends to nullify it, and if the act is complete and sensible without it, such clause may be rejected as surplusage.

AUSTIN, TEXAS, April 4, 1922.

Hon. J. T. Robison, Commissioner General Land Office, Austin, Texas.

DEAR SIR: In your letter of the 3rd inst. you request an opinion from this Department as to whether or not the owner of a mineral permit that has been grouped with other permits and by reason of such grouping the owner has more than three years to complete the development work, should pay to the State an annual rental of ten cents an acre for the fourth year.

Section 12, Chapter 81, Acts of the Second Called Session of the Thirty-sixth Legislature, provides that permits

"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 (16) sections of 640 acres each, more or less, in one group, for the purpose of developing oil and gas," etc.

Section 13 provides in part that

"Owners of permits included herein shall have *three years* after the date of the permit and the same time after the *average date* of the permits placed in a combination of permits in which to complete the development of oil and gas thereon," etc.

Section 15 provides in part that

"The owners of a permit or combination of permits that desire to avail themselves of the terms of this act shall pay to the State ten cents per acre, annually in advance, *for the second and third years,*" etc.

Chapter 81, *supra*, is the act that constitutes the owner of the soil the agent of the State for the purpose of leasing and selling the oil and gas belonging to the State in the land and Section 2 of this chapter provides that

"All leases and sales so made shall be assignable; provided, that no oil or gas rights shall be sold or leased hereunder for less than ten cents per acre per year, plus royalty, and the lessee or purchaser shall in every case pay to the State ten cents per acre per year on sales and rentals."

This same section then provides that in addition to the ten cents per acre that the lessee or purchaser in case of production shall pay to the State one-sixteenth ($1/16$) of the value of the oil and gas produced.

From the foregoing language it is evident that it was the intention of the Legislature for the State to receive an annual rental from the land embraced within the provisions of this act "in every case." Is the language used in Section 15, wherein it is stated that the owner of a permit shall pay to the State "ten cents per acre, annually in advance, for the *second and third years*," a limitation on the general language used in Section 2 of the act? We do not think so.

In our opinion the Legislature inadvertently used the phrase or clause "two and three years." We say this for the reason that three years was the limit fixed by Section 13 in which development work must be completed in all cases except where the permits had been combined and grouped as provided in Section 12, and then the time limit was three years from "the average date of the permits placed in a combination" and in writing the provisions of Section 15 the Legislature overlooked the fact that the time might be extended beyond the three year limit. It is evident when the act is considered as a whole that it was the intention of the Legislature to require the payment of the ten cents per acre per year "in every case." We are justified in treating the clause "for the second and third years" as surplusage.

Davis vs. State, 225 S. W., 532.

Sturges vs. Crowninshield, 4 Wheat., 202, 4 L. Ed., 529.

Gage vs. Chicago, 201 Ill., 93, 66 N. E., 374.

People vs. Henrichsen, 161 Ill., 223, 43 N. E., 973.

Lewis' Sutherland's Statutory Construction, Vol. 2 (2nd Ed.), Sec. 384.

Black on Interpretation of Statutes, Sections 35 and 39.

In Davis vs. State, supra, the constitutionality of the law prohibiting pool halls in Texas was before our Court of Criminal Appeals. This law prohibited the exhibition for hire of any table or stand upon which the games of pool or billiards or any game "similar or dissimilar" to the games of pool or billiards could be played. It was contended that the words "or dissimilar" as used in the act made it unlawful to play any kind of game on tables or stands whether like or unlike pool and billiards. The court said:

"Let us again observe that the purpose of this law seems manifestly to be to prohibit pool halls, or places where the idle, and possibly the vicious, congregate to play pool or billiards, or similar games upon tables or structures exhibited for gain; and we are led to believe that this purpose will be attained, and the act substantially be unaffected, if the words 'or dissimilar' were disregarded and held as surplusage."

Continuing the court said:

"It is also well understood that, if necessary to give effect to a law whose intent is plain, words may be supplied, or one word be substituted for another, or words may be transposed; and, likewise, it is held that *contradictory words or repugnant words and expressions, may be eliminated.*"

In the Sturges case, supra, the Supreme Court of the United States said:

"Where words conflict with each other, where the different clauses of the

instrument bear upon each other, and would be inconsistent unless the natural and common import of the words be varied, construction becomes necessary."

In the Gage case, supra, the Supreme Court of Illinois declared that:

"When a literal reading of a statute leads to an absurdity, plainly not intended, the courts will put such construction upon the language used as corresponds with the plain meaning and intent of the Legislature, and to effect that purpose, will strike out words clearly superfluous."

In Lewis' Sutherland's Statutory Construction, Section 384, it is said:

"Where a word or phrase in the statute would make the clause in which it occurs unintelligible, the word may be eliminated, and the clause read without it."

Mr. Black says in his book on Interpretation of Statutes, Section 39, that:

"It is the duty of the courts to give effect, if possible, to every word of the written law. But if a word or clause be found in a statute which appears to have been inserted through inadvertence or mistake, and which is incapable of any sensible meaning, or which is repugnant to the rest of the act and tends to nullify it, and if the statute is complete and sensible without it, such word or clause may be rejected as surplusage."

Relying on the foregoing authorities, we feel justified in advising you that the clause "for the second and third years" was inadvertently used and may be treated as surplusage, and where a permit has been extended beyond three years by reason of a combination of permits, the owner shall at the beginning of the fourth year pay to the State in advance an annual rental of ten cents per acre.

Yours truly,

E. F. SMITH,
First Assistant Attorney General.

Op. No. 2415, Bk. 57, P. 70.

CONSTITUTIONAL LAW—MINERAL PERMITS—FORFEITURE—REIN-
STATEMENT—RIGHTS OF THE OWNER OF THE SOIL.

1. Chapter 81, Acts of the Thirty-sixth Legislature, Second Called Session, which relinquishes to the owner of the soil fifteen-sixteenths of the oil and gas upon and within the lands mentioned in the act, is, when properly construed, a valid law.

2. The question of whether the owner of a mineral permit has acted in good faith and with reasonable diligence in a bona fide effort to develop the area included in the permit is one of fact which the law authorizes the Commissioner of the General Land Office to determine.

3. When the Commissioner of the General Land Office forfeits a mineral permit "for failure to continue development," he may, within his "discretion," reinstate the permit, provided the rights of another have not intervened.

4. The owner of the soil is the agent of the State for the purpose of selling or leasing the oil and gas that may be in certain lands. When a permit is forfeited on any of said land the owner of the soil may sell or lease the oil and gas upon or within said land, and if he sells or leases the same before the permit is reinstated, the original permit cannot be reinstated because the rights of another have intervened.

5. Where the owner of the soil has failed to sell or lease the oil and gas

after a permit has been forfeited the permit may be reinstated within the "discretion" of the Commissioner of the General Land Office.

Sections 4, 5, 11 and 12, Article 7, and Section 6, Article 16, Constitution of Texas.

Section 19, Chapter 83, Act approved March 16, 1917.

Sections 1, 2 and 10, Chapter 81, Act approved July 31, 1919.

AUSTIN, TEXAS, February 17, 1922.

*Honorable J. T. Robison, Commissioner of the General Land Office,
Austin, Texas.*

DEAR SIR: Your letter of the 16th ultimo addressed to the Attorney General reads as follows:

"In April, 1919, several oil and gas permits were issued to various persons in Reeves County, Texas. Evidence of a combination agreement under Chapter 81, act effective October 21, 1919, was filed in this office July 15, 1920.

"Affidavit filed shows the drilling of a well was begun September 26, 1920. On October 30, 1920, the well was alleged to be 104 feet deep. The owners admit no development by drilling has been done since the October showing of a well 104 feet deep had been drilled. This Department cancelled, or declared these permits forfeited on December 2, 1921, for failure to continue development.

"It is alleged by the owners that they had intended to resume the development and are now in a position to do so, if this Department will reinstate the permits. I have declined to do that for the reason I believe that the fact of ceasing to drill not only authorized a forfeiture, and further that when a legal forfeiture has been declared fifteen-sixteenths of the oil and gas and the right to sell, lease or develop the area automatically vests in the owner of the soil and this Department cannot, by a declaration of reinstatement, legally take away the rights of the owner of the soil and reinvest them in the former permittee.

"This is submitted with the request that you advise whether or not I should reinstate the permits.

"Letter of November 25, 1921, from the owners is attached as presenting their view. Please return it with your answer."

In answering your inquiry, it will be necessary to point out certain provisions of the Mineral Act of 1917. Your attention is therefore respectfully directed to Section 19 of Chapter 83, Acts of the Thirty-fifth Legislature, Regular Session, page 158, which provides that "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" such permit "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 same forfeited by proper entry upon the duplicate permit or lease kept in the General Land Office." This section also provides that "the Commissioner may exercise large discretion in the matter of requiring one to develop *gas* wells," but no such "large discretion" is given the Commissioner in requiring one to develop *oil wells*.

You state in your letter that you forfeited the permits which you mention "for failure to continue development." Under the provisions of the foregoing section of the Act of 1917, you had the authority to forfeit said permits for the reason given. Whether the owners of the mineral permit have proceeded in good faith and with reasonable diligence in a bona fide effort to develop the area included in the permit is a question of fact which the law authorizes you as Commissioner of the General Land Office to determine.

Having forfeited these permits for the reasons stated, can you as Commissioner of the General Land Office reinstate such permits, if, in your judgment, such permits should be reinstated?

In answering the foregoing question, your attention is directed to the latter part of said Section 19 of the Act of 1917, which provides "that all forfeitures may, within the discretion of the Commissioner, be set aside and all rights reinstated before the rights of another intervene." This language gives the Commissioner of the General Land Office the authority and power to reinstate a forfeited permit, if, in his judgment, justice demands such reinstatement, unless the provisions of Chapter 81 of the Second Called Session of the Thirty-sixth Legislature have taken away from the Land Commissioner the authority to reinstate a permit that has been forfeited.

Section 1 of said Chapter 81 was amended by Chapter 38, Acts of the First Called Session of the Thirty-seventh Legislature, page 112, and Section 1 as amended and Section 2 of said Chapter 81 constitute the owner of the soil the agent of the State of Texas, and authorizes the owner of the soil as such agent to sell or lease the oil and gas that may be upon or within the lands mentioned in said Chapter 81, subject to the provisions and exceptions contained in said act.

Section 10 of said Chapter 81 provides that "the provisions of this Act relinquishing to the owner of the soil fifteen-sixteenths of the oil and gas in or under such soil is made subject to the rights now existing under valid permits to prospect for oil and gas that heretofore have been issued or which may hereafter be issued upon valid application now on file for such permit."

The language just quoted shows that the Legislature was safeguarding in the enactment of said Chapter 81 the rights of those who had obtained permits or who had filed applications for permits under the Mineral Act of 1917.

Under the provisions of said Chapter 81, the State relinquished to the owner of the soil fifteen-sixteenths of the oil and gas that may be upon or within the lands mentioned in said act, this relinquishment being the consideration paid to the owner of the soil for his services in acting as the agent of the State in selling or leasing the oil or gas that may be within or upon said lands.

Section 10 aforesaid provides that the rights secured under valid permits to prospect for oil or gas shall be terminated in the manner provided by the law under which such rights were secured or "under the provisions of this Act," and, continuing, said Section 10 provides "but when such rights shall be so terminated, such relinquishment shall be fully effective." By the use of this language the Legislature did not intend to relinquish the title to fifteen-sixteenths of the oil and gas to the owner of the soil, but by the use of this language the owner of the soil after a valid permit has been forfeited acquires the right to sell or lease the oil or gas upon or within said land, and if he makes such sale or lease before the permit is reinstated, "the rights of another" have intervened and reinstatement of the original permit is made impossible. But the Commissioner of the General Land Office may within his discretion set aside a forfeiture and reinstate the permit up

to the time the owner of the soil exercises his right as the agent of the State and sells or leases the oil and gas.

We think that our construction of the provisions of said Section 10 are correct, for the following reasons:

The act of 1919 constitutes the owner of the soil the agent of the State for the purpose of selling and leasing the oil and gas that may be upon or within the land mentioned in the act, and for performing this service the State relinquishes to the owner of the soil fifteen-sixteenths of the oil and gas thereon. By the terms of this act the owner of the soil acquired the right to act as the agent of the State, but he acquired no title to the oil and gas until he as the agent of the State sells or leases the oil and gas. This Department said in an opinion of date January 21, 1921, printed in the 1918-20 Volume of the Opinions of the Attorney General, "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." This language was quoted with approval in Opinion No. 2404, of date January 4, 1922.

If we construed the language used in said Section 10 as vesting in the owner of the soil title to fifteen-sixteenths of the oil and gas and held that the owner of the soil thus acquired a right which would prevent the reinstatement of a forfeited permit within the discretion of the Commissioner as provided in Section 19 of the act of 1917, we would in all probability do violence to the Constitution. We say this for the reason that all the provisions of the Mineral Act of 1917 became a part of the contract between the State and the person to whom a permit was issued. As a part of the contract between the State and permittee was the right on the part of the permittee in the event his permit was forfeited to have an opportunity to secure its reinstatement "within the discretion of the Commissioner." This opportunity constituted a valuable right and the only way that the permittee could be denied this right was by someone else acquiring an intervening right before the forfeited permit was reinstated. The Legislature, in our opinion, could not by a subsequent law arbitrarily provide that immediately following the forfeiture of a permit that title to fifteen-sixteenths of the minerals should vest in the owner of the soil and thus deny the right given the original permittee to have his permit reinstated "within the discretion of the Commissioner."

Evidently the Legislature realized that it could not give to the owners of the soil the minerals therein that belonged to the State. The Legislature is prohibited by the Constitution from granting any relief to purchasers of school lands. (Section 4, Article 7, Constitution of Texas.) Oil and gas in place is a mineral and susceptible of being owned separate from the soil. (Texas Company vs. Daugherty, 107 Tex., 226.)

When the State sold this land and retained the mineral, it retained title to a part of the land. The land mentioned in Sections 1 and 2 of said Chapter 81 are the public school and asylum lands. The public school land is a part of the permanent available school fund, and Section 5, Article 7, of the Constitution provides that "no law shall ever

be enacted appropriating any part of the permanent available school fund to any other purpose whatever."

In order to secure the development of the oil and gas in the public school land, the Legislature, in our opinion, had the authority to grant fifteen-sixteenths of the oil and gas to the owner of the soil for his services in acting as the agent of the State, and thus assisting in the development of this land, but the Legislature did not have the power to give or appropriate fifteen-sixteenths of the oil and gas to the owner of the soil. The Legislature evidently was of the same opinion, for it did not attempt to give these minerals away.

Section 9, Article 7 of the Constitution, provides that the asylum lands "are hereby set apart to provide a permanent fund for the support, maintenance and improvements of said asylums." We do not think that the Legislature could give away any part of the asylum lands nor do we think it has attempted to do so.

As evidence of the care exercised by the framers of the Constitution to hold the land set apart for educational and eleemosynary purposes for those purposes and none other, we call attention to the provisions in Section 12, Article 7, which prohibits the Legislature from granting relief to purchasers of University lands and to Section 11, Article 7, which provides that the lands set apart for University purposes "shall constitute and become a permanent University fund." The public school, asylum and University lands cannot be appropriated by gift or otherwise, so as to divert these lands or any part of them from the uses and purposes for which they were set aside. Then again, in Section 6 of Article 16, the Constitution declares that "no appropriation for private or individual purposes shall be made." This language is broad enough to prevent the Legislature from making a gift of any kind whether of land or money to any person.

The Act of the Thirtieth Legislature providing that when persons are fined thereunder for abandonment of wife and children, the fine should be paid to the wife and children was held to be in violation of this section and void. (*Ex parte Smythe*, 120 S. W., 200; *Burch vs. State*, 120 S. W., 206; *Waller vs. State*, 120 S. W., 207; *McFarland vs. State*, 123 S. W., 133.) It was to avoid these constitutional provisions that the Legislature authorized and empowered the owner of the soil to act as the agent of the State in selling or leasing the oil and gas that might be in the lands mentioned in the act of 1919. For their services as such agents the State had a right to compensate them and the compensation is fixed as fifteen-sixteenths of the oil and gas, but the title to this fifteen-sixteenths cannot vest in the owner of the soil until he acts as the agent of the State and renders the prescribed service.

You are, therefore, respectfully advised that after the Commissioner of the General Land Office forfeits a mineral permit "for failure to continue development," he may within his "discretion" reinstate the permit, provided the rights of another have not intervened. That is to say, in order to prevent reinstatement, the Land Commissioner must have issued another permit on the area included in the original permit or else the owner of the soil must have sold or leased the oil and gas upon or within the land described in the original permit.

You as Commissioner of the General Land Office are the sole judge

of whether or not the facts are such as to justify you in reinstating the permits. For that reason, we do not advise you to reinstate the permits mentioned in your letter, but we simply point out that under the law you have the authority to do so, if in your judgment, justice and right demand their reinstatement, provided, of course, the rights of another have not intervened.

Yours very truly,

E. F. SMITH,
First Assistant Attorney General.

Op. No. 2404, Bk. 57, P. 221.

MINERAL PERMITS.

If a person holding an oil and gas permit from the State on a certain tract of land subsequently buys the soil from the State, he becomes a "subsequent purchaser" within the meaning of Section 11, Chapter 81, Acts of the Second Called Session of the Thirty-sixth Legislature.

A person holding an oil and gas permit from the State who afterwards buys the soil or surface included in his permit, is not entitled to have fifteen-sixteenths of the oil and gas in the land relinquished to him.

The owner of an oil and gas permit subsequently purchased the soil or surface and after oil was developed in paying quantities applied for a lease and insisted that the lease should be so drawn as only to require him to buy a royalty of one-sixteenth of the oil produced to the State. Held, that the lease must require payment to the State of \$2.00 an acre annually and in addition, one-eighth of the gross production of petroleum.

Sec. 7, Chap. 83, Acts of the Thirty-fifth Legislature, Regular Session.

Secs. 1, 10, 11 and 19, Chap. 81, Acts of the Thirty-sixth Legislature, Second Called Session.

AUSTIN, TEXAS, January 4, 1922.

Honorable J. T. Robison, Commissioner of General Land Office, Austin, Texas.

DEAR SIR: I have your letter of December 19th, addressed to the Attorney General, which reads as follows:

"On June 16, 1919, J. D. Abney filed an application with the surveyor of Stephens County for the oil and gas rights in a 14-acre tract of unsurveyed school land. The area was surveyed July 19, 1919. The application and field notes and affidavit as to interest in other permits and leases were filed in this office, August 7, 1919. A permit—No. 6117—was issued January 2, 1920

"It seems development was begun in due time and production found in paying quantities on November 7, 1921, and a lease duly applied for.

"After submitting a letter of inquiry to this Department on July 21, 1919, as to the existence of the vacancy and receiving an affirmative answer, the said Abney did on September 18, 1919, file with the county surveyor of Stephens County an application for a survey of the same area for the purpose of buying the surface. The survey was made September 20, 1919, and the application and field notes were filed in this office October 9, 1919. The survey was approved, the land classed as mineral and grazing and valued on March 6, 1920. Mr. Abney filed his application to buy the land April 19, 1920. The land was awarded, and patent was issued May 4, 1920. The patent contains this provision: 'The oil and gas that may be in the above described land are subject to Chapter 81, act approved July 31, 1919, and other minerals are reserved to the fund to which the land belongs.' Mr. Abney is still the owner of the permit

and the land. This Department has considered this area to be surveyed land within the meaning of Chapter 81, act approved July 31, 1919.

"By reason of the title to the permit and the soil being vested in the same person, it is contended that the State has only a one-sixteenth royalty interest under Chapter 81, Act of July 31, 1919, and it is desired that the oil and gas lease be so issued as to show the State to be entitled to one-sixteenth. This Department is of the opinion that the lease should show the State to be entitled to a one-eighth royalty. This is submitted for your opinion and advice as to what are the relative interests of the applicant and the State in the oil and gas produced on this area? See Chapter 83, Act of March 16, 1917; also Sections 1, 10, 11 and 19 of Chapter 81, Act approved July 31, 1919.

"Also kindly advise if the applicant should pay the two dollars per acre before obtaining the lease."

Chapter 83, Acts of the Thirty-fifth Legislature, Regular Session, authorizes the Commissioner of the General Land Office to issue oil and gas permits to prospect for and develop the land named in said act for petroleum and natural gas.

Section 7 of the act provides, "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:" The conditions are substantially as follows: The permittee must make an application to the Commissioner of the General Land Office and a first payment of two dollars per acre within thirty days after the discovery of petroleum in commercial quantities. Upon the payment of the two dollars per acre for each acre in the permit a lease shall be issued for a term of ten years, or less, and the lessee is then required after the expiration of the first year to pay the sum of two dollars per acre annually during the life of the lease, "and in addition thereto, the owner of the lease shall pay a sum of money equal to a royalty of one-eighth of the value of the gross production of petroleum." The royalties shall be paid to the State through the Commissioner of the General Land Office, payments to be made monthly during the life of the lease, etc.

Section 1, of Chapter 81, Acts of the Thirty-sixth Legislature, passed at the Second Called Session, provides that the purpose of the act is to secure the active co-operation of the owner of the soil with the State in order "to facilitate the development of its oil and gas resources, the State hereby constitutes the owner of the soil its agent for the purposes herein named, and in consideration therefor relinquishes to and vests in the owner of the soil an undivided fifteen-sixteenths of all oil and gas" within the land therein named.

Mr. J. D. Abney was issued a permit on January 2, 1920, on the tract of land described in your letter. At the time the permit was issued the State owned this land in fee simple. Subsequently, Mr. Abney made application to purchase this land. A patent was issued to him on May 4, 1920, and contained the following stipulation: "The oil and gas that may be in the above described land are subject to Chapter 81, Act approved July 31, 1919, and other minerals are reserved to the fund to which the land belongs."

On November 7, 1921, Mr. Abney developed oil in paying quantities and thereafter applied for a lease as required by Section 7 of Chapter

83, supra, but he insists that this lease should only require him to pay to the State a royalty of one-sixteenth of the petroleum produced, and not one-eighth of the petroleum produced, as required by said Section 7. It is his contention that he is entitled to the relinquishment of fifteen-sixteenths of the oil and gas in this land by reason of the provisions contained in Chapter 81, supra, because he is now the owner of the soil. As the owner of the soil, Mr. Abney is not, and never was, the agent of the State in securing the development of oil and natural gas in this land. "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." (Printed Opinions of the Attorney General, 1918-1920, page 341.)

Mr. Abney did not acquire any title to the minerals in this land by purchasing the soil because the patent that was issued to him expressly provided that the oil and gas that might be in the land are subject to Chapter 81, supra.

Section 10 of Chapter 81, supra, expressly provides that where rights existing under valid permits are in existence at the time a person acquires the title to the soil the provisions of the act relinquishing to the owner of the soil fifteen-sixteenths of the oil and gas shall be subject to such existing rights.

Section 11 of Chapter 81, supra, reads in part as follows:

"If one has heretofore or should hereafter acquire any valid right to the oil and gas in any unsold public free school or asylum land under any other law *a subsequent purchaser* of such land shall not acquire any rights to any of the oil and gas that may be therein."

Section 19 of Chapter 81, supra, provides that:

"All the terms, conditions, limitations and obligations provided in the law under which permits included herein have been or may be issued and rights secured therein, shall continue and remain in full force and effect, except as changed or modified by this act."

It is contended that the term "subsequent purchaser" was intended to mean "subsequent purchaser other than the permittee."

A careful reading of all the provisions of Chapter 81 convinces the writer that this contention cannot be sustained because there is not anything said in the act itself which remotely indicates such an intention on the part of the Legislature, and we do not feel authorized to add anything to the language used by the Legislature in enacting this law.

It is also contended that if Mr. Abney had failed to develop the land the permit would have been forfeited and the relinquishment to him of fifteen-sixteenths of the oil and gas would have been immediately effective after he became the owner of the land. That may be true, but Mr. Abney did not fail to develop the land; on the other hand, he has developed oil in paying quantities and is now entitled to and has applied for a lease and the proviso in Section 10 of said Chapter 81 provides that the relinquishment of a lease to the State shall not operate as a relinquishment of the oil and gas to the owner of the soil. Mr. Abney, being entitled at this time to a lease, we would hold that a relinquishment of this right would have the same effect as the relinquishment of a lease.

It is contended that our construction of the law in the instant case is harsh and works an injustice against Mr. Abney, but a careful examination of the actual facts conclusively show the contrary. Mr. Abney secured his permit and knew that if he developed oil in paying quantities that he must secure a lease and pay the State two dollars an acre annually for every acre included in his permit, and in addition thereto, one-eighth of the oil produced. "He purchased the surface with full knowledge that he was not acquiring any right or title to the oil and gas that might be in the land." (Opinions of the Attorney General, supra.) He knew, or is presumed to have known, that if someone else purchased the soil that the purchaser would get no part of the oil and gas; yet, knowing these facts, he himself, buys the soil and now contends that by reason of his purchase of the soil he is placed in a different and better position than another purchaser would have been in. We are unable to understand how he can contend as a matter of equity or justice that the State should place him in any better position than any other subsequent purchaser of the soil would be in. He is receiving the same treatment from the State that any other subsequent purchaser would have received, then, how can he complain?

The further contention is made that when Mr. Abney purchased the soil he acquired the greater interest in the land and in the oil and gas in the land, and the lesser interest in the oil and gas as evidenced by the permit immediately merged into the greater interest of the purchaser of the soil, thereby making Mr. Abney the owner of fifteen-sixteenths of the oil and gas in the land. The doctrine of merger is a well settled principle of law and is applicable in some instances, where, for example, the owner of a lien on land purchases the land, or where a lessee of property buys the property. The lesser interest of the lien holder or lessee merges with the greater interest of the owner, but the principle cannot be applied in this case for the reason that the State at the beginning of this transaction owned both the soil and the minerals. It first issued a permit to Mr. Abney which gave him certain rights. Later, it sold the soil to him, but reserved the minerals. It follows that Mr. Abney never at any time became possessed of the greater interest in the oil and gas because his purchase of the soil did not convey to him any right, title or interest whatsoever to any part of the oil or gas that might be in the land, but the State continued to own the oil and gas, subject only to Mr. Abney's rights as evidenced by his permit.

It is also contended that Mr. Abney commenced his efforts to secure the permit and to purchase the soil at one and the same time. His attempt to do this cannot be considered, for the facts as stated in your letter show that he did not purchase the land until some two or three months after the permit was issued.

We cannot agree with the contention made by the able attorney representing Mr. Abney that "it would be contrary to reason to conclude that the ownership of the permit by Abney could serve as a bar to the operation of the act for his benefit." The fact that Mr. Abney acquired the permit before he purchased the land and the further fact that the express and direct language of the act itself declares that after a permit is issued a "subsequent purchaser of such

land shall not acquire any rights to any of the oil and gas therein" is the thing that in our opinion prevents Mr. Abney from benefiting by the relinquishment feature of said Chapter 81.

You are therefore respectfully advised that in the opinion of this Department the lease to be issued to Mr. Abney should provide for the annual payment of two dollars per acre and in addition thereto, a sum of money equal to a royalty of one-eighth of the value of the gross production of petroleum.

I am, with respect,

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2273, Bk. 55, P. 71.

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 Thirty-fifth 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, Thirty-fifth Legislature.
Sections 11, 12 and 13 of Chapter 81, Acts of the Second Called Session, Thirty-sixth Legislature.

AUSTIN, TEXAS, January 21, 1921.

*Honorable 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 26, 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 Thirty-sixth 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, Thirty-fifth 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 26, 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, Thirty-fifth 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 Thirty-sixth 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 are 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-sixteenths interest in the oil and gas that may be in such land.

This permit was granted by authority and under the provisions of Chapter 83, Acts of the Thirty-fifth 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 per-

mit 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 31, 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-sixteenths 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, contractual 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,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2280, Bk. 55, P. 114.

ORIGINAL PURCHASERS—RIGHT TO SELL—RIGHTS OF VENDERS.

School lands sold by the State without condition of settlement and residence situated in Donley County, may be sold in whole or in part by the original purchaser.

The vendee of the original purchaser without condition of settlement of school lands situated in Donley County, can not be substituted for the original purchaser on the records and accounts kept in the General Land Office.

Article 5435, Revised Civil Statutes, as amended by the Thirty-sixth Legislature at its Regular Session.

AUSTIN, TEXAS, January 27, 1921.

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

DEAR MR. ROBISON: I have your letter of January 26th, written by Honorable J. H. Walker, Chief Clerk of the General Land Office. The letter reads as follows:

"Referring to your opinion of the 2nd instant construing Articles 5435 and 5437, R. S., 1911, and to our conversation over the phone this morning, I wish to state that our inquiry of the 21st instant grew out of the following case:

"Section 79, Block HD, S. F. 7696, J. D. Jefferies School Survey in Donley County, containing 432 acres, was awarded to J. E. Ryan October 20, 1919, or his application filed in this office September 2, 1919, who purchased the same without the condition of settlement and occupancy. By deed dated September 4, 1920, J. E. Ryan conveys to R. T. Darnell by metes and bounds 216 acres constituting the west one-half of said survey and by deed dated January 10, 1921, J. E. Ryan and his wife, Maud Ryan, conveyed to L. L. Taylor 172 acres by metes and bounds out of the east one-half of said section. These vendees desire to substitute themselves as purchasers of the parts of the section conveyed to them and have separate accounts opened with them for the land they own.

"It appears that the deed to Darnell was filed October 20, 1920, and the west one-half segregated and an account opened with Darnell for 216 acres. Now is presented the deed to L. L. Taylor, who desires to be substituted and have his part segregated. The question has arisen whether this tract of land can be subdivided and separate accounts opened with the vendees.

"Under such circumstances, should deeds be filed and the tracts subdivided?"

The questions presented are these: first, can the purchaser from the State of a tract of land situated in Donley County without condition of settlement and residence sell a part of the tract? Second, can the purchaser of a part of the tract have his deed filed in the General Land Office and become a substitute purchaser on the records and accounts kept in the General Land Office?

Article 5435, as amended by Section 9 of Chapter 163, Acts of the Regular Session, Thirty-sixth Legislature, provides in part:

"Purchasers on condition of settlement under any former law may sell their lands or a part thereof in tracts of any size."

This same act also provides:

"Purchasers without condition of settlement and residence under this act or any former law in the counties of Brewster, Bandera, Crockett, Culberson, Edwards, El Paso, Hudspeth, Jeff Davis, Kerr, Kimble, Menard, Pecos, Presidio, Real, Terrell, and Val Verde, may sell their lands at any time and in whole tracts only according to the original purchase and the vendee may become a substitute purchaser therefor direct from the State in the same manner as is provided in this section for other vendees so far as same may be applicable."

The provisions of Article 5435 last quoted, apply only to land situated in counties therein named. Donley County is not one of the named counties, consequently, the provisions last quoted do not apply to the land mentioned in your letter. The provisions first quoted deal with land sold on condition of settlement and is not applicable to the land mentioned in your letter, for the reason that this land was sold without condition of settlement and residence.

We find that provision has been made for the sale by the original purchaser from the State of land on condition of settlement. It may be sold in whole or in part. Provision is also made for the sale by the original purchaser from the State of land without condition of settlement in the counties named in that part of Article 5435 last quoted. It may be sold "in whole tracts only," but no provision seems to have been made for the sale of land purchased without condition of settlement that is situated in counties other than the ones named in said article.

In the absence of any direct authority from the Legislature, can the original purchaser sell the land, either in whole or in part, until patented? If it can be sold at all, should the sale be limited to whole tracts or should the purchaser from the State be permitted to sell the whole tract or any part thereof?

The sale of this land situated in Donley County by the State to J. E. Ryan is an executory contract and will not be an executed contract until both contracting parties have fully complied with the terms and conditions of the contract. Mr. Ryan must pay the purchase price. After the payment of the purchase price the State must execute its patent. The laws of Texas governing the sale of this kind of land in effect at the time the contract was made became a part of the contract and must be so considered. If the laws of Texas in effect at the time the sale was made prohibited the purchaser from selling the land or any part thereof until paid for, it could not be sold unless the law was amended. If the laws of Texas in effect at the time the sale was made did not prohibit the purchaser from selling the land in whole or in part thereof, he could sell it either in whole or in part as he might choose.

Article 5435, when amended, became effective June 18, 1919. The sale to J. E. Ryan of the land in question was made by the State after the act amending Article 5435 became effective on to wit: October 20, 1919.

It follows that under the terms of the contract made between Ryan and the State, the purchaser was not prohibited from selling this tract of land either in whole or in part.

You are, therefore, advised that in the opinion of this Department, Ryan could sell the land as he has done.

We are now confronted with the question of whether or not the vendee or vendees of Ryan can become substitute purchasers of the parts of the land conveyed to them by Ryan and have separate accounts opened with them for the land on the records of the General Land Office?

Again we must refer to the contract entered into between Ryan and the State. Without repeating what we have already said, it is sufficient to say that the law governing the sale of this land was a part of this contract.

Article 5435, as amended, makes no provision for the substitution of the vendees of the original purchaser of land sold by the State without condition of settlement, except lands situated in the counties named in said article, and as already pointed out, Donley County is not one of the counties named in said article. It was not a part of the contract between Ryan and the State that Ryan's vendees could be substituted as purchasers and Ryan relieved of all responsibility and liability. This is a valuable right to Ryan, but as no provision is made in the contract or in the law which we are considering as a part of the contract giving him this right, he is not entitled to it.

Furthermore, the law does not authorize the agent of the State, the Land Commissioner, to accept anyone as a substitute purchaser for Mr. Ryan, and in the absence of authority to make such substitution and attempt to accept anyone as a substitute purchaser for and in lieu of Mr. Ryan would be void and of no force or effect.

You are, therefore, advised that, in the opinion of this Department, the vendees of Ryan cannot be substituted for him, and that separate accounts cannot be opened with said vendees for the land conveyed to them by Ryan. The account must be continued in the name of J. E. Ryan, the original purchaser.

I am, with respect,

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2276, Bk. 55, P. 97.

STATUTORY CONSTRUCTION.

Where two statutes on the same subject, or on related subjects, are apparently in conflict with each other, they are to be reconciled by construction, so far as may be, on any fair hypothesis, and validity and effect given to both, if this can be done without doing violence to the evident intent and meaning of the Legislature as expressed in the two acts.

Article 5437, as amended by Chapter 79, Acts of the Regular Session, Thirty-sixth Legislature, and Article 5435, as amended by Section 9, of Chapter 163, Acts of the Regular Session, Thirty-sixth Legislature, can be reconciled and harmonized under the well known and well recognized rules of statutory interpretation and construction.

AUSTIN, TEXAS, January 22, 1921.

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

DEAR MR. ROBISON: Your letter of January 21st, addressed to the Attorney General, received, and reads as follows:

"Please note Chapter 79, page 130, Act approved March 17, 1919, then note Chapter 163, page 312, Section 9, Act approved April 3, 1919, both became effective same date.

"If in your opinion there is an irreconcilable conflict between the first act and the Section 9 of the second act and especially that portion of said section as relates to transfers of school land without condition of settlement the matter should be cleared up at this session. On account of the importance of this subject I would thank you for a specially early reply."

Chapter 79, referred to in your letter, amends Article 5437, so as to make said article read as follows:

"Any part of a tract of land heretofore or hereafter sold by the State, may, in the discretion of the Commissioner of the General Land Office, and regardless of the number of acres contained therein, be patented at any time upon the payment of the balance due the State for such part together with the patent fees prescribed by law; provided, however, that no part of any tract of land so sold by the State shall be patented until after the occupancy and improvements thereon required by law, if any, have been completed and proof thereof filed in the General Land Office."

Section 9, Chapter 163, referred to in your letter, amends Article 5435, and as amended, said article in part reads as follows:

"Purchasers without condition of settlement and residence under this act or any former law in the counties of Brewster, Bandera, Crockett, Culberson, Edwards, El Paso, Hudspeth, Jeff Davis, Kerr, Kimble, Menard, Pecos, Presidio, Real, Terrell, and Val Verde, may sell their lands at any time and in whole tracts only according to the original purchase and the vendee may become a substitute purchaser therefor direct from the State in the same manner as is provided in this section for other vendees so far as may be applicable. When purchasers have completed the required residence and filed in the Land Office satisfactory proof of that fact, and all purchasers without condition of settlement and residence shall have the option of paying the purchase price in full at any time together with lawful fees and obtain a patent for the land."

The conflict, if any, would be this: Article 5437, as amended, gives the Land Commissioner the discretionary power to patent "any part of the tract of land * * * regardless of the number of acres contained therein."

Article 5437, as amended, provides that purchasers of land without condition of settlement and residence in the counties named in that part of Article 5437 quoted above "may sell their lands at any time and in *whole tracts only* according to the original purchase."

Query: Does Article 5437, as amended, permit the purchaser from the State of land without the condition of settlement and residence to sell the same in less than whole tracts, and then obtain at the discretion of the Land Commissioner a patent on a "part of a tract * * * regardless of the number of acres contained therein?" We do not think so.

"A statute is to be so construed as not only to be consistent with itself throughout its whole extent, but also to harmonize with the other laws relating to the same or kindred matters, forming a complete, consistent and intelligible system." Black Int. Laws, page 346, and authorities there cited.

The provisions in the two acts above referred to can, in our opinion, be easily reconciled without doing violence to either, and at the same time uphold the manifest intention of the Legislature as the same appears by the language used in both articles.

We will assume, without deciding the question, that Article 5437, as amended, by implication authorizes the purchaser of any land from the State to sell any part of the purchase, regardless of the number of acres contained therein. This amendment passed the House of Representatives on March 1, 1919, and the Senate on March 13, 1919.

Article 5435, as amended, has the effect in our opinion to except from the provisions of Article 5437, as amended, land purchased without condition of settlement and residence in the counties named in said Article 5435. These two articles, assuming that our assumption with reference to the construction to be given to Article 5437 as amended is correct, are *pari materia* to each other, that is to say, they relate to the same subject, and laws *pari materia* must be construed with reference to each other.

Article 5435, as amended by Section 9 of said Chapter 163, passed the Senate on February 13, 1919, but was amended and passed by the House of Representatives on March 18, 1919, and the Senate concurred in the House amendments on March 19, 1919.

Chapter 163 is a later act than Chapter 79, and it must be assumed that the House of Representatives in amending and finally passing Chapter 163 had full knowledge and took full cognizance of all existing laws on the same subject, and that the House of Representatives when it amended the Senate Bill and finally passed what is now Chapter 163 had complete knowledge of the effect it would have on Article 5437, as amended by the House of Representatives on March 1, only 17 days before the Senate Bill was amended and finally passed by the House of Representatives.

"It is a presumption of equal force and applicability that the legislative body did not intend to be inconsistent with itself or to keep contradictory enactments on the statute book." Black Int. of Laws, 345-346.

The provisions of Article 5435, as amended by Section 9 of Chapter 163, must control, because "statutes of a later date should be given a controlling preponderance where there is any inconsistency or uncertainty so as to enforce the intent of the Legislature." Black Int. of Laws, 348.

Again, this same eminent authority says on page 326, "on the general principle of implied repeal, if there is any inconsistency or repugnance between two statutes, both relating to the same subject matter, which cannot be removed by any fair or reasonable method of interpretation, it is the latest expression of the legislative will which must prevail and override the earlier."

It is our opinion and you are so advised that by any fair and proper method of interpretation and construction, these two articles of the statute under consideration, as amended by the Thirty-sixth Legislature, can be reconciled and harmonized.

I am, with respect,

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2258, Bk. 54, P. 513.

DISPOSITION OF FUNDS RECEIVED FROM ROYALTIES AND RENTALS
UNDER CHAPTER 83, ACTS OF THE REGULAR SESSION, THIRTY-
FIFTH LEGISLATURE, AND CHAPTER 19, ACTS OF THE SECOND
CALLED SESSION, THIRTY-SIXTH LEGISLATURE.

All oil and gas royalties and rentals received from all islands, salt water lakes, bays, inlets, marshes and reefs owned by the State within tidewater limits, and that portion of the Gulf of Mexico within the jurisdiction of Texas, shall be prorated between the permanent school fund and the general revenue fund, as follows: two-thirds to the permanent school fund and one-third to the general revenue fund.

All oil and gas rentals received from land belonging to the permanent fund of the University of Texas, shall be credited to the available fund of said institution, but such funds shall be held by the Board of Regents in a special building fund, and shall be expended only for the erection of buildings or for other permanent improvements.

All oil and gas royalties collected from lands belonging to the University of Texas, shall be credited to the permanent fund of said institution.

All oil and gas royalties and rentals received from fresh water lakes and river beds and channels outside of tidewater limits, shall be placed to the credit of the game, fish and oyster fund.

Section 1, Chapter 183, Acts of the Regular Session, Thirty-fifth Legislature; Section 17, Chapter 183, Acts of the Regular Session, Thirty-fifth Legislature, as amended by Chapter 58, Third Called Session, Thirty-sixth Legislature; Sections 1 and 7, Chapter 19, Acts of the Second Called Session, Thirty-sixth Legislature.

AUSTIN, TEXAS, November 5, 1920

Hon. J. T. Robison, Commissioner of the General Land Office, Austin, Texas.

DEAR SIR: I have your letter of October 28, 1920, addressed to the Attorney General. Your letter reads as follows:

"I beg to refer you to Section 17 of Chapter 83 of an act approved March 16, 1917.

"Also Section 17, Chapter 21, of an act approved October 16, 1917.

"Also Section 7, Chapter 19, of an act approved July 23, 1919.

"Also Section 17, Chapter 58, of an act approved June 19, 1920.

"May I ask you under these acts what fund should receive the credit for royalties on oil and gas and the ten cents per acre paid on the area including University land and all other areas except the public school land and asylum lands?"

"You will note the question will arise in this inquiry as to whether or not Section 17, Chapter 83, was repealed by Chapter 21 of October 16, 1917, and therefore whether Chapter 58, approved June 19, 1920, is effective?"

In reply thereto, your attention is first directed to Chapter 83, Acts of the Regular Session of the Thirty-sixth Legislature, which was an Act to amend Chapter 173 of the Regular Session of the Thirty-third Legislature. Section 1 of this act provides in part as follows:

"All public school, University and asylum land and other public lands, fresh water lakes, river beds and channels, islands, bays, marshes, reefs and salt water lakes belonging to the State and all lands which may hereafter be so owned and all of said lands which have heretofore been sold or disposed of by the State or by its authority with a reservation of minerals or mineral rights therein as well as all lands which may hereafter be sold with the reservation of minerals or mineral rights therein, and lands purchased with a relinquishment of the minerals therein, shall be included within the provisions of this act."

Section 17 of said Chapter 83, reads as follows:

"The proceeds arising from activities under this act which affects land belonging to the public free school fund, the permanent University fund and the permanent fund of the several asylums shall be credited to the permanent fund of said institutions and the proceeds arising from the activities affecting other areas shall be credited to the Game, Fish and Oyster Fund."

Section 17 of said Chapter 83 was amended by Chapter 21, Acts of the Third Called Session of the Thirty-fifth Legislature. It is not necessary to set out the provisions of said Section 17 as amended by Chapter 21, for the reason that said Section 17 was again amended by Chapter 58 of the Third Called Session of the Thirty-sixth Legislature, and said Section 17 as amended by said Chapter 58, is the last expression of the Legislature with reference to this matter, unless the same was amended by the Fourth Called Session of the Thirty-sixth Legislature, which recently adjourned. Section 17, as amended by said Chapter 58, reads as follows:

"The proceeds arising from activities under this act which affect lands belonging to the public free school fund and the permanent fund of the several asylums shall be credited to the permanent funds of said institutions. All proceeds heretofore or hereafter paid or collected, from activities under this act affecting the lands belonging to the permanent fund of the University of Texas, save and except the royalties provided by this act, shall be credited to the available fund of said institution, and the State Treasurer is hereby directed to credit all such funds to the available fund of such institution, provided, however, that all such funds shall be held by the Board of Regents of the University of Texas in a special building fund, and shall be expended only for the erection of buildings or for other permanent improvements. All royalties collected under the terms of this act from lands belonging to the University of Texas, shall be credited to the permanent fund of the University. All proceeds arising from the activities affecting lands other than those belonging to the public free school fund, the University and the several asylums, shall be credited to the Game, Fish and Oyster Fund."

It will now be necessary for us to go back and consider the provisions of Chapter 19, Acts of the Second Called Session of the Thirty-sixth Legislature. Section 1 of said Chapter 19 provided for the leasing of "all islands, salt water lakes, bays, inlets, marshes and reefs owned by the State within tide water limits, and that portion of the Gulf of Mexico within the jurisdiction of Texas and the unsurveyed public free school lands."

It will be observed that the effect of Chapter 19, which is a later enactment than Chapter 83 of the Regular Session of the Thirty-fifth Legislature, has the effect of removing from the provisions of Chapter 83 the lands mentioned in Section 1, in so far as the same land was included in the lands mentioned in Section 1 of said Chapter 83. It follows, therefore, that the provisions of Section 17 of said Chapter 83, as amended by Chapter 58, Acts of the Third Called Session of the Thirty-sixth Legislature, have no relation whatever to the lands mentioned in said Section 1 of said Chapter 19.

Section 7 of said Chapter 19, Acts of the Second Called Session of the Thirty-sixth Legislature, in part reads as follows:

"Royalty and all other sums shall be due and payable to the State at Austin, Texas, and shall be paid to the Commissioner of the General Land Office and he shall transmit all remittances in the form received to the State Treasurer who shall credit the permanent free school fund with all amounts received from

the unsurveyed school lands and with two-thirds of the amount so received from other areas and shall credit the general revenue fund with the remaining one-third from said other areas."

You are, therefore, advised that all oil and gas royalties and rentals received under the provisions of Chapter 19, Acts of the Second Called Session of the Thirty-sixth Legislature, from all islands, salt water lakes, bays, inlets, marshes and reefs owned by the State within tide water limits, and that portion of the Gulf of Mexico within the jurisdiction of Texas, shall be prorated between the permanent school fund and the general revenue fund as follows: two-thirds to the permanent school fund, and one-third to the general revenue fund.

And you are further advised that all oil and gas rentals received from land belonging to the permanent fund of the University of Texas, shall be credited to the available fund of said institution, but such funds shall be held by the Board of Regents as a special building fund and shall be expended only for the erection of buildings or for other permanent improvements.

It is rentals only that go into this available fund. Royalties from land belonging to the permanent University fund do not go into this available fund, but all oil and gas royalties collected from lands belonging to the University of Texas, shall be credited to the permanent fund of the University.

And you are further advised that all oil and gas royalties and rentals received from fresh water lakes and river beds and channels outside of tide water limits, shall be placed to the credit of the Game, Fish and Oyster fund.

We do not think that the provisions of Chapter 81, Acts of the Second Called Session of the Thirty-sixth Legislature, affects in any way the disposition of the funds received from the lands described in said Chapter 83, enacted by the Regular Session of the Thirty-fifth Legislature, neither does it affect the funds received from lands described in Chapter 19, enacted by the Second Called Session of the Thirty-sixth Legislature.

We have limited our answer to the disposition of those funds especially inquired about, that is, to funds received from land belonging to the University and all other lands except the public school and the several asylum lands, neither do we pass upon the constitutionality of the provisions of these various acts relating to the disposition of the various funds, but content ourselves with simply pointing out to what funds the proceeds derived from these various lands under these different acts properly belong under the provisions of said acts.

I am, with respect,

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2376, Bk. 56, P. 286.

LAND—MINERALS—RECLASSIFICATION—DUTY OF ATTORNEY
GENERAL.

The facts concerning the sale of certain land by the State, raise a substantial doubt as to whether or not the State conveyed or reserved the minerals, if any, in the land.

If the Attorney General holds that the State parted with its title to the minerals, the courts will never have an opportunity to pass on the question, whereas, if he holds that the State reserve the minerals, the individual owning the land can take the case into the courts for final determination.

In all controversies involving the rights of the State, it is the duty and policy of the Attorney General to decide all substantial doubts in favor of the State.

AUSTIN, TEXAS, August 24, 1921.

Honorable J. T. Robison, Commissioner of General Land Office, Austin, Texas.

MY DEAR MR. ROBISON: Your letter of August 17th, addressed to the Attorney General, has been received. Your communication reads as follows:

"Prior to and on January 4, 1907, the records of this office showed certain lands to be classified as mineral and grazing. Under the Act of 1905 one Fred Gibson, as assignee of the lease, applied to this Department for the privilege of having certain lands valued so that he might, as such assignee, buy those tracts out of the lease. This Department wrote him on January 4th advising him of the price fixed on such lands and told him that they might be purchased as dry grazing and a carbon copy of that letter to Fred Gibson was sent to the county clerk, which was the usual course when this office intended to change the classification on the records here in such cases; that is, when the assignee of the lease desired to buy out of the lease.

"The carbon letter in this instance was sent to the clerk without comment, neither was there any notation on the letter as to why it was sent to the county clerk and the land at that time being, as aforesaid, classified as mineral, the land remained on the books of this office as mineral and showed to be mineral when Mr. Gibson filed his application in this office to buy on January 11th, the application being made as for dry grazing land.

"The point in this is: if the carbon copy to the county clerk was intended as notice to the clerk to change the classification such classification was not changed on the records of this office and the records of this Department still show the said tracts classified as mineral.

"Accompanying these applications aforesaid for the purchase of this land was an affidavit by the applicant, Fred Gibson, concerning the belief in the non-existence of minerals in the land and waiver if any minerals did exist, copy of which I am enclosing.

"Prior to the classification which was sent to the county clerk on January 3rd, three disinterested persons filed their affidavit here that there was not, to the best of their belief and knowledge, any minerals on this land, yet, the classification on that date retained the mineral classification and at the same time valuing the land at \$1.50 per acre. The letter next day to the applicant told him the land would be subject to sale to him as dry grazing land and a carbon of that letter was the one that went to the county clerk and upon that letter the question arises as to whether or not this Department did in fact re-classify the land and change it from mineral to grazing even though the official certified classification went out the day before and no change was made on the books of this office under letter of January 4th to the applicant.

"It does not seem that this Department requested the applicants to file a mineral waiver with their application.

"The point on which I wish your advice and opinion is this: Was the classification of this land, as a matter of law, changed from mineral to grazing

under the certified list which went to the county clerk on January 3, 1907, by the letter to the applicant on January 4, 1907, a carbon of which letter was sent to the clerk without comment; and what effect, if any, did the mineral waiver, voluntarily executed, have on the question of mineral reservation?

"The reason for this inquiry is that, under the mineral act concerning permits to prospect for oil and gas, this Department has issued mineral permits on these lands because the records here showed they were classified as mineral. It is now contended by the owners of these lands that this Department did in fact reclassify the land as dry grazing and sold it as such and therefore the mineral permits were unlawfully issued and contend they should be cancelled.

"I would thank you for your opinion upon the law of the matter. I think the questions are controlled by the school land act of 1905 and the Revised Statutes of 1895, under the chapter dealing with mineral lands, Title 71."

Since receiving the above letter the writer has discussed this matter somewhat in detail with you, and in addition to that, has carefully read two briefs submitted by the attorneys for the assignee of Fred Gibson, and has examined certified copies of certain records from both your office and the office of the county clerk of Pecos County, including the letter written to Fred Gibson, referred to in the first paragraph of your letter.

The law at the time these transactions took place did not attempt to define what the Commissioner of the General Land Office should do in order to reclassify land. It simply gave him the authority to reclassify and provided that he must notify the county clerk of the county in which the land was situated of such reclassification and made it the duty of the county clerk to record in a well-bound book such change in the classification (Sec. 3-6, Chapter 47, Acts of the Twenty-fourth Legislature), but did not require the Land Office to keep any record of any classification or reclassification of public lands. But it was the custom of the Land Office at the time these transactions occurred to keep a record of all classifications and when the land was reclassified, to make a notation on the record showing such reclassification. In a few instances, this may not have been done, but it was the rule and custom of the General Land Office to make such notation when the classification was changed. No notation of a change in classification was made with reference to the lands involved in this question after the letter was written to Mr. Gibson, but the land remained on the records of the General Land Office as "mineral" even until this day.

In 1919 application was made for a mineral permit or permits on this land. It affirmatively appears that the employee of the Land Office to whom the application was referred not only examined the books of the office to ascertain if this land was mineral, but that he also examined the files of the office and found the letter written to Mr. Gibson. This letter declaring the land to be dry grazing was called to your attention, but there was nothing in the letter to show, and the records and files of your office did not disclose that this letter, or a copy thereof, had ever been mailed to the county clerk. It was the custom of the Land Office to send a carbon copy of such letters to the county clerk and to write on the letter "for your information." The Gibson letter did not have this notation written on it. You advised the employee to treat the land as mineral and to issue the permits, and this was done. It now affirms

atively and without question appears that a carbon copy of the Gibson letter was mailed to and received by the county clerk, and by him filed. What your action would have been had you known this at the time the application for permits was under consideration is of course a matter of conjecture.

The determination of the question submitted depends on whether the Land Commissioner intended at the time the Gibson letter was written to reclassify the land. The letter indicates such an intention. On the other hand, the then Land Commissioner had on the date preceding the writing of the Gibson letter, notified the county clerk that the classification of this land was mineral, and after the writing of the letter, the records were not changed. Had the Land Commissioner intended to reclassify the land, it is passing strange that he did not do those things that were usually done in order to perfect a reclassification, viz., make the proper notations on the records of his office.

We also call attention to the fact that Mr. Gibson was the assignee of someone holding this land under a lease from the State. In order for him to purchase this land, the law required that he ascertain from the Land Commissioner the value of the land, and when he was advised by the Commissioner of the value of the land it became the duty of the Commissioner to notify the county clerk of the county in which the land was situated of such valuation (Sec. 5, Chapter 103, Acts of the Twenty-ninth Legislature). It was the custom of the Land Office after writing to the lessee or the assignee of the lessee advising as to the value of the land, to send a carbon copy of the letter to the county clerk of the county in which the land was situated, *that being the method used by the Land Office in notifying the county clerk of such valuation as required by the statute.*

The fact that a carbon copy of the Gibson letter was sent to the county clerk has no weight as a matter of evidence to show an intention on the part of the Land Commissioner to reclassify the land, for it was the custom to send such carbon copies to show the valuation, whether the land was reclassified, or not.

It follows that the sending of this carbon copy to the county clerk cannot be considered as a notice of reclassification unless as a matter of fact the land had been reclassified by the Land Commissioner, and the sending of the carbon copy is not, in our opinion, evidence of an intention on the part of the Land Commissioner to reclassify this land.

Mr. Gibson voluntarily executed a waiver of all claim to any mineral that might be in this land. Of course, this waiver is not binding on the vendees of Mr. Gibson if as a matter of fact the land was classified as dry grazing when he purchased, but the fact that he did execute the waiver is of value as evidence showing the construction that Mr. Gibson, the man who was buying the land, placed on the letter written by the Land Commissioner. We find as a result of the waiver the very man who received the original letter, the man who bought the land acting under the assumption that the land was mineral and that it was necessary for him to execute this waiver before he could purchase the land.

Certainly it cannot be contended in view of all the facts and actions of the interested parties that the question is free from doubt. We are of the opinion that it is very doubtful whether this land was in fact reclassified and being in doubt, we advise you not to cancel the mineral permits.

The very fact that you, as Commissioner of the General Land Office, and having spent many of the best years of your life in the service of the State in connection with the General Land Office, being entirely familiar not only with the law governing these matters, but with the rules and customs of the General Land Office, sent this inquiry to this Department, shows that you have serious doubts as to whether this land was reclassified.

If the State owns the minerals in this land, such ownership may be of little or great value, but if we advise that this ownership be surrendered on the state of facts presented, and our advice should be wrong, our error can never be corrected, whereas if our advice not to surrender the rights of the State is wrong, the vendees of Mr. Gibson can have our error corrected by proper legal proceedings.

In all controversies involving the rights of the State, it is the duty and likewise the policy of the Attorney General's Department to decide all substantial doubts in favor of the State for the reasons just mentioned.

I am, with respect,

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2346, Bk. 56, P. 461.

PUBLIC LANDS—SURVEYED FREE SCHOOL AND ASYLUM LANDS—
WHEN SUBJECT TO SALE—ADVERTISEMENT OR PUBLICITY AS
TO TIME OF SALE.

1. The law fixes certain dates on which surveyed public free school and asylum lands shall be sold, and the Commissioner of the General Land Office is without authority to sell such lands at any time other than on the dates so fixed.

2. No tract of surveyed public free school or asylum lands is subject to sale until it shall have been advertised, or publicity of such sale has been given, in the manner provided by law next preceding the next succeeding sales date, and this notwithstanding the fact that such tract of land may have been previously so advertised, or publicity of the sale of same may have been given as being on the market on one or more previous sales dates.

AUSTIN, TEXAS, May 18, 1921.

Hon. J. T. Robison, Commissioner, General Land Office, Austin, Texas.

DEAR SIR: The Attorney General is in receipt of your inquiry of the 5th instant, which is as follows:

"Surveyed public free school land has heretofore been advertised to come on the market at certain sale dates. Some of the tracts were not sold but remained unsold. No list was prepared showing the lands on the market the first day of May this year, but an application was received for a tract, which

particular tract had heretofore been advertised, but not readvertised before the May sale day, present year.

"Please examine Chapter 163, Act approved April 3, 1919, and advise me as to whether or not the application for this particular tract of land should be accepted or rejected?"

"The point is: does unsold land have to be advertised preceding each sale day as a condition precedent to a valid sale? See Section 3 of Chapter 163, which is an amendment to Article 5408, Revised Statutes of 1911, wherein I believe you will find the provision that I desire your interpretation of."

We are of the opinion, therefore, and you are so advised:

(a) That you are without authority to make a sale of any of these surveyed lands at any time other than on one of the dates designated in Section 1 of the Act of April 3, 1919.

(b) That "no tract of (surveyed) land shall be subject to sale until it shall have been advertised" by you as provided by Section 3 of the Act of April 3, 1919, next preceding the next succeeding date fixed by law for the sale of such land as being on sale at the time of such next succeeding sales date, and this notwithstanding the fact that such land may have been previously advertised as being on the market for sale on one or more previous sales dates.

Prior to the passage of the Act of April 5, 1915 (Ch. 150, p. 256, Gen. Laws, Reg. Ses., Thirty-fourth Leg.), with certain exceptions not necessary to discuss here, the surveyed public free school lands and asylum lands of this State were "on the market and subject to sale" at any time after the classification and valuation of same had been filed with the clerk of the county court in which the same was situated. The filing of the list describing such land and giving the classification and valuation of same with the clerk of the county court in which such land was situated, constituted an offer by the State to sell such land at the price stated, and the first qualified person who thereafter filed a proper application to purchase the same was taken as having accepted this offer of the State to sell and was entitled to have the land applied for awarded to him. There was no bidding for these lands and no definite date fixed for their sale, and no advertisement or publicity was required with respect to the offer of these lands for sale other than the filing of lists of description, classification and valuation of same with the clerk of the county court and the recording of such lists by such clerk. This was true after the passage of the Act of April 15, 1905 (Ch. 105, p. 159, Gen. Laws, Reg. Ses., Twenty-ninth Leg.), which required certain advertisements or publicity as to certain of these lands.

The Act of April 15, 1905, effective on that date, provided that the application to purchase these lands should be filed in the Land Office through due course of mail and not by anyone in person, in an envelope addressed to the General Land Office, and "when the land is to come on the market at some future date, the envelope shall have endorsed thereon," among other things, the date on which the land applied for will be on the market. That act withdrew all land from sale until September 1, 1905.

A previously executed lease on a certain tract of this land previously classified and appraised, expired July 30, 1905. The application of one Flores to purchase this tract of land was filed in the

Land Office September 1, 1905, but the envelope enclosing same bore no endorsement showing it to be an application to purchase land on the market on September 1, 1905. On September 2, 1905, one Oden filed in the Land Office his application to purchase this same tract of land, with the envelope enclosing same showing it to be an application to purchase land on the market on September 1, 1905. Flores' application was rejected and the land was awarded to Oden. Flores applied for a writ requiring the Commissioner of the General Land Office to award the land to him and the writ was granted. In considering the case, our Supreme Court (*Flores vs. Terrell*, 92 S. W., 32), said:

"We think the construction contended for by the relator, the true one, namely, that the provision in question was intended to apply to cases in which, by reason of expiration of leases and the like, the lands would come on the market upon some day in future and the Commissioner should offer them in advance for sale on that date. * * * But after the land came upon the market, there was no longer any likelihood of competitive bidding, and no longer any secrecy as to the amount offered. The Commissioner was bound to take the applications as they came, and the first in point of time acquired the right to purchase the land."

In another case arising under this act (*Estes vs. Terrell*, 92 S. W., 407), our Supreme Court said:

"The tract in controversy is a part of the lands surveyed and set apart to the school fund, and has never been leased. Prior to relator's application to purchase the tract, the respondent Terrell, as Commissioner of the General Land Office, caused said land to be classified and appraised, and notified the county clerk of Menard County of the classification and appraisement. The notice was received by the clerk, and was recorded as required by law, in the month of November, 1905. On the first day of December thereafter the relator mailed to the Commissioner his application to purchase the tract at the appraised value. This was the first application after notice of the valuation and appraisement was received by the clerk. He was a qualified purchaser, and his application was in strict conformity to all requirements of the statute. It was received by the Commissioner on December 4th, and was not accepted, for the reason that the Commissioner had assumed to delay exposing the land for sale until the first day of January, 1906, and had advertised it as being upon the market on that day. The sole question presented is thus stated in the brief for the respondent Terrell: 'Where the Commissioner of the General Land Office advertises that certain lands which have not been on the market will come on the market at a designated future date; and so states in the notice of classification, valuation, etc., which he transmits to the county clerk of the county, in which such lands lie, under the provisions of the Act of April 15, 1905 (Laws 1905, p. 159, c. 103), do such lands come on the market immediately upon the receipt by the clerk of such notice, or do they come upon the market upon the date so designated by the Commissioner therefor?'"

"We are of the opinion that when notice of the classification and appraisement was sent to the county clerk and was received by him, the tract was subject to sale, and that the Commissioner of the General Land Office was without authority to postpone the sale to some future date. The respondents rely upon the Act of April 15, 1905, to show that he had that power. That act repeals the previous laws upon the same subject only in so far as they are in conflict with it. Under the former statutes (Rev. St. 1895, Arts. 4218f, 4218g), the land was upon the market when the clerk of the county court received notice of the classification and appraisement. *Ford vs. Brown*, 96 Texas, 537. 74 S. W. 535; *Willoughby vs. Townsend*, 93 Texas, 80, 53 S. W., 581. We find no express provision in the Act of 1905 which empowers the Commissioner to fix the time at which lands which have never been leased shall come upon the market, on a day other than that on which the classification and appraisement shall come to

the hands of the county clerk; nor do we think that it contains any provision from which such power can be implied. * * *

"It is argued that since it was a main purpose of the Act of 1905 to secure competitive biddings for the school lands and thereby to benefit the school fund, and since in a case like the present one this could only be accomplished by fixing a future day for sale and giving publicity to the fact for the benefit of such as might desire to purchase, it is to be inferred that it was intended that the Commissioner should pursue the same course as in case of other lands which are expressly mentioned. The policy of selling the school lands to the highest bidder is a wise one, and it is probable that it did not occur to the Legislature, at the time that the act was passed, that a case like the present would arise. It is to be remembered that at that time nearly all of the surveyed school lands of the State which were not under lease had been surveyed, classified, and appraised, and were upon the market for sale. The act itself suspended the sale of these lands until the 1st of September next after its passage, when they all came upon the market at the same time and were subject to competitive offers. So, in case of leased lands, where the lease was kept in good standing, they were left subject to sale on the day after the leases expired, which itself fixed a day for competitive applications to purchase. For lands leased, but which might come upon the market by a cancellation of the leases, rules to secure competition were provided; and it is probable that, if it had occurred to the makers of the law, there were other lands which would come upon the market at a time not fixed, they would have been included in the list of those in which the Commissioner is empowered to fix the day on which they could be subject to sale; but this the Legislature has not done."

The case of *Marshall vs. Robison*, 191 S. W., 1136, and other similar cases, wherein it is held that the lands involved in them were subject to sale on a date previously fixed by the Commissioner of the General Land Office, and to the highest bidder on competitive bids, relate to lands coming under those provisions of the law providing for such sales of certain lands, such as those the leases on which had expired or had been cancelled, etc., and do not apply to the sale of other lands.

By the Act of April 5, 1915, a radical change was made in the method to be pursued in the sale of these lands. This act provides that "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," and further states that "Applications to purchase shall be opened at ten o'clock a. m., on the second day of September, 1915, and at the same hour and date of the following January, May and September of each year thereafter. * * * When all applications have been acted upon, the land remaining unsold shall be again advertised as now provided by law." The caption of the act declares it to be "An Act providing for the sale of lands belonging to the free school fund and the several asylum funds of the State on the first day of September, 1915, and on the first day of January, May and September of each year thereafter; * * * providing for the opening of applications to purchase and readvertising unsold lands," etc.

While this act is not clear in the matter of advertising lands for sale, nor with respect to awarding same to the applicant bidding the highest price therefor, we think it clearly fixes the dates on which same shall be or is offered for sale, and on which applications to pur-

chase shall be considered and awards made by the Commissioner of the Land Office, and that this provision applied alike to all of these lands that had been classified and appraised and that had not been sold prior to the last succeeding sale date. This act was expressly repealed by the Act of April 3, 1915. Ch. 163, p. 312, Gen. Laws, Reg. Ses., Thirty-sixth Legislature. The provisions of the Act of April 5, 1915, here noted, however, were carried into the Act of April 3, 1919, and were made more definite and certain, except that the requirement in the Act of April 5, 1915, that "When all applications have been acted upon, the land remaining unsold shall be again advertised as now provided by law," was not carried into the Act of April 3, 1919.

The Act of April 3, 1919, among other things contains the following provisions:

"Section 1. On the first day of September, 1919, and the first day of each January, May and September of each year thereafter, all the unsold lands set apart for the benefit of the public free school fund, the lunatic asylum fund, the blind asylum fund, the deaf and dumb asylum fund, the orphan asylum fund, which have heretofore been surveyed, or that may hereafter be surveyed and unsold portions of same, shall be subject to sale by the Commissioner of the General Land Office, under the regulations and upon the terms provided in this act; provided, no land leased before the passage of this act shall be subject to sale until the first *sale date* after the termination of the lease. No corporation shall purchase any land under this act.

"Sec. 2. (Amending Article 5407, R. C. S., 1911.) The Commissioner of the General Land Office shall from time to time, as the public interest may require, classify or re-classify, value or re-value any of the lands included in this act, designating the same as agricultural, grazing or timber, or a combination of said classifications, according to the facts in the particular case, and when entry of the classification and the appraisal is made on the records of the General Land Office, no further action on the part of the Commissioner, nor notice to the county clerk shall be required to give effect thereto. * * *

"Sec. 3. (Amending Article 5408, R. C. S., 1911.) In cases where any land included in this act may be leased and the same may come on the market, by reason of the expiration or cancellation of such lease or in cases where land may be sold and revert to the fund to which it originally belonged, by reason of the forfeiture or cancellation of the sale, it shall be the duty of the Commissioner to classify and value the same before the next sale date thereafter, and adopt such means as may be at his command that will give the widest publicity and general information as to when such land *and other unsold land* will be on the market for sale, together with the terms and conditions upon which the land may be purchased. *No tract of land shall be subject to sale until it shall have been advertised.* If there are no other satisfactory or sufficient means at the command of the Commissioner that will give the necessary publicity, he shall have printed at the expense of the State to be paid out of the appropriation for printing, lists of the land for free distribution to the public. The lists shall contain a brief statement of how one shall proceed to buy the land.

"Sec. 4. (Amending Article 5409, R. C. S., 1911.) One desiring to buy any portion of the land included in this act, shall transmit to the Commissioner of the General Land Office a separate application for each tract applied for. * * * Upon receipt and filing of the application * * * the sale shall be held effective from that date. If the interest on any sale should not be paid when due, the land shall be subject to forfeiture by the Commissioner * * * and thereupon the land and all payments shall be forfeited to the State and offered for sale on a *subsequent sale date*.

"Sec. 5. * * * Any unsold land may be leased at any time at not less than five cents per annum, payable in advance each year and for a term not to exceed five years, but all land so leased and unsold shall be subject to sale on each succeeding sale date. * * *

"Sec. 6. (Amending Article 5410, R. C. S., 1911.) * * * Any person desiring to purchase any of the surveyed land included in this act, shall make a separate application in writing for each tract as a whole and be addressed to the Commissioner of the General Land Office. * * * The application shall be delivered to the General Land Office in a sealed envelope addressed to the Commissioner of the General Land Office at Austin, Texas, and the envelope shall be endorsed thereon in effect: 'Application to buy land,' and date when the land will be on the market. Applications received at the Land Office in envelopes not so endorsed shall nevertheless be valid. When envelopes so endorsed and applications without endorsement on envelopes are received in the General Land Office, the envelope shall remain unopened and the application shall remain unfiled, and all shall be safely and securely kept by the Commissioner or his chief clerk until the day following *the day when the land comes on the market*, and at 10 o'clock a. m. *on said day* one or both of them shall begin to open the envelopes and file all applications and take such action thereon as may be provided by law. * * * All sales shall be made to the applicant who offers the most for the land not less than the price fixed by the Commissioner. Should two or more applicants offer the same price for any tract, the same being the highest price offered therefor *on any sale date*, all shall be rejected and the land offered for sale *on the next sale date*." * * *

From these provisions, we think it quite clear that the Legislature has fixed certain days, namely, January first, May first and September first of each year on which applications to purchase any of these lands must be in the General Land Office before they can be considered as applications to purchase any of these lands, and the second day of these months, respectively, in each year as the day on which such applications shall be considered and on which awards or sales shall be made. This being true, we are of the opinion that the Commissioner of the General Land Office is precluded from considering applications for the purchase of these lands, and from making sales of same, at any time other than on one of the dates named in this act; that these lands are not on the market and subject to sale, and are not offered for sale by the State at any time other than on these respective dates. It is true that this act (Sec. 4), provides that "upon receipt and filing of the application * * * the sale shall be held effective from that date," but it further provides (Sec. 6), that the envelope containing the bids "shall remain unfiled and all shall be safely and securely kept * * * until *the day following the day when the land comes on the market*," at which time the Commissioner of the General Land Office, or his Chief Clerk, or both of them, "shall begin to open the envelopes and file all applications and take such action thereon as may be provided by law." Note the further provision (Sec. 5), that all land leased and unsold "shall be subject to sale on each succeeding *sale date*"; also (Sec. 6), that "Should two or more applicants offer the same price for any tract, the same being the highest price offered therefor on any *sale date*, all shall be rejected and *the land offered for sale on the next sale date*."

We think that it shows clearly no tract of land can be taken as on the market and subject to sale, as being offered by the State for sale, until it has been advertised for sale as provided by Section 3 of this act. It is true that this section mentions specifically leased land that "may come on the market by reason of the expiration or cancellation of such lease" and land that "may be sold and revert to the fund to which it originally belonged by reason of the forfeiture

or cancellation of the sale," and provides for the classification and valuation of such land "before the next sales date thereafter," but the provision with respect to advertising or giving publicity as to the sale of these lands is that such means shall be adopted as "will give the widest publicity and general information as to when such land *and other unsold land*, will be on the market for sale." Following this is another sentence complete within itself, stating that "No tract of land shall be subject to sale until it shall have been advertised." We think this requirement that the sale of these lands be advertised as here provided applies as well to the surveyed lands as to those particularly mentioned.

Is it necessary that such of these lands as have been advertised next preceding a given sales date as are not sold at such sales date, and remain unsold, be advertised again before being on the market and subject to sale at a succeeding sales date? The present law is not clear on this point. The Act of April 5, 1915, especially provided that "When all applications have been acted upon, the land remaining unsold shall be again advertised as now provided by law," but that act was expressly repealed by the Act of April 3, 1919 (Sec. 10), and neither this provision nor one similar to it is found in the Act of April 3, 1919. We think, however, that this question should be answered in the affirmative.

We have already held that all the unsold surveyed lands mentioned in Section 1 of the Act of April 3, 1919, that has been classified and valued can be sold only on the respective dates named in that section. Other provisions of the act make it the duty of the Commissioner of the General Land Office to "adopt such means as may be at his command that will give the widest publicity and general information as to *when such land and other unsold land*"—which undoubtedly includes all property classified and appraised surveyed lands mentioned in Section 1 of this act and that are at any time not sold—"will be on the market for sale."

Further provision is made for the free distribution to the public of printed lists of these lands. This evidently contemplates a list of all the surveyed lands mentioned in Section 1 of this act that have been classified and appraised and that were not sold on the next preceding sales date. A prospective purchaser, having in his hand such a list, and having before him our law on the subject, would naturally and reasonably conclude that such list included all the land of that character that was to be sold by the State on the date specified in such list, and would prepare his application to purchase accordingly. If there were other lands not included in such list that were also open to purchase on such date, but which lands were included in a former list of lands on the market at a previous sales date, there would be little or no competition in bidding for such lands and one of the principal purposes of the law, namely, competition in the purchase of these lands, would be defeated.

This result becomes more apparent when we note that it is now required as it was under previous laws, that the county clerks be furnished with notice of the classification and valuation of such of these lands as may be situated in their respective counties, as will

be seen from Section 2 of this act. Furthermore, an advertisement or list of lands coming on the market at a given sales date, or any publicity that certain lands will be for sale on one of the sales dates above provided for, would not be an advertisement, list, notice or "publicity" that any of such lands would be on the market and subject to sale at any following or other sales date. The State having these lands for sale, and having by law fixed certain dates on which it will offer the same for sale, the pertinent and essential inquiry on the part of a prospective purchaser is: What lands has the State for sale on its next sales date? The answer to this question should be found in the list, advertisement or "publicity" authorized and required by Section 3 of this act.

Just here we note that the provision of the Act of April 15, 1905, "That 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. (Art. 5416, R. C. S., 1911), and the provisions of the Act of May 16, 1907, that "On said date the land and timber thereon shall be subject to sale and so remain until sold," have been dropped, in effect repealed, and are not now the law.

Wherefore, we have advised you as stated in the beginning of this opinion.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2341, Bk. 56, P. 293.

LAND SUITS—POLICY OF THE ATTORNEY GENERAL'S DEPARTMENT.

The Attorney General will not express an opinion when the question submitted is, at the time the opinion is written, involved in a lawsuit between private litigants.

The Attorney General will not institute suit in behalf of the State for the recovery of land when the facts disclose that the State has not suffered loss, except in cases where the land was acquired from the State by fraud or is held in violation of the spirit and plain policy of our laws.

AUSTIN, TEXAS, May 2, 1921.

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

DEAR MR. ROBISON: Our delay in answering your inquiry of June 10, 1920, with reference to an alleged vacancy in Wichita County, being the land embraced in a certain mineral permit issued by your department to W. M. Harris on the 25th day of October, 1919, may be briefly explained as follows:

The parties who claimed to own this land requested this Department to give them a hearing before we answered your inquiry. The hearing could not be arranged to the satisfaction of all interested parties until the latter part of November, 1920. At that time appeared the attorneys representing the parties claiming to own the land, and Mr. Harris appeared in person, and by other counsel.

At the conclusion of the hearing, Mr. Harris asked for time in which to submit for our consideration an additional brief. His re-

quest was granted. We did not receive the brief until a short time ago.

The land involved consists of about 35 acres of what has been and may now be very valuable oil lands. The parties claiming to own the land assert that it is embraced within the boundaries of the H. T. & B. Survey Number 1. Mr. Harris contends that it is vacant unappropriated public domain. The facts are as follows:

On May 7, 1872, A. L. Shoemaker, District Surveyor, located, surveyed and returned to the Land Office his field notes, together with Certificate No. 394, for 640 acres of land, issued to the H. T. & B. Ry. Co. (certified copies certificates, assignment of same, plat and field notes, Surveys Nos. 1 and 2, H. T. & B. R. R. Co.), the same having been filed in the Land Office June 15, 1872. The Land Office reversed numbers of said surveys One and Two. On July 10, 1874, the Land Office filed corrected field notes of said H., T. & B. Survey No. 1, prepared by J. P. Earle on May 4, 1874, after making certain notations and corrections therein. This corrected survey supposed there was a conflict between the northwest corner of said H., T. & B. No. 1 and the southeast corner of T., E. & L. Co. Survey No. 830, as shown by the said field notes and corrections of the Land Office, as well as by the map of 1874. (See certified copy Earle's field notes, Exhibit No. 5.) These field notes as corrected by the Land Office were again certified to on October 27, 1874, by said J. P. Earle, District Surveyor (Exhibit No. 6).

Thereafter, on April 14, 1875, the said J. P. Earle prepared, and on May 11, 1875, filed with the Land Office the following certificate:

"I, J. P. Earle, district surveyor Clay Land District, do hereby certify that the *corrected* field notes of Survey No. 1 by virtue of Houston Tap & Brazoria R. R. Scrip No. 394, have been cancelled on the records in my office, the original notes having been found correct by recent corrections in the Land Office map.

"J. P. EARLE,
"Surveyor Clay Land District.

"Henrietta,
"Apr. 14, 1875.

Thereafter, on May 29, 1875, patent was issued to Joseph R. Anderson, using the corrected and cancelled field notes.

The following pencil memoranda appear on the back of said corrected field notes:

"This survey is erroneously patented, as the corrected field notes have been cancelled according to surveyor's certificate.

"E. S."

"The patent ought to be cancelled and the survey repatented on the original field notes. Feb. 9, '97.

"E. Schultze."

"Original notes should have been used for patent instead of corrected notes. Make map to show full survey.

"Robison."

"See Frisbee vs. Smith, 13 Civ. App., 384."
"1/2/19"

On back of field notes of H., T. & B. No. 1, appears in pencil:

"In conflict with Survey No. 830, File No. 3437, of T. E. & L. Co., Nov. 20, '72. Schenck."

On January 24, 1878, District Surveyor Green made surveys for the B., S. & F., Nos. 1 and 2; which Survey No. 2, as originally made, conflicts with H., T. & B. No. 1.

On December 11, 1890, J. H. Barwise, Jr., surveyed and made corrected field notes of said B., S. & F. No. 2, as follows:

"Corrected field notes of a survey of 628 acres of land made for the State by virtue of Certificate No. 1565 issued to Beatty, Seale & Forwood, said Survey No. 2 in Wichita County, Texas, situated on the waters of....., a tributary of..... River, about 10 miles North 5 West, of center of county:

"Beginning at a stone the Southeast corner of No. 1, same certificate;

"Thence West with S. B. line of same 2978 vrs. of S. W. Cor. in the E. B. line of the S. Denison;

"Thence South, passing S. E. corner of same 1305 vrs. to a pile of stone in the E. B. line of H. T. & B. No. 1, Cert. No. 577;

"Thence East 2093 vrs. stake in W. B. line H. T. & B. No. 1, Cert. No. 394;

"Thence North 374 vrs. to N. W. Corner of No. 1;

"Thence East with N. B. line of No. 1, 885 vrs. a stake;

"Thence North 931 vrs. to the place of beginning. -

"Variation $9\frac{1}{2}$ East."

(Recorded Surveyors Records, Wichita County, Book 1, page 217.)

It will be noted that this re-survey of B., S. & F. No. 2 (and it is patented in accordance with same), calls for its southeast corner "a stake in W. B. line of H., T. & B. No. 1, thence north 374 vrs., stake in N. W. corner said H., T. & B. No. 1; thence east with the N. B. line, H., T. & B. No. 1, 885 vrs." This recognition of the original survey of H., T. & B. No. 1 is fully disclosed by the survey made on the ground as well as by the connecting line run by N. Henderson in January, 1890, which is shown on the plat filed by applicant, W. M. Harris.

The official map of Wichita County of 1859, in use until 1874, shows said survey as 1900 varas square.

The map of 1874 shows conflict evidently to the extent that the original survey was reduced by the corrected and cancelled field notes with T., E. & L. No. 830. The Land Office evidently had not had the surveys starting from Red River and those from the Wichita River connected at that time and erroneously assumed that the T., E. & L. Co. No. 830 was approximately two miles south of its real location. The alteration in the field notes and this map clearly indicates the theory upon which the Land Office acted in calling for corrected field notes in 1874. Prior to the issuance of the patent, however, the Land Office discovered its mistake, as did District Surveyor Earle, and the said Earle cancelled the corrected field notes on the surveyor's records of his district and certified his act to the Land Office, stating in said certificate that the original field notes were correct. It is evident, therefore, that the corrected field notes were carried into the patent through mistake when, as a matter of fact, the original field notes should have been carried into the patent.

The map of 1881, the next official map, also shows H., T. & B. No. 1 in the form of a square, but it, too, erroneously locates the B., S. & F. Surveys, showing No. 3 contiguous to the northwest corner of H., T. & B. No. 1.

The map of 1889 shows various conflicts, difficult to describe.

The map of 1897, the present official map of Wichita County, shows H., T. & B. No. 1, 1900 varas square and that its west line is called for by B., S. & F. No. 2, and B., S. & F. No. 3.

Survey No. 3, B., S. & F., which seems to have been surveyed several times, was finally patented with field notes as follows:

- "Beginning at a stake in the S. B. line of B. S. & F. Survey No. 2, Cert. No. 1565, 886 vrs. East of its Southwest corner;
- "Thence East 1204 vrs. to a stake in W. B. line of H. T. & B. Survey No. 1;
- "Thence South 1379 vrs. a stake in said W. B. line;
- "Thence West 1204 vrs. a stake;
- "Thence North 1379 vrs. to the place of beginning, covering 294 acres of land."

By this survey and patent it is shown that the original survey of H., T. & B. No. 1 was called for and that the corrected field notes were ignored. This patent was dated November 13, 1889.

On November 29, 1892, Herman Specht, D. T. Carr, G. S. DeWolf, J. L. Pratt and M. A. Smith, who were at that time the owners of the surveys; B., S. & F. No. 3; G., C. & S. F. No. 1; H., T. & B. Nos. 1 and 2, filed a protest against the attempted location of 35 acres out of the northwest corner of the original H., T. & B. Survey No. 1, and in that protest stated that the owners of the land indicated had established their lines according to the full original survey lines of H., T. & B. No. 1, and that said lands were in cultivation by actual settlers, and further stated that same was so surveyed in the form of 1900 varas square by John W. Field.

Said survey B., S. & F. No. 2 was purchased from the State by E. N. Bledsoe on application filed July 3, 1888, and same has subsequently been patented under the Barwise field notes hereinbefore given.

There are other facts connected with this matter, but for the purpose of this opinion it is not necessary to recite them, except as to one other matter to which we now call attention.

In addition to the foregoing facts, we call attention to the following pencil notation made in the field notes of the 35 acres in controversy:

"For John W. Swisher, File No. 2044, the entirely original Section 1, H. T. & B. R. R. Co. (Scrip 3296). The corrected field notes No. 1 should have been corrected instead of the original. The office was not notified about the cancellation before the patent was issued. The patent of No. 1 ought to be returned for cancellation and re-patented from the original field notes.

"E. Schultze."

(See Protest in Scrip No. 3296.)
June 24, 1893.

We do not propose to pass on the questions of law involved in this matter for the reason that Mr. Harris has instituted suit in the district court of Wichita County against the parties claiming to own this land. It has long been the policy of this Department not to express an opinion on questions of law when the identical questions are pending before some court of competent jurisdiction for determination.

We content ourselves by advising that in the opinion of this Department, the State of Texas ought not to bring suit in trespass to try title to recover this land, for the reason that the facts fail to

disclose that the State will suffer any loss by reason of this 35 acres remaining in H., T. & B. Survey No. 1, as originally surveyed. The facts disclose that Joseph R. Anderson and his assigns were entitled to receive from the State 640 acres of land, and H., T. & B. Survey No. 1, as originally surveyed, according to the facts, contains only 640 acres. Therefore, the State has not suffered any loss, and will not suffer any loss, if the 35 acres involved in this opinion continue to remain in H., T. & B. Survey No. 1. The records in the General Land Office disclose that it has long been considered by that department that "the patent of Number One ought to be returned for cancellation and repatented from the original field notes." There is nothing in the record that discloses that this land was acquired from the State by fraud, or that it is being held in violation of the spirit and plain policy of our laws.

This Department, during the present administration, and during the six years that Honorable B. F. Looney was Attorney General, has consistently declined to bring suit in behalf of the State for the recovery of land when it has appeared from the facts that the State has not suffered any loss, and that the land was not acquired from the State by fraud, was not held in violation of the spirit or plain policy of our laws. We quote from a former opinion of this Department:

"It will not be the policy of this Department under this administration to file suits for the recovery of lands merely because the State has the *power* to recover them.

"We desire that the foregoing statement as to the policy of this Department be not misunderstood. It has reference to cases of the character of the one before us. Whenever land has been acquired from the State through fraud or has been acquired, or is held in violation of the spirit or plain policy of our laws, we shall do all in our power to recover it for the State, and we are confident that in the performance of such purpose we shall have the hearty cooperation of your Department." (Printed Opinions of the Attorney General, 1912-1914, pp. 545-546.)

This is a clear, concise statement of the position of the present Attorney General in the instant case.

I am, with respect,

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

OPINIONS ON PUBLIC OFFICERS AND FEES OF OFFICE.

Op. No. 2355, Bk. 56, P. 378.

COUNTY ATTORNEY—AUTHORITY TO INSTITUTE SUITS FOR VIOLATIONS OF SEMI-MONTHLY PAY LAW.

1. In a county included within a district having a district attorney the county attorney is not authorized to bring an action for penalties for violations of semi-monthly pay law without direction from the Commissioner of Labor Statistics.

2. In a county not included in such a district a county has authority, by reason of constitutional provision, to institute such suits on his own initiative.

State Constitution, Art. 5, Sec. 21; Acts Thirty-fourth Legislature, Regular Session, Chap. 25; Vernon's Complete Texas Statutes of 1920, Arts. 5245-98 to 5246-100.

AUSTIN, TEXAS, May 23, 1921.

Honorable J. Carroll McConnell, County Attorney, Palo Pinto, Texas.
Honorable W. V. Dunnam, County Attorney, Eastland, Texas.

DEAR SIRs: This Department is in receipt of the same inquiry from each of you gentlemen, that is, as to whether a county attorney has authority to bring penalty suits under the semi-monthly pay law, the same being Articles 5245-98 to 5246-100, Vernon's Complete Statutes of 1920, without direction so to do by the Commissioner of Labor Statistics.

Since the rule appears to be different in a county included in a district in which there is a district attorney than that which applies in a county not included in such a district, and since Palo Pinto County is within the former class of counties, while Eastland County is among the latter, we deem it necessary to pass upon the question from both standpoints.

Section 21 of Article 5 of our State Constitution contains the following language relative to the duties of county attorneys:

"The county attorneys shall represent the State in all cases in the district and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a district attorney, the respective duties of district attorneys and county attorneys shall, in such counties, be regulated by the Legislature."

Under this constitutional provision, in a county not included in a district in which there is a district attorney, it would seem that the county attorney has authority to represent the State in the district and inferior courts in this county regardless of statute. *State vs. Moore*, 57 Texas, 307.

It will be noted, however, that the Constitution provides that if any county shall be included in a district in which there shall be a district attorney, the respective duties of district attorneys and county attorneys shall in such counties be regulated by the Legislature. By reason of this provision it was held in *State vs. Texas Central Railroad Company*, 130 S. W., 663, that a county attorney of a county in a district in which there is a district attorney has no authority

to bring suits in behalf of the State unless the Legislature has by statute authorized him to do so.

We are, therefore, of the opinion that the county attorney in a county not included in a district in which there is a district attorney would have authority to represent the State and institute suits for violations of Chapter 25, General Laws, Regular Session of the Thirty-fourth Legislature, being the semi-monthly pay law, and this independent of the provisions of said act directing the bringing of said suits by the officials mentioned therein. This, of course, means that in such counties the county attorney, under his constitutional authority, could bring suits of this character without direction from the Commissioner of Labor Statistics.

However, in view of the decision last above referred to, a different rule will apply in counties included in a district having a district attorney. In such a county the duty of the county attorney is prescribed by said act itself, and he has no authority relative to such suits except as provided therein. That portion of the act prescribing how these suits shall be instituted reads as follows:

"Every person, partnership or corporation wilfully failing or refusing to pay the wages of any employe at the time and in the manner provided in this statute shall forfeit to the State of Texas the sum of fifty (\$50.00) dollars for each and every such failure or refusal, and suits for penalties accruing under this act shall be brought in any court having jurisdiction of the amount in the county in which the employe should have been paid, or where employed. Such suits shall be instituted at the direction of the Commissioner of Labor Statistics by the Attorney General or under his direction or by the county or district attorney for the county or district in which suit is brought; and the attorney bringing any such suit shall be entitled to receive and shall receive as compensation for his service therein \$10 of the penalty or penalties recovered in such suit, and the fees and compensation so allowed shall be over and above the fees allowed to the Attorney General, county or district attorneys under the general fee act."

This Department is of the opinion that this act makes a direction from the Commissioner of Labor Statistics a condition precedent to the bringing of a suit of this kind by the county attorney, except, of course, as above stated in counties not included in a district having a district attorney. The act says that "such suits shall be instituted at the direction of the Commissioner of Labor Statistics * * * by the county or district attorney for the county or district in which suit is brought." We can give effect to this language under our view, even in counties in which the county attorney has constitutional authority to represent the State, by assuming that in such counties the act may have the effect of making it the duty of the county attorney to institute such suits when directed so to do by the Commissioner of Labor Statistics, and that he may also do so at his discretion and on his own initiative.

The net result of our holding, so far as your inquiry is concerned, is that in a county included within a district having a district attorney the county attorney is not authorized to bring an action under said statute except at the direction of the Commissioner of Labor Sta-

tistics; but that in a county not included in such a district a county attorney has authority to bring such suits on his own initiative.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2352, Bk. 56, P. 373.

OFFICERS—COUNTY AUDITOR—APPOINTMENT OF ASSISTANTS AND
CLERICAL HELP.

1. Under Articles 1464 and 1465, Revised Civil Statutes of 1911, authorizing the county auditor to appoint an assistant with the consent of the county judge and clerical help with the consent of the county judge or the commissioners court, the county auditor has authority, after receiving the consent of the county judge or commissioners court, as the case may be, to make an appointment, to select the appointee and make the appointment and the county judge or commissioners court has no authority to control the county auditor in the selection of any particular person to fill such office or position.

2. Mandamus will not lie against the county judge or the commissioners court to compel either to give consent to the appointment of an assistant or clerical help to the county auditor, since the authority conferred upon the county judge and commissioners court involves the exercise of discretion.

AUSTIN, TEXAS, June 7, 1921.

Honorable J. R. Keith, County Attorney, Cleburne, Texas.

DEAR SIR: I have yours of recent date propounding to this Department the question whether the county auditor has authority to appoint an assistant after receiving the consent of the county judge, or whether the county judge has a voice in selecting the individual who is to be appointed to such position or office.

Under Article 1464, Revised Civil Statutes of 1911, the county auditor is authorized to appoint an assistant, "said appointment to be made with the consent of the county judge who shall require said assistant to take the usual oath of office for faithful performance of duty."

Under Article 1465 the county auditor has authority "to appoint additional clerical help when needed with the consent of the county judge or of the commissioners' court."

It is the opinion of this Department that by virtue of Article 1464, it is the province of the county judge to pass upon the necessity of the appointment of an assistant to the county auditor, but that after doing this the county judge has no authority to determine who shall be appointed to such a position. The appointive power is conferred upon the county auditor and not upon the county judge. The county auditor must procure the consent of the county judge to make the appointment, but after he has this consent, it is his province to make the appointment and select the person who shall be appointed.

The same may be said of the authority of the county auditor under Article 1465 to appoint clerical help when needed. Under this statute the county auditor appoints, after the county judge or the commissioners' court has given consent to the appointment. Neither the

county judge nor the commissioners' court has authority to select the individual who shall be appointed to do clerical work.

This interpretation of the statute gives effect to all of the language used therein. If we should hold that the county judge or the commissioners' court has authority to select the person who shall be appointed, we would not give effect to the use of the language conferring upon the county auditor the appointive power. On the other hand, under our interpretation full effect is given to the language conferring the appointive power upon the county auditor, and at the same time, full effect is given to that part of the statute requiring the county auditor to have the consent of the county judge or the commissioners' court, as the case may be.

I note your further inquiry as to whether a writ of mandamus would lie to compel the county judge to authorize the appointment of necessary assistants authorized by the statute.

The evident purpose and intention of the Legislature in passing the statute was to confer upon the county judge the authority to pass upon the necessity of an assistant to the county auditor and upon the county judge or the commissioners' court to pass upon the necessity of appointing additional clerical help for the county auditor. The exercise of this authority involves discretion and the power and authority conferred is not simply ministerial in its nature, but, to a certain extent, is judicial. To hold that mandamus would lie to compel the county judge or the commissioners' court to give his or its consent to such appointments would be to deprive the county judge or the commissioners' court, as the case might be, of the discretion clearly conferred by statute. What purpose would be served by authorizing an official or body to pass upon the necessity of an appointment and then hold that he or it may be compelled to give his consent?

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2384, Bk. 56, P. 215.

COMMISSIONERS' COURT—USE OF GENERAL FUND OF COUNTY FOR
FLOOD PREVENTION.

The commissioners court of Bexar County acts within its authority in providing for the expenditure by the county of two thousand five hundred (\$2500) dollars to pay one-half of the expenses in making a preliminary survey to ascertain the most feasible and practicable method of preventing disastrous floods, and such expenditure may be made out of the general fund of the county.

AUSTIN, TEXAS, September 23, 1921.

Honorable W. L. Kendall, County Auditor, San Antonio, Texas.

DEAR SIR: I have yours of the 21st instant, addressed to the Attorney General, reading as follows:

"I am enclosing herewith a copy of an order passed by the commissioners court of Bexar County yesterday.

"In this connection it is not clear to me whether or not any funds of Bexar County can be used as per this order.

"I understand from the county judge that this money is really to be expended in making preliminary surveys, test holes and incidental work to determine the feasibility and practicability of erecting a detention reservoir or flood reservoir in the Olmos Creek above the city of San Antonio to prevent future floods to the city of San Antonio and along the San Antonio River, one feature of the work being to determine the character of foundation that would be obtainable for building dams for these reservoirs.

"At a meeting of the Chamber of Commerce eight engineers volunteered their services in doing this research work or preliminary survey work, but the expense of such help as may be necessary and such material as they may require is to be borne jointly by the city and county to an amount not to exceed \$2500 each.

"I have some doubt as to whether this money can be appropriated at all for such purposes and if so, out of what fund it can be so appropriated, out of the general fund or road and bridge fund and I would thank you for your advice in this matter at the earliest possible time as it is very important and the people of this county are hurrying the matter with all possible haste."

The order, copy of which you enclose with your letter, contains the following:

"Flood Prevention Order Authorizing County Judge Augustus McCloskey for and in Behalf of Bexar County to Enter Into An Agreement With
City of San Antonio.

"In the matter of the making of a preliminary survey to ascertain the most feasible and practicable methods of preventing floods in the future, upon the motion of County Commissioner Jacob Rubiola, seconded by County Commissioner J. S. McNeel, all members of the court present voting 'aye'; it is ordered by the court that County Judge Augustus McCloskey for and in behalf of Bexar County, Texas, be and he is hereby authorized to enter into an agreement with the city of San Antonio, wherein Bexar County is to stand one-half of the expense in making a preliminary survey to ascertain and determine the most feasible and practicable methods of preventing floods in the future, at an expenditure by Bexar County of an amount not to exceed \$2500."

It is the opinion of this Department that the authority of the Commissioners' Court of your County to take such action is to be found in Article 2251, Revised Civil Statutes of 1911, which is in the following language:

"The municipal authorities of towns and cities, and commissioners courts of the counties wherein such towns and cities are situated, may co-operate with each other in making such improvements connected with said towns, cities and counties as may be deemed by said authorities and courts necessary to improve the public health and to promote efficient sanitary regulations; and, by mutual arrangement, they may provide for the construction of said improvements and the payment therefor."

Under this article of the statutes, as will be noted, Bexar County is authorized to co-operate with the City of San Antonio in making such improvements connected with the city and county as may be deemed by the municipal authorities and the commissioners' court *necessary to improve the public health and to promote efficient sanitary regulations*, and the city and county may make mutual arrangements for the payment therefor.

It is a well known fact that disastrous floods occur from time to time in Bexar County, and especially within the City of San Antonio, resulting in great loss of life and property, and it is known of all men that floods of this kind are detrimental to the public health

and sanitation. If there is anything that can be done to prevent or even minimize the danger incident to these floods, it ought, by all means, to be done, and as a general rule large undertakings of this kind can be undertaken and carried out only by some public or governmental agency. The Legislature evidently recognized this in enacting what is now Article 2251, quoted above.

You are, therefore, respectfully advised that by reason of Article 2251, the Commissioners' Court was within its lawful authority in passing the order under consideration.

Having conferred this authority upon the Commissioners' Court to act in behalf of the county, and having failed to designate any particular fund out of which the expenses of exercising such authority may be defrayed, the Legislature evidently intended that such expenses should be borne out of the general county fund, and we respectfully advise that this was the legislative intent.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2339, Bk. 56, P. 403.

OFFICERS—HOLDING TWO OFFICES—CONSTABLE AND TICK INSPECTOR—COUNTY OFFICER BEING INTERESTED IN COUNTY CONTRACT.

1. A person is not inhibited by the Constitution from holding, at the same time, the office of constable and the position of inspector appointed under the Tick Eradication Law.

2. A constable would not violate Article 376, Penal Code, by accepting and performing the duties of the position of inspector under the Tick Eradication Law.

AUSTIN, TEXAS, April 19, 1921.

Honorable F. M. Scott, District Attorney, Marshall, Texas.

DEAR SIR: Yours of the 9th instant, addressed to the Attorney General, was referred to me for attention and reply. Your inquiry reads as follows:

"I am desirous to know whether or not a man can hold the offices of constable and dipping inspector at the same time.

"The facts are as follows: L. A. Pope is constable of Precinct No. 6, Harrison County, Texas, and he has been appointed dipping inspector of Precinct No. 6, Harrison County, Texas.

"Please let me have your answer at the earliest possible convenience."

The first question to be determined is whether our State Constitution inhibits a person from holding or exercising at the same time the office of constable and the position of inspector appointed by the Live Stock Sanitary Commission, under and by virtue of what is known as the Tick Eradication Law.

Section 40 of Article 16 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, county commissioner, notary public, and postmaster, unless otherwise specially provided herein."

There is no doubt that a constable is an officer and is also a county officer.

State Constitution, Article 5, Section 24.

Revised Civil Statutes, Article 6030.

1916-18 Reports and Opinions of the Attorney General, pp. 449, 463, 474.

Broach vs. Garth, 50 S. W., 594.

No one would contend that a constable does not hold an office of emolument within the meaning of Section 40 above quoted, and it is not necessary to discuss this point further.

However, this Department is of the opinion that the position of inspector under the Tick Eradication Law is not an office of emolument and in fact is not an office at all, but rather a position of employment. Very often it is difficult to determine whether a given position is an office or not. It has been said by good authority that in the most general and comprehensive sense, a public office is an agency for the State and a person whose duty it is to perform this agency is a public officer. Stated more definitely, a public office is a charge or trust conferred by public authority for a public purpose, the duties of which involve their performance, the exercise of some portion of the sovereign power, whether great or small. A public officer is an individual who has been appointed or elected in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the public assigned to him by law. 23 A. and E. Ency. of Law, Second Edition, p. 322.

We quote the following from the above cited authority:

"There are numerous criteria which are not in themselves conclusive, yet which aid in determining whether a person is an officer and whether his employment is an office. Thus, a public officer is usually required to take an oath, and frequently has to give a bond. Usually an officer is entitled to a salary or fees, but this is not necessary. The term 'office' also embraces the ideas of tenure and duration or continuance. Generally speaking, one of the requisites of an office is that it must be created by a constitutional provision, or it must be authorized by some statute. Official or unofficial character is to be determined not by the presence or absence of an official designation, but by the nature of the functions to be performed. Designation by the law as an officer is, however, of some significance."

The Tick Eradication Law provides for the appointment of inspectors by the Live Stock Sanitary Commission. The commissioners' court of the county determines the number of inspectors and fixes the compensation of such inspectors. The inspectors are subject to discharge by the Live Stock Sanitary Commission, and are required to work under the direction and orders of said commission. Articles 7314i and 7314j, Vernon's Complete Statutes of 1920.

The Tick Eradication Law provides that the ascertaining of the presence of the fever carrying tick on any premises, places or live stock, or the ascertaining or exposure of premises, places or live stock to said fever carrying tick shall be done by authorized representatives or inspectors of the Live Stock Sanitary Commission, or by said commissioners. Also, that the commission shall direct persons, companies or corporations to dip their live stock under the supervision of an authorized inspector of the Live Stock Sanitary Commission, etc.

See Sections 15a, 15b and 15d of Chapter 38, General Laws, Third Called Session of the Thirty-sixth Legislature.

At no place in the law do we find that these inspectors are required to take an oath of office or execute an official bond, nor does the law provide for any particular term or tenure of office.

This Department is of the opinion that a position of this kind is a mere employment or appointment as distinguished from an office. It necessarily follows that it is our opinion that a person is not inhibited by Section 40 of Article 16 from holding, at the same time, the office of constable and the position of inspector under the Tick Eradication Law.

Section 55 of Article 16 is in the following language:

"The accounting officers of this State shall neither draw nor pay a warrant upon the treasury in favor of any person, for salary or compensation as agent, officer or appointee, who holds at the same time any other office or position of honor, trust or profit, under this State or the United States, except as prescribed in this Constitution."

This section has reference to offices, positions, etc., directly under the State government and has no application to the offices or positions under consideration.

A more serious question, in our opinion, is whether the constable would violate Article 376 of the Penal Code by accepting the position and exercising the duties of tick inspector. Article 376 reads as follows:

"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."

It is our opinion that the inhibition against any county officer being pecuniarily interested in "the purchase or sale of anything made for or on account of such county" would not prevent a constable from holding or exercising the position of tick inspector. Is such a position such a *contract* or other *work* as is within the contemplation of Article 376? The precise language is:

"Any contracts made by such county * * * 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."

It would seem that the rule of *ejusdem generis* applies and that the words "or any other work undertaken by such county" are limited to contracts or "work" like or similar to those specifically mentioned immediately preceding these words; that is, contracts or work similar to those "for the construction or repair of any bridge, road, street, alley or house." It is the opinion of the writer that a contract of employment of a tick inspector is not a contract similar to those

enumerated in the statute. To illustrate how strictly the court will apply this rule, we call attention to the following:

Where a statute used the expression "whenever a magistrate is informed upon oath that an offense is about to be committed against the person or property of the informant, or of another, or that any person has threatened to commit an offense," etc., the word "offense" last used refers back to the enumerated classes of offenses," that is, offenses against the person or property, and did not include other offenses. *Ex parte Muckenfuss*, 52 Tex. Cr. App., 467; 107 S. W., 1131.

The Penal Code of 1895, Article 199, prohibiting merchants, grocers or traders in any business whatsoever "or the proprietor of any place of public amusement" to remain open on Sunday, and defining the term public amusement as circuses, theaters and such other amusements as are exhibited and for which an admission fee is charged, did not prohibit the owner of a baseball park from permitting a game to be played on Sunday, since the words "such other amusements as are exhibited and for which an admission fee is charged" are limited to amusements of like or similar character as those named immediately preceding. *Ex parte Roquemore*, 60 Tex. Cr. App., 282; 131 S. W., 1101.

A statute prohibiting "any merchant, grocer, or dealer in merchandise or trader in any business" from having his place of business open on Sunday, did not include a farmer, as the word "trader" in that instance meant a trader of a similar kind to those mentioned in the statute. *Hanks vs. State*, 50 Tex. Cr. App., 577; 99 S. W., 1101.

Lewis' Sutherland Statutory Construction, Second Edition, Section 422, contains the following language:

"When there are general words following particular and specific words, the former must be confined to things of the same kind. This is known as the rule of *ejusdem generis*."

Where an act imposed a penalty on any person hauling "any timber or stone or other thing otherwise than upon wheeled carriages," it was held not to extend to straw, but was confined to things as weighty and as likely to cause injury to roads as timber or stone. Lewis' Sutherland's Statutory Construction, Second Edition, Section 423.

It was enacted that "no tradesman, artificer, workman, laborer or other person whatsoever shall do or exercise any labor, business or work of their ordinary callings upon the Lord's day." It was held that this language did not include a farmer or driver of stage coaches or attorneys. *Id.*; Section 424.

The words "other property" in an act enabling the owner of realty to sustain an action to recover timber, lumber, coal or other property severed from the realty, were held to be extended to include only articles of the same general character as those enumerated, such as slate, marble, iron ore, zinc ore and all other forms of mineral and ores, building stone and fixtures and machinery of every description, but the language would not include property such as growing crops. *Id.*, Section 427.

A statute of New York relating to offenses of the nature of bur-

glary enacted that the term "building" includes a railway car, vessel, booth, tent, shop or other erection or enclosure, but the general words were construed as limited to the same class of erections or enclosures already specified and did not include a vault intended and used exclusively for the interment of the dead. *Id.*, Section 428.

The rule is particularly applicable to penal statutes. *Id.*, Section 425.

An act for keeping in repair a harbor imposed certain duties enumerated in a schedule annexed on goods exported and imported. In the schedule under the head of "metals" certain specified duties were imposed on "copper, brass, pewter and tin, and *on all other metals not enumerated.*" It was held that the latter words did not include gold and silver, as gold and silver were not *ejusdem generis* with those enumerated.

Many more illustrations could be added, but these are sufficient to illustrate the rule. It is true there are exceptions to the rule and that the rule will not be invoked to defeat the clearly expressed intention of the Legislature. However, the present case in our opinion does not constitute an exception. There is no specially cogent reason for inhibiting a constable from holding this or other position, since he has nothing to do with the making of the contract of employment in behalf of the county or the Live Stock Sanitary Commission, and there is no incompatibility between the two positions. We are not called upon to pass upon the question whether the constable would be guilty of neglect of duty if he should accept the other position or vice versa. This would be a question of fact. For neglect of duty he could, of course, be removed. What we are passing upon is that there is no positive law or rule of public policy inhibiting the holding of the two positions.

We do not consider it necessary to discuss the argument that might be raised that the contract is not with the county, but with the Live Stock Sanitary Commission. Under the act the county pays the compensation of the inspectors and the commissioners' court determines the necessity, number and pay of inspectors. The contract is probably with the county and has been considered from that standpoint.

While our statutes provide that the rule of strict construction shall not be applied to criminal statutes, still it is well known that our Court of Criminal Appeals does apply the rule of strict construction. This naturally grows out of the provisions in our Constitution guaranteeing certain rights and privileges to the defendant in a criminal case. There being doubt as to whether the statutes denounce the transaction as a criminal offense, we are justified in resolving the doubt against it being such.

From the foregoing considerations, it is the opinion of this Department that a contract of employment of an inspector appointed by the Live Stock Sanitary Commission, under the Tick Eradication Law, is not such a contract as is contemplated by Article 376 of the Penal Code, and that therefore this article of the statute would not

make it unlawful for a constable to accept and perform the duties of the position of tick inspector.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2307, Bk. 55, P. 286.

OFFICERS—CONSTABLES—APPOINTMENT OF DEPUTIES.

1. Article 3903, Revised Civil Statutes of 1911, as amended, requiring application to be made by certain county officers to the commissioners court for permission to appoint deputies and authorizing such court to determine the number of deputies to be appointed and their compensation, has no application and does not govern in the appointment of deputy constables except in cities having more than 20,000 inhabitants according to the last United States census.

2. The authority for appointment of deputy constables except in such cities will be found exclusively in Articles 7137 and 7138, Revised Civil Statutes of 1911, and it is not necessary to make application to the commissioners court in the appointment of such deputies or to comply with Article 3903 in any manner.

3. In cities of more than 20,000 inhabitants according to the last United States census Article 3903 must be complied with in the appointment of deputy constables, provided that in no event can more than two be appointed in such cities because of the limitation in Articles 7137.

AUSTIN, TEXAS, March 10, 1921.

Honorable I. A. Whitus, County Attorney of Camp County, Pittsburg, Texas.

DEAR SIR: Your letter of February 8, 1921, addressed to the Attorney General, was referred to me for reply. The communication mentioned reads as follows:

"Can a constable appoint one deputy for his precinct? Also, can a constable be a deputy of a sheriff? If the statute does not authorize a constable to appoint at least one deputy, can he do so by making application and getting authority from the county judge?"

"Article 3881 mentions all the officers of the county including that of constable, but this article applies only to counties having more than 25,000 population, which our county does not. I have examined the law on this point, but it is not plain so I would be glad to have an opinion from you on the above questions."

Under date of the 4th instant I answered your question relative to a person at the same time holding the office of deputy sheriff and that of constable.

The remainder of your letter presents a somewhat more difficult problem. The provisions of the Revised Civil Statutes construed are Articles 3881 and 3903, as amended, on the general subject of deputies, and Articles 7137 and 7138, dealing specifically with the subject of deputy constables.

Articles 7137 and 7138 constitute a part of Chapter 2, Title 123, of the Revised Civil Statutes, said Chapter 2 being under the head "Of Constables, Election, Qualification, etc." Said Articles 7173 and 7138 are as follows:

"Article 7137. There shall be elected at each general election by the qualified

voters of each justice's precinct a constable for such precinct, who shall hold his office for the term of two years, and until his successor is elected and qualified; provided, that when in any such justice's precinct there may be a city of eight thousand or more inhabitants, such constable may appoint no more than two deputies, who shall qualify as required of deputy sheriffs."

"Article 7138. Be it further provided, that in cities and towns of twenty-five hundred or more inhabitants said constable may appoint no more than one deputy, who shall qualify in such manner as is required by law."

Article 3903 is a portion of Chapter 4, Title 58, said title being headed "Fees of Office" and said Chapter 4 being under the head "General Provisions." Article 3903, as amended by Chapter 32, General Laws, Third Called Session of the Thirty-sixth Legislature, provides that "whenever any officer *named* in Articles 3881 to 3886 shall require the services of deputies or assistants in the performance of his duties, he may apply to the county commissioners' court of his county to appoint such deputies and assistants * * * whereupon said court shall make its order authorizing the appointment of such deputies and fix the salary to be paid them and determine the number to be appointed."

Articles 3881 to 3886 do not mention constables except as follows: Article 3881 provides the maximum fees of all kinds that may be retained by certain named officers and contains this language: "constables, an amount not exceeding two thousand dollars per annum; provided, that this act shall not apply to justices of the peace or constables except those holding office in cities of more than twenty thousand inhabitants, to be determined by the last United States census."

Unless constables elsewhere than in cities of more than twenty thousand inhabitants are "named" in Article 3881, then Article 3903 has no application to such constables. Are such constables "named" in Article 3881? Let us examine carefully the language used in Article 3881 relative to constables. The exact language is, "constables, an amount not exceeding two thousand dollars per annum; provided, that this act shall not apply to justices of the peace or constables except those holding offices in cities of more than twenty thousand inhabitants," etc. It seems to the writer that this is tantamount to saying that "constables holding office in cities of more than twenty thousand inhabitants according to the last United States census, an amount not exceeding two thousand dollars per annum." It is believed that the language used in Article 3881 means exactly as indicated, and that therefore constables outside of cities of more than twenty thousand inhabitants according to the last United States census are not "named" in said Article 3881 within the meaning of Article 3903.

The point is settled beyond doubt, in the opinion of the writer, by the use of the following words in Article 3881, when we consider the history of this legislation, as it is perfectly legitimate to do: "provided that this act shall not apply to justices of the peace or constables except those holding offices in cities of more than twenty thousand inhabitants," etc.

It says "this act" shall not apply, etc. We will now show conclus-

ively that Article 3903 is a part of "this act" and therefore does not govern or apply as to constables except in the cities above mentioned.

Articles 3881 and 3903 were derived originally from an act of the Twenty-fifth Legislature. (Ch. 5, p. 5. First Spec. Ses.) Section 10 of this act prescribed the maximum fees to be retained by certain officers, naming them, and Section 12 of the same act provided that any officer "named in Section 10 of this act" should apply to the county judge, etc., whenever he desired to appoint deputies or assistants. The requirements are expressed in the same general language as now found in Article 3903. Section 10 contained this language: "*provided, that this act shall not apply to justices of the peace and constables, except those holding office in cities of more than 15,000 inhabitants, to be determined by the next preceding city election, etc.*" (The Italics are ours.) The language in Italics was carried forward in the revision of the Civil Statutes of 1911 and is now a part of Article 3881 except as to the number of inhabitants, which has been increased to twenty thousand. Therefore the expression "this act" used in Article 3881 includes Article 3903. This is necessarily true because the two articles were originally parts of the same act, and since the codifiers did not change the form of the statute in this respect we must ascribe to these words the meaning as originally intended.

This being true, it necessarily follows that the provisions of Article 3903 relative to the appointment of deputies do not apply to constables outside of cities of more than 20,000 inhabitants according to the last United States census.

Article 3903 not applying except in such cities, do Articles 7137 and 7138 apply? We think so. Said articles must exclusively govern in all instances except in cities of more than 20,000 inhabitants according to the last United States census, and in the latter mentioned instances said articles will govern as well as Article 3903.

We base this holding on the idea that the provisions of Article 3903, being upon a general subject, do not have the effect of nullifying Articles 7137 and 7138, the latter articles dealing with a more specific subject. The two different statutes are in *pari materia* and must be construed as if they were a single enactment.

It is true that the original statute requiring certain county officers to apply for the permission of the county judge to appoint deputies was a subsequent enactment to that concerning appointment of deputies by constables and now contained in the Revised Civil Statutes as Articles 7137 and 7138, and it is further true that said subsequent statute contained a clause repealing all laws and parts of laws in conflict therewith. But it is well known that this expression will not have the effect of repealing a former statute or any part thereof except in so far as the two statutes conflict. In fact such a repealing clause has been said by respectable authority to have little or no practical effect. The substance of Articles 7137 and 7138 was first enacted into law in an act presented to the Governor for approval May 8, 1897, and being Chapter 132, General Laws of the Thirty-fifth Legislature, Regular Session:

Articles 3903 and 3881 were first enacted (in substance so far as

your inquiry is concerned) by the same Legislature at a subsequent session. See Chapters 5 and 15 of the Acts of the Special Session, Twenty-fifth Legislature, adjourning June 20, 1897.

It is the opinion of this Department that this subsequent act, containing general provisions relative to the appointment of deputies, did not have the effect of repealing by implication the former statute relating specifically to the appointment of deputies by constables. A statute on a general subject will not repeal one upon a specific subject unless an intention to effect such repeal is clear. Moreover, repeals by implication are not favored in law, and statutes in pari materia will be construed as one act. Both statutes in this instance can stand, as there is not such a conflict between the two as to prevent them doing so.

Another cogent reason for holding that both statutes are law is that the codifiers of the Revised Civil Statutes of 1911 included both in the revision of 1911, and our civil courts (as distinguished from our courts in criminal matters), tend to hold that the Revised Civil Statutes of 1911 govern even as to new matter or matter omitted; that is to say, new matter included therein will be considered law and statutes omitted therefrom will be treated as repealed. See authorities cited on pages 563 and 623, Reports and Opinions of the Attorney General of Texas for 1918-20.

Articles 7137 and 7138 are law, therefore, and must be considered with Articles 3903 and 3881 as parts of the same code and in pari materia.

Our holding is consistent with that of the Court of Criminal Appeals in *Johnson vs. State*, 164 S. W., 836, in which it was said that:

"Articles 7137 and 7138 of the Revised Civil Statutes furnishes the only authority for a constable to appoint deputies."

The point decided was that in a justice precinct having no city or town containing as many as twenty-five hundred inhabitants there was no authority for a constable to appoint a deputy.

A similar question arose in this Department and a very exhaustive and well considered opinion was written by Assistant Attorney General C. W. Taylor in 1915 (Opinions of the Attorney General for 1914-16, page 563). The question arose under the statute relative to the appointment of deputies by sheriffs. The opinion held that Article 7125 of the Revised Civil Statutes of 1911, placing a limitation upon the number of deputies a sheriff may appoint, and Article 3903, providing that certain county officers shall make application to the county judge for authority to appoint deputies and directing the county judge to authorize the appointment of such number of deputies as in his opinion may be necessary, being in pari materia, should be construed together, and there being no irreconcilable conflict between the two, both will stand and the discretion of the county judge in permitting such number of deputy sheriffs as in his opinion may be necessary is limited by the provisions of Article 7125.

Our case is on all fours with the one considered in the opinion just referred to, so far as deputy constables in cities of more than twenty thousand inhabitants are concerned, and of course as to other deputy

constables Article 3903 could not have the effect of repealing Articles 7137 and 7138 in view of what we have said.

You are, therefore, advised that Article 3903, Revised Civil Statutes of 1911, as amended, does not govern and has no application in the appointment of deputy constables except in cities of more than twenty thousand inhabitants according to the last United States census, and that such appointments are governed exclusively by Articles 7137 and 7138; that in cities of more than twenty thousand inhabitants according to the last United States census Article 3903 must be complied with in the appointment of deputy constables and that such appointments are also limited by Article 7137.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2328, Bk. 55, P. 349.

OFFICERS—JUSTICES OF THE PEACE—OFFICE RENT.

1. The commissioners court is not authorized by law to furnish offices for justices of the peace except as provided in Chapter 94, General Laws, Regular Session of the Thirty-sixth Legislature, which statute requires that suitable places shall be provided and furnished in the courthouse for the holding of court by justices of the peace in the precinct where such courthouse is situated where there are more than seventy-five thousand inhabitants in such justice precinct.

2. In all other instances the commissioners court is without authority to furnish offices for justices of the peace and hence said court is not authorized to pay office rent out of county funds for justices of the peace.

AUSTIN, TEXAS, March 29, 1921.

Honorable O. H. Howard, County Auditor, Palo Pinto, Texas.

DEAR SIR: I have yours of the 16th instant, addressed to the Attorney General, requesting this Department to advise you whether the county auditor would be violating the laws to approve or countersign a warrant drawn on the county funds to pay office rent for a justice of the peace "in cities or towns of less than 7500 population." You state that the commissioners' court of your county agreed to allow twenty-five dollars per month for house rent for one of the justices of the peace and you desire to be advised whether you as county auditor would violate the law if you should approve or countersign a warrant drawn on the county funds to pay said office rent.

It goes without saying that you would not be authorized to countersign a county warrant unless such warrant were issued for a lawful purpose.

It is a fundamental rule that the commissioners' court is without power or authority to do anything unless the power or authority to do that thing is conferred upon said court by law. It follows that unless the law authorizes the commissioners' court to pay office rent for a justice of the peace, the commissioners' court has no such authority. We find no statute authorizing the payment of office rent of a justice of the peace by the county, and the only reference to the sub-

ject of furnishing an office for justices of the peace that we find in the statutes, is in Chapter 94, General Laws, Regular Session of the Thirty-sixth Legislature. Said chapter provides that:

"Hereafter the commissioners courts of the respective counties affected hereby shall provide and furnish suitable places in the courthouse of their respective counties for the holding of court by justices of the peace in the precinct where such courthouse is situated, where there are more than seventy-five thousand inhabitants in such justice precincts."

The emergency clause of the above mentioned act of the Legislature contains this provision:

"In larger justice precincts the expense of maintaining suitable places for the holding of court by justices of the peace is prohibitive, etc."

It would seem from this latter expression that the Legislature was under the impression that the commissioners' court was, before the passage of the act, without authority even to provide offices in the court house for justices of the peace, and that in order for the commissioners' court to have authority to furnish offices in the court house to justices of the peace in precincts having more than 75,000 inhabitants, it was necessary to expressly confer such authority upon said court. Having affirmatively conferred this authority upon the commissioners' court to be exercised under the circumstances and conditions mentioned in this act, this has the effect of negating the authority of the court to exercise like authority under any other circumstances or conditions.

Answering your question, therefore, we beg to advise that you would be without authority under the law to countersign a warrant drawn on county funds to pay office rent of justice of the peace in your county.

Very truly yours,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2354, Bk. 56, P. 376.

JUSTICES OF THE PEACE—FIRE INQUESTS.

Justices of the peace have the authority conferred by Chapter 2 of Title 13 of the Code of Criminal Procedure of 1911, notwithstanding the provisions of the State Fire Insurance Commission law, the latter being Chapter 90, Title 71, of the Revised Civil Statutes of 1911, as amended.

AUSTIN, TEXAS, May 28, 1921.

Honorable W. K. Jones, County Attorney, Del Rio, Texas.

DEAR SIR: I have yours of the 19th instant, addressed to the Attorney General, reading as follows:

"Please advise me whether justices of the peace still have the legal right to hold fire inquests under Article 1081 et seq., Vernon's Criminal Statutes, or was this authority superseded by the Act of April 2, 1913, Chapter 106, Laws of 1913, creating the State Fire Insurance Commission?"

The statute authorizing fire inquests to be held by justices of the

peace was enacted June 2, 1873, and is brought forward in the Code of Criminal Procedure of 1911 as Chapter 2 of Title 13.

The Fire Insurance Commission Law was originally enacted in 1910 (Acts Fourth Called Session, p. 125), and was amended by an act of 1913 (Acts Regular Session, Thirty-third Legislature, p. 195), and again amended in 1917 (Acts Thirty-fifth Legislature, Chapter 73).

We have examined these acts relative to the State Fire Insurance Commission and the duties of the State Fire Marshal and do not find any express provision repealing the law authorizing justices of the peace to hold fire inquests. The rule is that a statute will not be held to repeal a prior statute by implication unless the two statutes are in direct conflict and such conflict is irreconcilable. It is true that the State Fire Marshal is given authority to examine into the cause of fires, which is a similar authority to the one conferred upon justices of the peace to hold fire inquests. However, this does not necessarily render the two acts conflicting. There is no good reason why both the State Fire Marshal and a justice of the peace might not have this same authority. If it had been the intention of the Legislature to repeal the act conferring authority upon justices of the peace to hold fire inquests, it could have and doubtless would have expressed such intention in plain terms. In the absence of language disclosing such an intention, we must presume that it was intended that both acts should stand.

You are, therefore, advised that justices of the peace have the authority conferred by Chapter 2 of Title 13 of the Code of Criminal Procedure of 1911, notwithstanding the provisions of the State Fire Insurance Commission Law, the latter being Chapter 9 of Title 71 of the Revised Civil Statutes of 1911, as amended.

Very truly yours,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2329, Bk. 55, P. 402.

OFFICERS—SHERIFF AND JAILER—HOUSEHOLD FURNITURE.

County funds cannot be used to purchase household furniture for the sheriff or jailer over and above the compensation of such officials, even though a portion of the jail is used as a residence for such sheriff or jailer.

AUSTIN, TEXAS, April 6, 1921.

Honorable A. L. Liles, County Auditor, Bell County, Belton, Texas.

DEAR SIR: I have yours of February 15th, addressed to the Attorney General, presenting the following inquiry:

“What articles of household furniture should the county pay for in that portion of the jail set aside as a residence for the sheriff or jailer?”

We have made diligent search in the Constitution and statutes of this State and do not find that authority has been granted, either expressly or impliedly, for the county to use its funds to purchase articles of household furniture for the sheriff or jailer.

The only references to the sheriff to be found in the Constitution

are the following: In Article 8, Section 16, making the sheriff the collector of taxes in certain counties; Section 23 of Article 5, providing for the election of a sheriff, and Section 24 of the same article, providing for the removal of sheriffs and other officers.

Title 123, Revised Civil Statutes, provides for the election, qualification, etc., of a sheriff. Under Article 7127 guards for the safekeeping of prisoners may be employed. Article 5109 provides that each sheriff is the keeper of the jail of his county, etc. Article 5110 is to the general effect that jails must be constructed so that the death penalty may be executed therein. Under Article 5111 it is the duty of the commissioners' court to see that the jails of their respective counties are kept in a clean and healthy condition, properly ventilated, etc.

Article 2241, Subdivision 7 of the Revised Civil Statutes provides that the commissioners' court shall have power and that it is the duty of said court to provide and keep in repair court houses, jails and all necessary public buildings.

Article 5108 provides that the commissioners' courts of the several counties shall provide safe and suitable jails for their respective counties and shall cause the same to be kept in good repair.

Article 1397 is also upon the subject of providing a court house and jail for the county and said article requires offices of county officers to be provided at the county seat. Under Article 610 bonds may be issued for the erection of a county court house and jail, or either.

Turning to the Code of Criminal Procedure, we find that Article 52 thereof authorizes the appointment of a jailer who shall be responsible for the safety of the prisoners, etc. This article also requires the sheriff to exercise supervision and control over the jail. Article 49 provides that the sheriff is the keeper of the jail of his county and responsible for the safekeeping of all prisoners committed to his custody. Article 53 authorizes the renting of a suitable house when there is no jail, and employment of guards.

We have thus reviewed the provisions of our Constitution and statutes relating to the subject matter under investigation, and find no expression indicating an authorization to use county funds to purchase household furniture for the sheriff or jailer.

The sheriff might find it necessary to stay at the county jail, even at night, in order to perform his duties under the law, and the same may be said of the jailer. We are aware that in some instances the family of the sheriff or jailer occupies a portion of the jail with the sheriff or jailer. It does not follow, however, that the county would be authorized to pay for household furniture for the sheriff or jailer under these circumstances. Household furniture is a matter of personal expense; the need of it does not depend upon holding public office; its necessity is not incident to the performance of the duties of the office, but on the other hand the necessity would exist irrespective of the office of sheriff or jailer. It is contemplated that expenses of this nature are provided for in the salary or compensation of a public official unless the law states otherwise.

The idea is clearly stated by the Supreme Court of Idaho in Clyne,

Sheriff, vs. Bingham County (7 Idaho, 75; 60 Pac., 76), though we are not prepared to say that a statute authorizing the payment of "actual and necessary" expenses in performance of official duty would not in any circumstances authorize payment for bed and board. The court said:

"2. Are living expenses, such as charges for bed and board of county officials, under the statute, legal charges against the county? We think not. The statute contemplates that such expenses should be taken into consideration in fixing the salaries of county officials. *Stockey vs. Board (Idaho)*, 57 Pac., 312; *Reynolds vs. Board (Idaho)*, 59 Pac., 730. A man must eat and sleep, whether he is an officer or not; or, in other words, such expense is not 'actual and necessary in the performance of official duty,' within the meaning and intent of the statute; the same being a necessary ordinary expense, and not merely incidental to the performance of an official act. If such items are allowed to a sheriff while performing some of his official duties, it should be allowed to him and other officers for every day of the year in which they perform official duties. Such conclusion is not warranted by the statute. Therefore no officer should be allowed for expenses incurred for bed and board of himself."

We hold that there is no authority to use county funds to purchase household furniture for the sheriff or jailer over and above the salary or compensation of either such official. Expenses for such a purpose are not "actual and necessary expenses incurred by him in the conduct of his said office" within the meaning of Article 3897, *Vernon's Complete Statutes, 1920*, and the general authority to provide a court house and jail does not include authority to purchase household furniture for the sheriff or jailer and his family.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2420, Bk. 55, P. 182.

COUNTY OFFICERS—DEPUTIES AND ASSISTANTS.

The sheriff, and other county officers similarly situated, cannot have "assistants" in addition to the number of "deputies" which he may appoint under the law.

AUSTIN, TEXAS, May 20, 1922.

Honorable H. L. Washburn, County Auditor, Houston, Texas.

DEAR SIR: I am in receipt of yours of December 16, 1921, relative to our opinion No. 2403, dated November 28, 1921, addressed to Honorable Hubert Bookout, in which this Department held, among other things, that under Article 3903, Revised Civil Statutes of 1911, as amended, the county judge, with the consent of the commissioners' court may appoint a stenographer to be paid out of excess fees of his office due the county, if any.

Accompanying your letter is a typewritten argument taking issue with us in this matter. You think the statute should not be construed to authorize the county judge to employ a stenographer; that Article 3903 authorizing the appointment of deputies and assistants refers only to those officers having authority under some other statute to appoint deputies or assistants. To hold otherwise, you think,

would allow sheriffs and other officers similarly situated to appoint "assistants" in addition to the number of deputies which they may appoint under particular statutes relative to such officers. For instance, this Department has held that Article 7125 furnishes a limitation upon the number of deputy sheriffs that may be appointed notwithstanding the provisions of Article 3903; that permission of the commissioners' court must be had to appoint a deputy sheriff or deputy sheriffs but that in no event could more deputies be appointed than provided in Article 7125. In view of this it seems to be your opinion that the logic of our holding that a county judge may appoint an assistant as distinguished from a deputy, would lead to a holding that the sheriff would not be limited by Article 7125 as to the appointment of "assistants" since said Article 7125 uses the word "deputies" and does not use the word "assistants."

Your communication and brief have received the closest scrutiny and consideration, but we cannot concur in your opinion. It is true that a rather peculiar situation is presented. However, our first duty is to give meaning to the words of the statute as ordinarily understood. We believe our construction is more consistent with the probable intention of the Legislature as disclosed from the language used than would be a contrary ruling. To adopt your contention would be to construe Article 3903 as if it read as follows:

"Whenever any officer named in Articles 3881 to 3886, *except the county judge and justice of the peace*, shall require the services of deputies or assistants in the performance of his duties," etc.

We are unable to read into the statute the language in Italics making an exception of the county judge and justices of the peace. We are not justified in limiting the plain import of the words used under the circumstances. The statute refers to the county judge as well as to the other officers mentioned in Articles 3881 to 3886, because the county judge is one of those officers so named.

We do not think it necessarily follows from our ruling that all the officers mentioned may have assistants as distinguished from deputies, in addition to the deputies they may have. The statute evidently means that each of the officers mentioned may have either assistants or deputies but does not mean that they may have both. Those having deputies would scarcely need assistants because a deputy is in fact an assistant, he is more than an assistant, but an assistant is not necessarily a deputy. On the other hand, no intention is evidenced by the statute to authorize such an officer as the county judge to have a deputy. In the nature of things an assistant (for instance, a clerical assistant), is a more appropriate term to use in connection with the county judge's office than is "deputy," because whereas the county judge may properly have an assistant to assist him in ministerial and clerical duties, he is not presumed to have the authority to appoint a deputy as that term is ordinarily used, at least in the absence of clear language to that effect. Hence our conclusion that in the use of the term "deputies or assistants" the Legislature intended that the officers mentioned may have either deputies or assistants but not both deputies and assistants unless there might be some particular

statute relative to a particular officer indicating that such officer should have both deputies and assistants.

In answer to your inquiry, therefore, you are respectfully advised that in the opinion of this Department the sheriff cannot have "assistants" in addition to the "deputies" he may appoint under the law. You will, of course, apply this same rule to other county officers similarly situated.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2267, Bk. 55, P. 12.

OFFICERS—COUNTY SUPERINTENDENTS—HOLDING THE OFFICE OF
COUNTY SUPERINTENDENT AND TEACHING SCHOOL AT
THE SAME TIME.

1. Teaching school by the county superintendent in the public schools of the State might constitute official misconduct and neglect of duty, as defined by Article 6033 of the Revised Civil Statutes of this State, but this would be a question of fact to be determined in a particular case.

2. It is unlawful, as against public policy, for a county superintendent to hold a position as school teacher in a school where it is his duty to approve the contract or voucher of the teacher or teachers.

AUSTIN, TEXAS, January 4, 1921.

Miss Annie Webb Blanton, State Superintendent of Public Instruction, Capitol.

DEAR MISS BLANTON: I have yours of December 18, 1920, addressed to the Attorney General, reading as follows:

"I find that in several sections of the State, county superintendents have performed the duties of a county superintendent at a salary less than that permitted by the law, giving to the work of county superintendent only a small portion of their time, and, at the same time, holding a position as teacher in the schools of city or county and receiving a salary also for this work. In view of the fact that a person is not permitted to receive two salaries from the State, and teachers are paid from the State funds, I should like to have a ruling from you as to whether such a practice is legal."

It appears that we have no constitutional provision, or statute, in terms inhibiting a county superintendent from teaching in the public schools of the State. For your information we here call attention to some provisions of the Constitution and statutes which do not apply to the situation in hand, though they might be thought to be applicable by the casual observer.

Section 40 of Article 16 of the State Constitution is in the following language:

"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."

This section, as you will observe, applies only to offices of emolument. The county superintendency is without question an office of emolument, but an ordinary position of teaching school in the public

schools of this State is not an office. So this provision of the Constitution has no application.

Another section of the same article of the Constitution (Section 33) declares that:

"The accounting officers of this State shall neither draw nor pay a warrant upon the treasury in favor of any person, for salary or compensation as agent, officer, or appointee, who holds at the same time any other office or position of honor, trust, or profit, under this State or the United States, except as prescribed in this Constitution."

The inhibition here is aimed at the "accounting officers of the State," and such officers shall neither draw nor pay a warrant "upon the Treasury," under the conditions set forth. This Department has never considered this provision as applying to any positions, etc., where the incumbent is not directly employed and compensated by the State. For instance, it has been held by this Department that the county attorney's office does not come within the meaning of this provision. (1916-1918 Report and Opinions of the Attorney General of Texas, page 651.)

Article 376 of the Penal Code of Texas is as follows:

"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 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."

It would not be seriously contended that the matter inquired about by you is affected by this article of the statute.

So, as before stated, we have no statute or provision of the Constitution specifically prohibiting a person from holding the office of county superintendent of public instruction and at the same time teaching in the public schools of the State, unless the employment as teacher should be directly under the State government.

However, there are other phases to be considered, to wit: First, the matter of neglect of duty, and second, the holding of incompatible positions from the standpoint of public policy.

NEGLECT OF DUTY.

If a county superintendent should teach school to the extent that his official duties are neglected, he would be guilty of official misconduct, as defined by Article 6033 of the Revised Civil Statutes of this State. After providing that county officers (which term would include the county superintendent) may be removed for official misconduct, the statute defines the term "official misconduct" as follows:

"By 'official misconduct,' as used in this title with reference to county officers, is meant any unlawful behavior in relation to the duties of his office, wilful in its character, of any officer intrusted in any manner with the administration of justice, or the execution of the laws; and under this head of official misconduct

are included any wilful or corrupt failure, refusal or neglect of an officer to perform any duty enjoined on him by law."

The duties of the county superintendent are many, but I call your particular attention to the fact that that official has, 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 confer with the teachers and trustees and give them advice when needed, visit and examine schools and deliver lectures that shall tend to create an interest in public education. (Art. 2752, Revised Civil Statutes.) This article of the statutes contains the following language: "He shall spend as much as four days in each week visiting the schools while they are in session, when it is possible for him to do so."

He has many other duties, and it is difficult to understand how a county superintendent could hold a position of teaching in the public schools and at the same time not be guilty of official misconduct as defined by the statute above quoted. The fact alone that he is required to spend four days a week in visiting the schools when possible for him to do so would, it seems to us, preclude him from holding an ordinary position as teacher in the public schools of the State and at the same time perform his own official duties.

It would be, however, a question of fact as to whether in a particular case a county superintendent would be guilty of official misconduct through neglect of duty, under the statute, and the matter should be determined in connection with all the facts. The nature of the position of teaching will be considered in determining whether a county superintendent could hold such a position and at the same time not be guilty of neglect of official duty.

INCOMPATIBILITY.

There are certain positions of school teaching which are clearly incompatible with the office of a county superintendent; that is, it would be against good, sound, public policy to permit a person to hold and exercise any such position while holding and exercising the office of county superintendent, since in his capacity as county superintendent he would be called upon in certain instances to exercise authority with reference to the position of school teacher. Thus we find, by referring to the statutes, that it is made his duty to "approve all vouchers, legally drawn against the school fund of his county," and to "examine all contracts between the trustees and teachers of his county, and if, in his judgment, such contracts are proper, he shall approve the same." It was never contemplated by law that a county superintendent should approve his own vouchers and his own contract.

This Department passed upon an analogous case when it held that a person cannot at the same time hold the office of justice of the peace and that of county commissioner, on the ground of public policy. It was pointed out that a county commissioner passes upon certain reports, etc., of a justice of the peace, and it would not be proper for a person, as county commissioner, to pass upon his own acts as justice of the peace.

We do not consider it necessary to go through the statutes and ascertain whether there might not be other instances where the county superintendent would be precluded from teaching in the public schools on the ground of incompatibility, but we do state unhesitatingly that a county superintendent could not lawfully hold a position as teacher in a school where it is his duty to approve the contract or voucher of the teacher or teachers.

Any particular case should be considered in the light of the facts and the principles herein discussed.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2424, Bk. 57, P. 299.

RECORDS—SURVEYOR'S OFFICE—TRANSCRIBING—COMPENSATION.

Compensation for transcribing the records of the office of a county surveyor where such county has already been constituted a separate land district and already has its records as such, is governed by the provisions of Article 5334, and not by Article 5329, of the Revised Civil Statutes.

AUSTIN, TEXAS, March 31, 1922.

Honorable Nat H. Davis, County Attorney, Conroe, Texas.

DEAR SIR: The Attorney General is in receipt of your several letters, the last one dated the 24th inst., in which you state that the commissioners court of your county has passed an order providing for the transcribing of the records of the county surveyor's office and requesting his opinion as to whether this work should be paid for by your county under Article 5329 or under Article 5334 of the Revised Civil Statutes of 1911.

Said Article 5329 was taken from Section 6 of the Act of March 20, 1848, and reads as follows:

"The transcript of records and maps, together with the examination of the same, shall be paid for by the county for the benefit of which they are made, allowing ten cents for every hundred words in copying said records; and three dollars per day for each day the draftsman may be actually and necessarily engaged in copying maps, as provided by law; and clerks and district surveyors for examining and certifying transcripts of records shall have three dollars per day."

The title of this act from which this article is taken reads as follows: "An act to give to each corporate county in this State its own county surveyor, map and records."

The difficulty in construing this article results from the uncertainty as to what "records and maps" are referred to, and as to what is meant by the words "and clerks and district surveyors for examining and certifying transcripts of records."

By reference to this original act from which this article is taken it will be seen that its purpose was to provide a method by which a county constituting a part of a land district composed of a larger area might become within itself a separate land district, and that the purpose of this section was to provide pay for those who performed

certain services in preparing for such county a map of the county, and a copy of such parts of the records of the office of the district surveyor of the land district of which the county was a part as pertained to the lands situated in such county. As originally passed this act clearly had no reference to transcribing the records of the surveyor's office of a county that had already become a separate land district and had its records as such.

The original act provided for, (1) the appointment of a competent draftsman to make two maps of the county, (2) the appointment of some competent person to copy from the records of the district surveyor such records of his office as pertained to lands situated in the county, and (3) for examining, comparing and certifying to the correctness of such copies of such records by the county clerk and the district surveyor of the county and district from which such records were copied, and Section 6 of the act, now Article 5329, provided (1) that the draftsman who made the maps should be paid three dollars a day, (2) that the person copying the records should be paid eight cents a hundred words for such work, and (3) that the county clerk and district surveyor should be paid three dollars a day for comparing, examining and certifying the copies of the records so made. Thus considered in connection with the balance of the original act there can be no doubt as to what records were referred to by this section originally, nor as to what clerk and district surveyor were meant, nor as to the duties of such clerk and district surveyor. It clearly had no reference to the transcribing of the surveyor's records of a county that had already become a separate land district and that had its own records as such.

This section, however, has been brought forward into the Revised Civil Statutes entirely disassociated from the balance of the act; and, indeed, no other parts of the original act seem to have been brought into our present Revised Civil Statutes. It is our opinion, however, that it does not follow from this that this article must be given a different meaning, and that it must now be made to apply to the transcribing of the surveyor's records of a county that has already become a separate land district and has its own records as such, an application clearly not intended by it as originally passed.

In the first place, by reference to other provisions of the statutes, particularly Chapters 3 and 4 of Title 79, said Article 5329 being now a part of the latter chapter, we find that there may at this time exist in this State counties that do not constitute separate land districts and that may at any time, of course, desire to become such, and that will in such case be obliged to procure maps and records for that purpose. In such case the preparation and procuring of such records should be paid for as provided by this article.

In the second place, Article 5334, which constitutes the whole of the act of November 6, 1871, the caption of which is "An Act to provide for transcribing the surveyor's records," expressly provides for the transcribing of the surveyor's records of a county upon order of the commissioners' court, and prescribes the compensation for same. Laws of Texas, Vol. 7, p. 20. Said article reads as follows:

"Whenever the county commissioners court of any county shall deem the same

necessary, they shall order the surveyor's records to be transcribed in good and substantial books, in a plain hand, by the surveyor or special deputies sworn to make true copies of the same, for which services they shall be allowed not more than ten cents per hundred words, to be paid out of the county treasury."

In such case, that is, in the matter of transcribing the surveyor's records of a county that has already become a separate land district and already has its surveyor, county map and surveyor's record, there can be no occasion for a draftsman to prepare a map of the county, for obtaining a copy of such records from the office of the surveyor of the land district of which the county may have constituted a part as pertain to the lands in such county, nor, of course, for having such copies examined, compared and certified by the county clerk and district surveyor of the land district of which such county may have formerly constituted a part. In such case such county is already a separate land district and has its own records, and the work to be done and paid for is the matter of transcribing its own records.

It is our opinion, therefore, and you are so advised, that the transcribing of the records of the surveyor's office of your county should be done and paid for under said Article 5334 and not under said Article 5329.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2428, Bk. 57, P. 41.

COUNTY SURVEYOR—LICENSED LAND SURVEYOR—RECORDING FIELD NOTES AND PLATS.

1. Valid field notes, otherwise properly recorded in the surveyor's records, constitute a legal record of same although not indexed. Such records are not required to be indexed.

2. A licensed land surveyor, under the provisions of Chapter 67, page 173, General Laws, Second Called Session, Thirty-sixth Legislature, has the authority, and it is his duty, to record in the county surveyor's records of the county in which the land is situated the field notes and plat of each land survey made by him.

3. It is not clear that pasting field notes and plats by a surveyor upon the surveyor's records constitutes the recording of such field notes and plats as contemplated by our statutes, and such officers are advised to transcribe or copy field notes and plats upon the pages or leaves of their records with pen and ink, or typewriter, or in print, or a combination of these methods, so that the record, when so made, will be a true copy of the original field notes.

AUSTIN, TEXAS, April 28, 1922.

Honorable John R. McGee, County Attorney, Lubbock, Texas.

DEAR SIR: The Attorney General is in receipt of yours of June 6, 1921, in which you request his opinion upon the following questions:

"1. Is it lawful to paste typewritten sheets with field notes onto the regular field note record books of the county surveyor?"

"2. Is same legal without indexing them?"

"3. Is it lawful for a State licensed land surveyor to make out field notes and have other parties than himself paste them in county surveyor's records?"

"4. Do you interpret the above mentioned act to give said licensed surveyor authority to record (properly or otherwise) field notes in the county surveyor's records?"

"5. Is it legal to paste maps in surveyor's records?"

We answer your second question in the affirmative. There is no statute requiring the surveyor's records to be indexed, and where there is no statute requiring a record to be indexed it is not necessary that an instrument recorded therein should be indexed before it can be considered as recorded. Ruling Case Law, Vol. 23, pp. 190 et seq.

We answer your fourth question in the affirmative. This answer is based upon the plain provisions of Sections 6, 7, 8, and 10 of Chapter 67, page 173, General Laws, Second Called Session, Thirty-sixth Legislature. This provision of this act does not contravene Section 44 of Article 16 of our State Constitution.

Your first and fifth questions and your third question in part, present a matter that has never been passed upon either by the courts of this State or by this Department. We quote, however, the following from the texts cited:

"The several recording acts point out generally or sometimes with considerable detail the manner in which a record must be made, and as to this matter the statutes in the several jurisdictions vary. Recording means the copying of the instrument to be recorded into public records in a book kept for that purpose, by or under the superintendence of the officer, appointed therefor, and in view of the purpose to be subserved, which is the making of accurate, durable official copies of such instruments, the copy should be made with ink of non-fading quality, and a copy made in pencil or other material that will not permanently remain is not within the spirit of the recording act. So it has been held that a map pasted between the leaves of the recorder's book is not properly recorded." R. C. L., Vol. 23, p. 182, Sec. 38.

"Record. Copying an instrument into the public records in a book kept for that purpose by or under the superintendence of the officers appointed therefor." Cyc., Vol. 34, p. 576.

"The object of a record is not only to give an instrument perpetuity, but also publicity, and this must be done by accurately transcribing it into a book kept for that purpose." Cyc., Vol. 34, p. 588.

The case of Sawyer vs. Adams, 8 Vt., 172, 30 Am. Dec., 459, is not exactly in point here since it turned upon the question as to whether or not the instrument in question was recorded in the proper book, but in the course of the opinion that court uses language which aptly indicates what is ordinarily and usually meant by the verb "record" as used in statutes of this character. This language is as follows:

"On the first particular there is but little doubt that recording means the copying of the instrument to be recorded, into the public records of the town in a book kept for that purpose, by or under the superintendence of the officer appointed therefor."

In the case of Pawlette vs. Sandgate, 17 Vt., 619, the question was raised as to whether or not a certain instrument required by the statutes of that State to be recorded, and having on it only the endorsement by the clerk "Rec'd into record, Oct. 9, 1807," was admissible in evidence for the purpose of showing when the instrument was recorded. On this point the court says:

"This could not be regarded as a record. If there was not originally a set-

tled and well-defined meaning of the term, there must be at this time; and it is hardly to be expected that there can be any different understanding as to what the term imports. The object of a record is not only to give the instrument perpetuity, but publicity; and it is now well understood, that that is to be done by transcribing the paper into book kept for that purpose."

The only reported case we have been able to find that bears upon the exact question of the pasting of instruments upon the record books is that of *Caldwell vs. Center*, 30 Cal., 539, 89 Am. Dec., 131. This was a case where one claimed land under a deed describing same as follows: "Known as lot No. 1 in the subdivision of the tract of land lying on the new county road, and known as Folley's Tract, the map of which is duly recorded in the recorder's office of the county of San Francisco reference to which is here made." It was held that this description was not sufficient to designate and attach itself to any particular tract of land without the aid of other evidence. The only evidence introduced for this purpose was a map from the recorder's office and a map from the surveyor's office, and parol testimony in explanation of the latter map. Objection was made to the admission in evidence of the map from the recorder's office upon the grounds, among others, that "it was made with pencil and not with ink," and that "it is pasted in between the leaves of the book, but not recorded, the map from the surveyor's office was held inadmissible for reasons not here in point. With respect to the map from the recorder's office the court says:

"The objections should have been sustained. Had the deed referred to a map to be found in that place and condition it would have been admissible in evidence, for it would have constituted in effect a part of the deed as much so as if it had been copied into it. (*Vance vs. Force*, 24 Cal., 144, and cases cited.) But the deed calls for a map *duly recorded*, in the recorder's office, and by the utmost stretch of liberality the one produced can not be regarded as recorded. The act concerning these records provides that the several instruments entitled to record shall be recorded in 'large and strong bound books and in a fair, large and legible hand.' The necessary implication from this provision is that the instrument must be *copied* into the proper book of record; and in view of the purpose to be subserved by the recording of the several classes of instrument-mentioned in the act—making and preservation of accurate and durable copies of such instruments—a copy made in pencil or other material that would not permanently remain would not be within the spirit of the act. The map should for these reasons have been excluded."

In view of these authorities, and bearing in mind the several provisions of our statutes providing for and requiring the recording of field notes and plats by surveyors, particularly Articles 3695, 5303, 5305, 5307, 5336 and 5337, and the provisions of Chapter 67, page 173, General Laws, Second Called Session, Thirty-sixth Legislature, and since we do not find that the courts of this State have ever passed upon this question, you are advised that in our opinion our statutes upon this subject indicate that the original field notes should be transcribed or copied upon the leaves or pages of the proper record book of the surveyor's office, either with pen and ink, or typewriter, or in print, or a combination of these either by or under the personal supervision and authority of the official surveyor making the survey. This is at least the safe course to pursue, both for the surveyor and for those for whom they make the survey.

We are not prepared to say that field notes properly transcribed

or copied onto a separate sheet of paper and such sheet of paper thereafter pasted by the proper surveyor onto a sheet or page of the proper record book of the surveyor's office would not for any purpose constitute a recording of such field notes, but in view of the authorities herein cited and our statutes upon the subject, as well as our statutes on analogous subjects, there may at least be some question as to whether or not such a course would constitute a compliance with our statutes on this subject.

In passing upon this question we have also considered the line of cases indicated by *Billingsley vs. Houston Oil Company*, 182 S. W., 373, and authorities there cited. That line of cases is not exactly in point but might be taken as indicating by analogy that the duty and responsibility of recording field notes rests upon the surveyor, that the party for whom the survey and field notes are made may not be required to see that such duty is properly performed, and that the party for whom the survey is made, and others interested therein, might not be deprived of valuable rights because of the failure of the surveyor properly to record his field notes and plat. This, however, to whatever extent true, could not be availed of by the surveyor as in any way justifying or excusing this failure properly to record his field notes and plat.

In further answer to your third question you are advised that it is immaterial who performs the physical act of copying or transcribing field notes and plats upon the record books. This may be done by the surveyor who made the survey and prepared the field notes and plat, or by any one else. This work, however, if not actually done by such surveyor, must be done under his personal authority and supervision, and when done such surveyor himself must officially attest the correctness of the record and make proper certificate with respect thereto.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2370, Bk. 56, P. 348.

OFFICERS—SUPERINTENDENT OF BLIND ASYLUM—AUTHORITY TO
APPOINT EMPLOYEES.

The Superintendent of the State Blind Asylum has authority to appoint or remove the subordinate officers, the teachers and other employees, without the consent or approval of the State Board of Control.

AUSTIN, TEXAS, August 9, 1921.

Honorable W. C. Carpenter, Member House of Representatives, Capitol.

DEAR SIR: This is in response to your inquiry of even date, addressed to the Attorney General, reading as follows:

"Will you not do me the kindness to give me your construction of Article 184, Revised Civil Statutes of Texas, relating to the power of the Superintendent of the Blind Asylum in the appointing and discharging of subordinates?"

"Has any board, or individual, other than the superintendent, the right or power to appoint or discharge any teacher or other employee of said institution?"

The act of the Legislature creating the State Board of Control is Chapter 167, General Laws, Regular Session of the Thirty-sixth Legislature. That portion of the act material to your inquiry is Section 9, reading as follows:

"The board of managers for each and all of the asylums of this State, including the Blind Asylum, Lunatic Asylum, the Deaf and Dumb Asylum, State Orphan's Home, the Asylum for the Deaf, Dumb and Blind for Colored Youths, the State Colony for Feeble-Minded, the board of trustees or managers for the Confederate Home, the State Epileptic Colony, the Confederate Woman's Home, the Home for Lepers, and the Anti-Tuberculosis Colony, and governing boards, trustees, or managers of the State Juvenile Training School and the Girls' Training School for each and all, whether especially named herein or not, abolished by this act, and all laws and statutes providing for the creation of such boards and their appointments are repealed.

"And all statutes regulating and governing the Lunatic Asylum of this State, the Blind Asylum, the Deaf and Dumb Asylum, the Orphans' Home, the Deaf and Dumb and Blind Asylum for Colored Youths, the State Colony for Feeble-Minded, Confederate Home, the Epileptic Colony, Confederate Woman's Home, the Home for Lepers, and the State Tuberculosis Sanatorium, the State Juvenile Training School, and the Girls' Training School, are made applicable to the Board of Control hereby created, and the administration of all of said statutes relating to said institutions, including Title 10, Revised Civil Statutes of the State (1911), including Chapter 163, Acts of the Regular Session of the Thirty-third Legislature, Chapter 36, General Laws, passed by the Regular Session of the Thirty-second Legislature; Chapter 77, General Laws, passed by the Regular Session of the Thirty-second Legislature, and Chapter 64, General Laws, passed by the Legislature, Session of the Thirty-third Legislature, and all other laws relating to the institutions named, whether here enumerated or not, are hereby made to relate and govern the Board of Control hereby created, and the administration of each and all of said statutes, and the institutions and departments to which they relate, is hereby placed under the Board of Control created by this act; and the Board of Control hereby created shall exercise all the powers and authority heretofore conferred by law to the boards of managers and trustees of the various institutions and departments named under this section."

It will be noted that the Board of Control has the same authority over the Blind Asylum as the Board of Trustees thereof had under prior laws. It becomes necessary, therefore, to examine the statute applicable to the Blind Asylum in order to ascertain the relative authority of the State Board of Control and the superintendent of the asylum.

Article 171 of the Revised Civil Statutes of 1911 provides in substance that the general control, management and direction of the affairs, property and business of the Blind Asylum shall be vested in a board of trustees appointed by the Governor by and with the advice and consent of the Senate.

Article 175 is in the following language:

"The boards of trustees shall have power—

"1. To examine and pass upon all accounts and expenditures of the superintendents, and to approve or disapprove the same.

"2. To make all contracts and necessary arrangements for the erection of any buildings, or the making of any improvements, upon the grounds of the asylum."

Article 181 provides for the appointment of a superintendent by the board of trustees and is in the following language:

"The board of trustees of each of said asylums, respectively, shall elect a

superintendent of each of said asylums, who shall hold his office for the period of two years. Each of said superintendents shall have had special advantages and practical experience in the management of the persons committed to his charge by virtue of his appointment."

Article 182 reads as follows:

"The superintendent of each of said asylums shall, within twenty days after notification of his appointment, enter into bond in the sum of ten thousand dollars, payable to the State, with two or more good and sufficient sureties to be approved by the Governor, conditioned for the faithful performance of all the duties of said office; and he shall also take the oath prescribed by the Constitution, which oath and bond shall be filed in the office of the Secretary of State."

Article 183 provides that the board of trustees of each of said asylums shall have power to remove the superintendent for good cause only, then follow Articles 184, 185, 186 and 187, which are as follows:

"Art. 184. The superintendent shall be the administrative head of the asylum for which he is appointed, and shall have the power—

"1. To establish such rules and regulations for the government of the institution as, in his judgment, will best promote the interest and welfare of all who may be placed in his charge.

"2. Where not otherwise provided by law, to appoint the subordinate officers, the necessary number of teachers and all other employes, and, subject to the approval of the board of trustees, to fix their salaries.

"3. To remove at his discretion any officer, teacher or employe who does not discharge his duty, or whose conduct may be such as to endanger the morals of the pupils or the best interests of the asylum.

"Art. 185. The superintendent shall also have the care and custody of the buildings, grounds, furniture and other property pertaining to the asylum, and shall act as the general financier and purchasing agent of the asylum for all supplies not furnished by contract in accordance with the provisions of Chapter 1 of Title 125.

"Art. 186. At each regular meeting of the board of trustees, the superintendent shall present an itemized account of all receipts and expenditures by him on account of the asylum, which account shall be verified by his own affidavit; and for any expenses other than the supplies provided for in Chapter 1 of Title 125, the Comptroller shall not draw his warrant upon the Treasurer, unless the account upon which such warrant is drawn is certified as correct and just by the superintendent and is approved by the president of the board of trustees.

"Art. 187. On the first days of January and July of each year, the superintendent of each asylum shall report to the Governor, under oath, a full statement of all moneys and choses in action received by him and disbursed or otherwise disposed of; and, on the first day of November of each year he shall make his annual report to the Governor, showing in detail the operations of the institution for the year, accompanied with such suggestions and recommendations as he may deem important to the well-being of the institution over which he presides."

A reading of the statutes herein referred to discloses that the superintendent of the Blind Asylum is an officer of the State government whose term is two years; that he takes an oath and executes a bond and is removable for good cause only. He is the administrative head of the Blind Asylum, being authorized to establish rules and regulations for the government of the institution. As above appears, his power to appoint subordinate officers, teachers and other employes is conferred in the following language:

"2. Where not otherwise provided by law, to appoint the subordinate officers, the necessary number of teachers and all other employes, and *subject to the approval of the board of trustees, to fix their salaries.*

"3. To remove at his discretion any officer, teacher or employe who does not discharge his duty, or whose conduct may be such as to endanger the morals of the pupils or the best interests of the asylum."

It is the opinion of this Department that it was the intention of the Legislature to confer upon the superintendent the authority to appoint subordinate officers, necessary teachers and all other employees, without the consent or approval of the board of trustees, which, of course, means now without the approval or consent of the State Board of Control, since the State Board of Control has the same authority and power as was conferred by law upon the board of trustees. This legislative intent is made clear from the fact that Article 184, Subdivision 2, provides that the fixing of the salaries shall be subject to the approval of the board of trustees, while it does not so provide with reference to the appointment of subordinate officers, teachers and other employees. The Legislature evidently understood that the language used in conferring appointive authority upon the superintendent was sufficient to authorize him to appoint these officials and employees without approval of the board of trustees, and that, therefore, in order to require him to have the approval of the board of trustees in fixing salaries, it was necessary to expressly state in the statute that the fixing of the salaries should be subject to the approval of the board of trustees.

It is true that Article 171 provides that the general control, management and direction of the affairs, property and business of certain institutions, including the Blind Asylum, shall be vested in a board of trustees. However, this is a general provision which must give way to the specific provision conferring appointive power upon the superintendent, for it is a well settled rule of construction that where a general provision and a specific provision conflict, the specific provision must prevail.

You are, therefore, advised that the superintendent of the Blind Asylum has authority without consent or approval of the State Board of Control, to appoint subordinate officers, necessary number of teachers and all other employees of the Blind Asylum under his superintendency. The statute so provides "except as otherwise provided by law," and we do not find any other provision prescribing any other method of appointment of subordinate officers, teachers and employees of the Blind Asylum. The same unqualified authority (so far as permission of the Board of Control is concerned), is conferred upon the superintendent to remove such officers, teachers and employees.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2400, Bk. 56, P. 332.

OFFICERS—RESIGNATION—RIGHT TO WITHDRAW RESIGNATION.

Superintendent of the State Institution for the Training of Juveniles may withdraw resignation before it becomes effective.

On November 18, 1921, C. E. King, superintendent of the above named insti-

tution, tendered his resignation in writing to the State Board of Control effective at the end of sixty days from date. On November 27, 1921, he sent a telegram to said board withdrawing the resignation, reciting therein that the board had not accepted his resignation. Held that the withdrawal was effective; that the acceptance or non-acceptance of the resignation by the board was not controlling; that the officer had a right to resign without acceptance; that since the resignation by its terms was not to take effect until sixty days hence, the matter was within the control of the officer in so far as his rights to the office were concerned and he could at any time before the expiration of the sixty-day period withdraw the resignation.

AUSTIN, TEXAS, November 20, 1921.

Honorable S. B. Cowell, Chairman State Board of Control, Capitol.

DEAR SIR: You request on behalf of your board an opinion as to the present status of the office of Superintendent of the State Institution for the Training of Juveniles, located at Gatesville, this State. The facts are as follows:

On November 18, 1921, C. E. King, who was on and prior to that date superintendent of the institution just above named, tendered to your board, in writing, a resignation of his office. Mr. King sent the board a lengthy communication but in so far as material his resignation was couched in the following language:

"This letter conveys to you my resignation as Superintendent of the State Juvenile Training School, effective at the end of the sixty-day period from the date hereof which the law contemplates that I should have while making arrangements to sever my connection and that you should have within which to perfect your plans in regard to my successor."

On November 27, 1921, Mr. King sent to the board a telegram withdrawing his resignation, as follows:

"Under date of November 18, 1921, I tendered you my resignation as Superintendent of the State Juvenile Training School. You have not accepted my resignation. Inasmuch as I think the conditions which were assumed when I tendered the resignation do not and did not in fact exist and because of developments since the resignation was tendered, I hereby withdraw my proffered resignation and respectfully ask that you consider it as no longer of any effect. This is intended as a complete and final withdrawal of my resignation, but I shall of course write you fully."

The sole question for determination is whether there is a vacancy in the office, in view of the incumbent's withdrawal of his resignation, so as to justify or make necessary the appointment of a successor.

While not really material, as will presently appear, it may be mentioned that at the time of the receipt of the message of withdrawal the board had not acted on the resignation; that is, it had not formally accepted the resignation. However, on November 29th, two days after the date of the message of withdrawal, the board did formally accept the resignation.

The authority to appoint the Superintendent of the State Institution for the Training of Juveniles is vested in the Board of Control. (Arts. 5223, 5225, 7150½h, Vernon's Complete Statutes, 1920). Beyond question this superintendency is an office, so that the question will be controlled by the rules of law applicable to resignations of officers generally.

In England the rule prevailed that a public officer had no right to resign without the consent of the appointing power.

Throop, Public Officers, Sec. 409.
A. & E. Ency. of Law, Title Public Officers.

But the rule does not prevail with unanimity in the United States, the courts in some instances adhering to the ancient English rule while in others holding that a public officer may resign at will. Mr. Throop says that the latter doctrine was first laid down by Mr. Justice MacLean in *United States vs. Wright*, 1 McL. (U. S.), 509. (Throop, Sec. 410.) In the case mentioned Mr. Justice MacLean said, in part:

"There can be no doubt that a civil officer has a right to resign his office at pleasure, and it is not in the power of the executive to compel him to remain in office. It is only necessary that the resignation should be received, to take effect, and this does not depend upon the acceptance or rejection of the resignation by the president."

An exhaustive resume of the authorities upon this and the kindred question as to the right to withdraw a resignation will be found in the following volumes of L. R. A.:

- 23 L. R. A., page 681.
- 16 L. R. A. (N. S.), page 1058.
- 18 L. R. A. (N. S.), page 1210.
- 1917F., L. R. A., page 547.

In some cases a distinction is made between the interests of the public and the rights of the officer in considering the right of the officer to resign, and as we think, properly so. The question of the duty of the officer to continue to perform the duties of his office until a successor is chosen and qualifies is not to be confused with the question of the right of the officer to relinquish the office in so far as his own rights thereto are concerned.

As before stated, there is a conflict in the decisions of the American courts as to the right to resign without consent of a superior. It will be found that some of the cases held that a resignation is not effective until accepted by the appointing power and others to the contrary. The latter doctrine is, in our opinion, the correct one, and the law in this State. In so far as the rights of the officer are concerned, there is no good reason for holding he cannot resign at will. The right to an office is a valuable right in law, and why should he not be permitted to relinquish it? The Court of Appeals of this State in the year 1885, in *Byars vs. Crisp*, 2 Willson Civ. Cas., Secs. 707, 708, when White, Hurt and Willson constituted the court, upheld the absolute right of the county judge to resign his office, and held that the validity of the resignation did not depend on its being accepted. We quote from the court's decision as follows:

"Sec. 708. Resignation of office; when it takes effect to create a vacancy. If, therefore, the resignation of the county judge created a vacancy in that office, before the election of the special judge, such election was without authority of law, and the proceedings of the term of the court held by him are null and absolutely void. Did the resignation create a vacancy, and at what time? We are not aware of any decision of the courts of this State bearing upon the question. There can be no doubt that a civil officer can resign his office at pleasure. (U. S. vs. Wright, 1 McLean, 509.) But when does the resignation take effect so as to create a vacancy? In *Williams vs. Pitts*, 49 Ala., 402, it was said. 'When an officer transmits an unconditional resignation, which he intends shall reach the officer or authority intended to receive it, he resigns. He has given formal expression to his will, and sent away a notice of it to whom it may

concern. There is nothing more for him to do. Nobody else is authorized to accept it. It needs no acceptance.' (Citing *Nourse vs. Clarke*, 3 Nevada, 566; *People vs. Porter*, 6 Cal., 26.) In *U. S. vs. Wright*, supra, it was said: 'It is only necessary that the resignation should be received to take effect, and this does not depend upon the acceptance or rejection of the resignation.' In *The People vs. Porter*, supra, it was held that the tenure of office depends upon the will of the incumbent during his term, and that to render his resignation effectual, it was not necessary that it should be accepted. But upon this point the authorities are not uniform. In *State vs. Boecker*, 56 Mo., 17, it was held that a resignation is not in general complete, until it has been accepted by the authority capable of receiving it, with the knowledge and consent of the person resigning. But in that case, it is to be observed, the resignation by its terms was to take effect in future, and in such cases a different rule from that which governs an unconditional *eo instante* resignation, seems to obtain. In Iowa and Indiana it has been held that when a written resignation is tendered to the proper authority, and filed by him without objection, the office becomes vacant. (*Gates vs. Delaware*, 12 Iowa, 405; *State vs. Hauss*, 43 Ind., 105.) And in Illinois it was held that a resignation which had been received by a court, and filed by the clerk, was to be considered as accepted without an entry of an order to that effect. (*Pace vs. People*, 50 Ill., 432.) We conclude that the correct rule is, that when an officer delivers his unconditional resignation to the proper authority, to take effect at once, it is effectual without acceptance, and the office is vacant. This being our view of the law, we hold the resignation of the county judge created a vacancy in that office, at once, which could only be filled by the commissioners court of the county; and that during the existence of such vacancy there was no authority of law for the election of a special judge of said county court; and that the judgment and other proceedings of the special judge in this case are void."

The case of *McGhee vs. Dickey et al.*, 23 S. W., 404, by the Court of Civil Appeals, is not to be considered an authority to the contrary of the decision above mentioned. In the *McGhee vs. Dickey* case the county judge had tendered his resignation to the commissioners' court, but later at the instance of the commissioners' court withdrew his resignation. The court held that in view of the constitutional provision requiring performance of duties until qualification of a successor, the acts of the county judge after withdrawal of the resignation were valid. The same holding would probably have been made in the *Byars vs. Crisp* case, supra, had the question been involved. The question in the Court of Appeals case was whether there was a vacancy authorizing the appointment of a successor, while the question before the Court of Civil Appeals in *McGhee vs. Dickey* case was as to the validity of the acts of the officer in view of his resignation. There could be a vacancy authorizing an appointment to fill it, and at the same time the acts of the person resigning would be valid as to third parties. So that the conflict in the two cases is more apparent than real. Moreover, the Court of Civil Appeals in the *McGhee vs. Dickey* case held that if they were incorrect in holding that the officer could not arbitrarily dispense with his duty to perform the duties of the office, still the action of the commissioners' court in inducing the county judge to withdraw his resignation was tantamount to an appointment to fill the vacancy.

Without an extensive discussion of the authorities, it is the opinion of this Department that Mr. King had the right to resign his office and that the validity of the resignation was not dependent upon acceptance by the Board of Control. Therefore, had Mr. King re-

signed, effective immediately, or if the period had expired at the end of which his resignation was to be effective, the right to the office would have been relinquished and beyond the control of Mr. King and his attempt to withdraw the resignation would have been a nullity.

However, the resignation, according to its express terms, was not to take effect until at the end of sixty days after date and the sixty day period had not expired at the time of the withdrawal of the resignation. Therefore Mr. King had not on the date of the withdrawal relinquished the office. A vacancy had not occurred and the authority of appointment of a successor had not accrued to the Board.

Under these facts, you are respectfully advised that the withdrawal of the resignation was valid and there now exists no vacancy. The officer having the unqualified right to relinquish his right to the office irrespective of acceptance or non-acceptance by the Board, the matter was within his control until the resignation should actually take effect. He had the right to resign and after the taking effect of his resignation the office would be beyond his reach, but until such time there is no actual resignation: it is not much more than an announcement of intention to resign sixty days hence.

Ruling Case Law, Vol. 22, page 559, in so far as the facts involved in this opinion are concerned, correctly states the rule as follows:

"Apparently a resignation to take effect in the future may be withdrawn prior to the time of its taking effect, even against the will of the body to which it is tendered, and which has accepted it, provided that such acceptance is not necessary to render it effective."

In this connection see the case discussed in the note in 16 L. R. A. (N. S.), 1058, and the case of the State of Nevada vs. Murphy, 18 L. R. A. (N. S.), 1210. The writer has not found any case holding that an officer is without power to withdraw his resignation before it takes effect in any jurisdiction where the rule obtains that the validity of the resignation does not depend upon acceptance. Hence we are of the opinion that the quoted language, above, from Ruling Case Law, states the correct rule.

From the court's opinion in State of Nevada vs. Murphy, supra, in which a similar state of facts to ours was involved, we quote the following:

"The resignation of respondent being conditional, and not to take effect except upon certain contingencies and at a future day, there was no vacancy in the office until the happening of the contingency and until the arrival of such day. In the meantime the resignation was within the control of the respondent, and could be withdrawn at his pleasure; and, if such withdrawal was made by the respondent, he stands as if he had never written nor sent said resignation."

As before stated, our conclusion is that Mr. King's withdrawal must be treated as valid, and that there is no vacancy in the office at this time.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2367, Bk. 56, P. 357.

OFFICERS—REMOVAL FROM OFFICE—PRISON COMMISSIONERS.

Since the removal from office of members of the Board of Prison Commissioners of this State is otherwise provided for by law, such officers are not subject to removal from office in the manner provided for by Article 6027 of the Revised Civil Statutes of 1911.

AUSTIN, TEXAS, July 19, 1921.

*Honorable N. B. Williams, Member of House of Representatives, and
Member of Penitentiary Investigation Committee, Austin, Texas.*

DEAR SIR: We have your verbal inquiry of the 18th instant, for yourself and in behalf of the committee of which you are a member, as to the present state of the statutes of this State with respect to the removal from office of members of the Board of Prison Commissioners of this State.

The present prison system of this State was inaugurated under the provisions of Chapter 10, General Laws, Fourth Called Session, Thirty-first Legislature, effective January 20, 1911. This act expressly repeals Chapters 1, 2, 3, 4, 5, 6, 7 and 8 of Title 79 of the Revised Civil Statutes of 1895, under which our penitentiaries were operated up to January 20, 1921. Section 4 of that act created the office of prison commissioner, provided for the filling of such office by appointment by the Governor, with the advice and consent of the Senate, and fixed the term of office at two years. The latter part of the section, however, reads as follows:

“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 or in conformance with the provisions of such constitutional amendment without the necessity of further legislative enactment.”

We have here foreshadowed a contemplated amendment to our State Constitution. This amendment was proposed by a resolution passed at the Regular Session of the Thirty-second Legislature (Gen. Laws, Reg. Ses., Thirty-second Leg., p. 285), and adopted by the people at an election held for that purpose on November 5, 1912. This amendment, being Section 58 of Article 16 of our State Constitution, 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. The terms to be decided by lot after they shall have qualified and one Prison Commissioner shall be appointed every two years thereafter. In case of a vacancy in said office the Governor of this State shall fill said vacancy by appointment for the unexpired term thereof.”

Thus the office of prison commissioner, previously a statutory office, became a constitutional office on January 20, 1913. Likewise the term of office was changed from two years to six years.

Any member of the Board of Prison Commissioners, appointed as here provided, and having qualified as required by law, is entitled to hold such office for the full term of six years, unless sooner removed in some manner provided by law.

Said Chapter 10 of the acts of the Fourth Called Session of the Thirty-first Legislature was carried forward into and now appears as Chapter 1 of Title 104 of the Revised Civil Statutes of 1911.

Section 28 of that act, which appears as Article 6195 of the Revised Civil Statutes of 1911, has not been expressly repealed nor amended, and reads as follows:

"If any member of the Board of Prison Commissioners shall be guilty of malfeasance or non-feasance in office or shall become incapable or unfit to discharge his official duties, or shall wilfully fail, refuse or neglect to discharge the duties of his office, such member shall be subject to removal from office as provided by Article 3528, Revised Statutes of 1895."

Said Article 3528 of the Revised Civil Statutes of 1895 here referred to has been brought forward into and now appears as Article 6027 of the Revised Civil Statutes of 1911.

Said Article 6027, which was Article 3387 of the Revised Civil Statutes of 1879, and Article 3528 of the Revised Civil Statutes of 1895, now appears as part of Chapter 1 of Title 98 of the Revised Civil Statutes of 1911, relating to the removal from office of State and certain district officers, and reads as follows:

"All State officers appointed by the Governor, or elected by the Legislature, where the mode of their removal is not otherwise provided by law, may be removed by him for good and sufficient cause, to be spread on the records of his office and to be reported by him to the next session of the Legislature thereafter."

Since the office of prison commissioner is clearly a State office, and is filled by appointment of the Governor, with the consent of the Senate, this article, if valid and still in force with respect to the office of prison commissioner, provides a mode for removal from office of any person holding the office of prison commissioner, unless the mode of removal of such officer from office is otherwise provided for by law.

Our State Constitution provides for the removal of certain officers from office (Secs. 3, 5, 9, and 24 of Art. 5, and Secs. 1, 2, 3, 4, 5, 6 and 8 of Art. 15), but neither of these nor any other provision of our Constitution designates a method for the removal from office of a prison commissioner.

That the Legislature, however, is authorized, and that it is its duty, to provide a method for the removal from office of a prison commissioner is clear from the provisions of Section 7 of Article 15 of our State Constitution, which reads as follows:

"The Legislature shall provide by law for the trial and removal from office of all officers of this State, the modes for which have not been provided in this Constitution."

So we turn to our statutes on this subject.

We have already referred to and quoted Section 28, Chapter 10 of the General Laws passed by the Fourth Called Session of the Thirty-first Legislature, now Article 6195 of the Revised Civil Statutes of 1911, and Article 6027 of the Revised Civil Statutes of 1911 there

referred to. Both appear in the Revised Civil Statutes of 1911, and neither has been expressly repealed or amended.

We now refer to Article 6017 of the Revised Civil Statutes of 1911, taken from the act of August 21, 1876, same being Article 3518 of the Revised Civil Statutes of 1895. It reads as follows:

"The Governor, Lieutenant Governor, Attorney General, Treasurer, Commissioner of the General Land Office, Comptroller, Commissioner of Agriculture, Commissioner of Insurance, Statistics and History, and the judges of the Supreme Court, Court of Criminal Appeals, Courts of Civil Appeals and District Courts, and the judge of the Criminal District Court of Galveston and Harris Counties, shall be removable from office by impeachment in the manner provided in the Constitution."

You will note that prison commissioners are not mentioned in this article, and that no general language is used in it that could be held to include them. For this reason this article is not applicable to them.

Just here, however, we note the provision of Section 1, Chapter 34, General Laws, Third Called Session, Thirty-fifth Legislature, effective December 27, 1917, which reads as follows:

"The Governor, Lieutenant Governor, *Secretary of State*, Attorney General, State Treasurer, Commissioner of the General Land Office, Comptroller of Public Accounts, Commissioner of Agriculture, Commissioner of Insurance and Banking, judges of the Supreme Court, of the Court of Criminal Appeals, of the Courts of Civil Appeals, of the District Courts, of the Criminal District Courts of Galveston and Harris and of other counties which have criminal district courts, and all other State officers and heads of State departments or institutions of any kind, and all members, regents, trustees, commissioners having the control or management of any State institution or enterprise, shall be removable from office or position by impeachment in the manner provided in the Constitution, and in this act, the remedy by impeachment as herein provided for being cumulative of all other remedies with respect to the impeachment or removal of public officers."

Except as here italicized this section reads the same as said Article 6017.

It will be seen that this section names the same officers as those mentioned in said Article 6017, as well as certain others, and also contains general language that includes other officers, and in the compilation of our statutes by one of our law publishing houses, entitled "Complete Texas Statutes, 1920," said Article 6017 of the Revised Civil Statutes of 1911 is dropped and said Section 1 of said Chapter 34 is substituted in its place. These compilers thus indicate that in their opinion the latter supersedes and repeals the former. It is unnecessary for us to express an opinion as to whether or not this effect should be given to said Chapter 34, and we do not do so.

At the time said Article 6195 was enacted both Article 6017 and Article 6027 were effective. It is presumed that the Legislature knew this, and understood the provisions of both. The Legislature was free to provide for the removal from office of the members of the Board of Prison Commissioners under either of these articles, and it designated Article 6027. It follows that the Legislature intended that members of the Board of Prison Commissioners should be removed from office under Article 6027, and not under Article 6017.

Said Article 6027 provides that: "All State officers appointed by

the Governor," and members of the Board of Prison Commissioners are State officers appointed by the Governor, "*where the mode of their removal is not otherwise provided by law*, may be removed by him," the Governor, "for good cause," etc. Is there a "mode of their removal" otherwise provided for by law? If so, such officers, by the express terms of said Articles 6195 and 6027, may not be removed from office in the manner provided by said Article 6027. It is only "*where the mode of their removal is not otherwise provided by law*" that the removal from office of a State officer appointed by the Governor may be effected in the manner provided by said Article 6027, even if it be granted that said Article 6027 is valid in that particular.

We refer again to Section 1 of said Chapter 34, hereinbefore quoted. That section does not specifically name the office of prison commissioner, but it does say, after naming certain State officers—

"* * * and all other State officers and heads of State departments or institutions of any kind, and all members, regents, trustees, commissioners having the control or management of any State institution or enterprise, shall be removable from office or position by impeachment in the manner provided in the Constitution and in this act, the remedy by impeachment as herein provided for being cumulative of all other remedies with respect to the impeachment or removal of public officers."

That members of the Board of Prison Commissioners come within this language is evident.

We conclude that said Chapter 34, together with Section 4 of Article 15 of our State Constitution, provides a mode for the removal from office of members of the Board of Prison Commissioners.

We also call your attention to the provision of Articles 6074 to 6077 of the Revised Civil Statutes of 1911, providing a method for the removal from office of those who violate any of the provisions of the law contained in the Penal Code relating to the offense known as Nepotism and the inhibited acts connected therewith, and to Articles 6398 to 6404 providing for the removal from office of any officer under the circumstances therein stated.

Since therefore, the removal from office of the members of the Board of Prison Commissioners is provided for by law otherwise than in the manner authorized by said Article 6027, we conclude that such officers are not now subject to removal from office in the manner provided by said Article 6027.

Just here we note that the validity of said Article 6027, as to the method provided by it for the removal from office of certain State officers, was seriously questioned by Honorable B. F. Looney, then Attorney General of this State, in an opinion rendered by him on September 15, 1917, addressed to Honorable W. P. Hobby, then Governor of Texas, on the question of the authority of the Governor to remove from office a member of the Board of Regents of the University of Texas (Rep. and Op. Atty. Gen., 1916-18, p. 444). We are enclosing herewith a copy of that opinion.

We understand that your inquiry relates only to the present status of our statutes with respect to the office of prison commissioner, and not with respect to any other office, or the general question of the re-

removal from office of State and other officers, and we have limited our discussion and opinion accordingly.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2358, Bk. 56, P. 367.

COUNTY ATTORNEY—FEES IN MISDEMEANOR CASES, OTHER THAN GAMING CASES.

1. When a defendant is convicted of a misdemeanor other than gambling, in the county court, whether by plea of guilty or otherwise, the county attorney is entitled to a fee of \$10.00.

2. When a defendant is convicted of a misdemeanor other than gambling, in a justice, mayor or recorder's court after a trial before a jury, or before the court without a jury, the attorney representing the State is entitled to a fee of \$10.00.

3. When a defendant pleads guilty in a misdemeanor case other than for gambling, in a justice, mayor or recorder's court, the attorney representing the State is entitled to a fee of only \$5.00.

4. For every conviction, either in the county court or justice court, by plea of guilty or otherwise, under the laws against gaming, the county attorney is entitled to \$15.00.

Articles 1168, 1179 and 1180, Code of Criminal Procedure of Texas.

AUSTIN, TEXAS, June 4, 1921.

Honorable J. E. Woods, County Attorney, Teague, Texas.

DEAR SIR: I have your letter of May 29, addressed to the Attorney General, requesting a construction by this Department of Articles 1168, 1179 and 1180, Code of Criminal Procedure, with reference to the fees to be paid the county attorney in misdemeanor cases upon convictions had in the county court, justice court, mayor or recorder's court, and what effect, if any, a plea of guilty has upon the fees to be paid the county attorney.

The above articles of the code are to be found in Chapter 4, Title 15. Said Chapter 4 is entitled. "All costs to be paid by defendant." This chapter is divided into four subdivisions. Subdivision number 2 relates to the fees to be paid "in the district or county court." It is in subdivision 2 that we find Article 1168, and said article reads as follows:

"District and county attorneys shall be allowed the following fees, to be taxed against the defendant:

"For every conviction under the laws against gaming when no appeal is taken, or when, on appeal, the judgment is affirmed, fifteen dollars.

"For every other conviction in cases of misdemeanor, where no appeal is taken, or where on appeal, the judgment is affirmed, ten dollars."

The title and subtitles of said Chapter 4 are an arbitrary arrangement made by the codifiers. Article 1168 is taken from Section 7, of Chapter 164, 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." Said Section 7 reads in part as follows:

"The county attorneys shall be entitled to the following fees and no others, towit: 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; in all other cases of misdemeanor where the defendant is convicted and no appeal is taken, or when upon appeal the judgment is affirmed, ten dollars, to be paid by the defendant as other costs. * * *"

If the placing of Article 1168 under the heading of fees "in the district and county court" by the codifiers governs, then the county attorney would be entitled to fifteen dollars in a gaming case only when the conviction was obtained in the county court. If the original enactment of the Legislature governs, the county attorney is entitled to a fee of fifteen dollars for each conviction for gaming in whatever court obtained. We have held that in this instance the original enactment controls. See Opinion No. 2000, Book 52, page 46, reported in the Biennial Report of the Attorney General, 1918-1920, p. 562. This opinion follows the decisions of the Court of Criminal Appeals.

In the same sentence fixing the fees of county attorneys in gaming cases, we find that the Fifteenth Legislature provided for the payment of a fee of ten dollars to the county attorney "in all other cases of misdemeanor where the defendant is convicted * * *." This sentence is brought forward and is now a part of Article 1168 already quoted, but the Legislature, by subsequent legislation, has modified this sentence, for we find that the Twenty-eighth Legislature amended Article 1132 (now Article 1180), Code of Criminal Procedure, so that said article now reads as follows:

"No fee shall be allowed a district or county attorney in any case where he is not present and representing the State, upon the trial thereof, unless he has taken some action therein for the State, or is present and ready to represent the State at each regular term of the court in which such criminal action is pending; provided, however, that when pleas of guilty are entertained and accepted in any justice court, at any other time than the regular term thereof, the county attorney shall receive the sum of five dollars; and in no case shall the county attorney, in consideration of a plea of guilty, remit any part of his lawful fee."

Then we have Article 1179 reading as follows:

"Where several defendants are prosecuted jointly, and do not sever on trial, but one attorney's fee shall be allowed; and where a defendant pleads guilty to a charge before a justice, mayor or recorder, the fee allowed the attorney representing the State shall be five dollars."

This last quoted article may have been added by the codifiers, for Vernon's Code of Criminal Procedure makes no reference to any independent act of the Legislature, but this addition, if it is an addition, is an act of the Legislature. In this connection, we again point out that the Court of Criminal Appeals has only held that the arbitrary arrangement under various heads by the codifiers does not control, but it is the actual language used by the Legislature in enacting the bill originally that does control. Articles 1179 and 1180 are found in subdivision No. 3 of Chapter 4, Title 15, and said subdivision 3 relates to fees to be paid "in justices', mayors' and recorders' courts."

It is a fundamental rule of statutory construction that effect must

be given to each enactment of the Legislature, and each enactment of the Legislature must be harmonized if possible with other and prior acts, unless the later act by specific language repeals the prior act. In the absence of such specific language, no part of the prior act not in conflict with the later act will be repealed. Hence, we must give effect to and construe Articles 1179 and 1180 with the provisions of Article 1168, and harmonize the provisions contained in the three several articles so as to give effect to each of the three articles. The Act of the Fifteenth Legislature provides for a fee to be paid the county attorney of \$10 for each conviction in misdemeanor cases other than gambling, but the Twenty-eighth Legislature has provided "that when pleas of guilty are maintained and accepted in any justice court at any other time than the regular term thereof, the county attorney shall receive the sum of five dollars." And Article 1179 provides that "where a defendant pleads guilty to a charge before a justice, mayor or recorder's court, the fee allowed the attorney representing the State shall be five dollars." It will be observed that the only instances in which the fee is limited to five dollars are the two above mentioned.

It is therefore the opinion of this Department, and you are so advised, that:

First: When a defendant is convicted of a misdemeanor other than gambling, in the county court, whether by plea of guilty or otherwise, the county attorney is entitled to a fee of ten dollars;

Second: When a defendant is convicted of a misdemeanor other than gambling, in a justice, mayor or recorder's court after a trial before a jury, or before the court without a jury, the attorney representing the State is entitled to a fee of ten dollars;

Third: When a defendant pleads guilty in a misdemeanor case other than for gambling, in a justice, mayor or recorder's court, the attorney representing the State is entitled to a fee of only five dollars;

Fourth: For every conviction, either in the county court or justice court, by plea of guilty or otherwise, under the laws against gaming, the county attorney is entitled to fifteen dollars.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2349, Bk. 56, P. 414.

EXPENSES—COUNTY OFFICERS—COUNTY ATTORNEY—STENOGRAPHERS
—TELEGRAPH AND TELEPHONE MESSENGERS—OFFICE RENT.

1. Expenses incurred by the county attorney for telephone and telegraph messages, if actually and necessarily incurred by him in the conduct of his office, may be deducted from fees of his office that would otherwise be payable by him to the county.

2. The county attorney is not entitled to deduct from fees of his office otherwise payable to the county any expenses that may have been incurred by him for stenographer hire nor for office rent.

AUSTIN, TEXAS, May 24, 1921.

Honorable F. V. Hinson, County Attorney, Graham, Texas.

DEAR SIR: The Attorney General is in receipt of yours of April 5th, which reads as follows:

"1. Is it within the province of the commissioners court to allow as a reasonable expense the salary of one stenographer if used solely for criminal work; if only one-half of the stenographer's time is devoted to criminal work for the county, may they allow one-half of the salary?

"2. In the construction of what are reasonable expenses, we beg to ask if the following might be allowed by the commissioners court:

"(a) Telephone bills, including telegrams.

"(b) Office rent, where there is no suitable space in the courthouse."

The general question thus presented by your inquiry has been before this Department for sometime, not only as based upon your inquiry but on account of other inquiries of a similar nature from other sources.

In an opinion rendered by this Department on May 13, 1921, addressed to Honorable V. F. Grindstaff, County Attorney, Aspermont, Texas, prepared by Honorable C. L. Stone, Assistant Attorney General, and approved by this Department on the 21st instant, in construing Article 3897 of the Revised Civil Statutes of 1911, held that no expenses were allowed under this Article other than such as may have been incurred for stationery, stamps, telephone and traveling expenses or on account of items of a similar or like character.

In another opinion rendered by this Department on the 11th instant, addressed to Honorable O. H. Howard, County Auditor, Palo Pinto County, prepared by Honorable C. L. Sutton, Assistant Attorney General, and approved by this Department on the 21st instant, it was held that the doctrine of *ejusdem generis* is applicable in the construction of this article of our statutes. This rule is thus stated in Section 422, Lewis' Sutherland's Statutory Construction, Second Edition:

"It is a principle of statutory construction everywhere recognized and acted upon, not only with respect to penal statutes, but to those affecting only civil rights and duties, that where words particularly designating specific acts or things are followed and associated with words of general import comprehensively designating acts or things, the latter are generally to be regarded as comprehending only matters of the same kind and class as those particularly stated. They are to be deemed to have been used not in the broad sense which they might bear as standing alone, but as relating to the words of more definite and particular meaning with which they are associated."

This being the construction placed upon this law by this Department, we are of the opinion that expenses incurred by you for telephone and telegraph messages, if actually necessarily incurred by you in the conduct of your office, may be deducted from fees of your office that would otherwise be payable by you to the county. This law expressly authorizes the deduction of such expenses so incurred as telephone expenses, and we think it quite clear that such expenses so incurred on account of telegraph messages are of such a similar nature to telephone expenses as to bring telegraph expenses clearly within the rule here stated.

On the other hand, we are of the opinion that stenographer hire

and office rent are not similar to the items of expense provided for by this law and for that reason do not come within the construction placed upon that law by this Department and that you are not entitled to deduct items of expenses incurred by you on account of them from fees of your office that would be otherwise payable to the county.

Yours very truly,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2263, Bk. 55, P. 1.

FEES—COUNTY OFFICERS—MAXIMUM—POPULATION.

Maximum fees of certain county officers in counties containing a city of over 25,000 inhabitants, or in such counties as shown by the United States census of 1910 shall contain as many as 37,000 inhabitants, are fixed by Article 3883, R. C. S., of 1911, as amended by Chapter 121, page 246, General Laws, Regular Session, Thirty-third Legislature, and as further amended by Chapter 130, page 133, General Laws, Regular Session, Thirty-fifth Legislature, and as again amended by Chapter 40, page 58, General Laws, Third Called Session, Thirty-sixth Legislature.

AUSTIN, TEXAS, December 1, 1920.

Hon. Roy Baskin, County Attorney, Cameron, Texas.

DEAR SIR: The Attorney General is just in receipt of yours of the 27th instant, which is as follows:

"We would thank you to advise us in regard to the fees of certain officers of Milam County, differences of opinion having arisen due to the announcement of the 1920 census.

"The United States census of 1910 gave Milam County a population of 36,780, and that of 1920 gives a population of 36,104.

"Article 3885, Vernon's Sayles' Statutes as amended by Chapter 130, Acts of the Thirty-fifth Legislature, Regular Session, as amended by Chapter 40, Acts of the Third Called Session of the Thirty-sixth Legislature, provides that county officers named therein shall receive the amounts specified, based on the population of 1910.

"Article 3887, Vernon's Sayles' Statutes, provides that 'the last United States census shall govern as to population in all cases.'

"Query: Are the county officers of Milam County affected entitled to fees stipulated in Article 3883 (as last amended), or will their fees for the year just ending be governed by Article 3882? In other words, as to fees of office will Milam County be classified for the fiscal year ending November 30, 1920, as a county having a population under thirty-seven thousand, or a county having a population over thirty-seven thousand?

"As your answer will affect the reports made by some of the officers of this county, we shall appreciate a prompt reply."

The question thus presented is not without difficulty but we have reached the conclusion that the officers of Milam County, under the facts stated by you, should be allowed compensation under Article 3882 of the Revised Civil Statutes of 1911 as amended by Chapter 121, page 246, of the General Laws passed by the Regular Session of the Thirty-third Legislature, approved April 5, 1913, and not under Article 3885 as amended by Chapter 121, page 246, of the General Laws passed by the Regular Session of the Thirty-third Legislature, approved April 3, 1913, and as further amended by Chapter 130, page 133, of the

General Laws passed by the Regular Session of the Thirty-fifth Legislature, approved March 29, 1917, and as again amended by Chapter 40, page 68, of the General Laws passed by the Third Called Session of the Thirty-sixth Legislature, approved June 17, 1920.

Said Article 3882 is taken from that part of Section 10 of Chapter 5, page 5, of the General Laws passed by the First Called Session of the Twenty-fifth Legislature, approved June 16, 1897, which reads:

"That up to 1902 in counties in which there were cast at the last presidential election as many as 5000 votes, and thereafter in any counties shown by the National census of 1900 to contain as many as 25,000 inhabitants, the following amounts shall be allowed," etc.

This was amended by Chapter 120, page 244, of the General Laws passed by the Regular Session of the Thirty-third Legislature, approved April 3, 1913, so as to read:

"In any counties shown by the last United States census to contain as many as 25,000 inhabitants the following amounts shall be allowed," etc.

This article has not since been amended, and is now the law applicable to all counties shown by the last United States census to contain as many as 25,000 inhabitants, except in so far as the same may have been changed or amended, if at all, by later acts.

Article 3883 was taken from the latter part of Section 10 of Chapter 5, page 5, of the General Laws passed by the First Called Session of the Twenty-fifth Legislature, approved June 16, 1897, which provides:

"That in counties containing a city of over 25,000 inhabitants, or in which there were cast at the last presidential election as many as 7500 votes or by the census of 1900 shall contain as many as 35,500 inhabitants, the following amounts of fees shall be allowed," etc.

This article was also amended by Chapter 121, page 246, of the General Laws passed by the Regular Session of the Thirty-third Legislature, approved April 5, 1913, so as to read:

"In counties containing a city of over 25,000 inhabitants, or, in such counties as shown by the *last United States census* to contain as many as 30,000 inhabitants, the following amount of fees shall be allowed," etc.

This article was again amended by Chapter 150, page 533, of the General Laws passed by the Regular Session of the Thirty-fifth Legislature, approved March 29, 1917, so as to read as follows:

"In counties containing a city of over 25,000 inhabitants, or in such counties as shown by the *United States census of 1912*, shall contain as many as 37,000 inhabitants, the following amount of fees shall be allowed," etc.

This article was again amended by Chapter 40, page 68, of the General Laws passed by the Third Called Session of the Thirty-sixth Legislature, approved June 17, 1920, and now reads as follows:

"The counties containing a city of over 25,000 inhabitants, or in such counties as shown by the *United States census of 1910* shall contain as many as 37,000 inhabitants, the following amount of fees shall be allowed," etc.

It will be noted that under Article 3883 as approved April 3, 1913, required that the number of inhabitants of a county should be determined by "the last United States census," while this article as amended

by the Act approved March 29, 1917, and as again amended by the Act approved June 17, 1920, fixes the population "as shown by the United States census of 1910." While the reason for so doing is not apparent to this writer it must be concluded that the Legislature, since it so clearly and definitely did so, must have intended to change the rule, for determining population, from "the last United States census of 1910," as provided by the amendments of March 29, approved April 3, 1913, to the population "as shown by the United States census of 1910," as provided by the amendments of March 29, 1917, and June 17, 1920.

Hence we conclude that said Article 3883, as it stands at present, is applicable only to "counties containing a city of over 25,000 inhabitants, or in such counties as shown by the *United States census of 1910*" to contain as many as 37,000 inhabitants, notwithstanding the fact that a later United States census may show such county to have a population in excess of 37,000 inhabitants.

Inasmuch, therefore, as the United States census of 1910 showed Milam County to have a population of less than 37,000 inhabitants, it follows that the officers of that county, named in said Article 3883 would not be entitled to compensation under said Article 3883.

On the other hand, since, as shown by the last United States census, Milam County contains "as many as 25,000 inhabitants," it follows that the maximum amount of fees to be retained by the officers of that county is not as fixed by Article 3881 of the Revised Civil Statutes of 1911, but that such maximum fees come within the provisions of said Article 3882.

It is true that this construction of the law may result in inequalities with reference to the maximum fees that may be retained by county officers in different counties, but since the Legislature has seen fit to so make the law, and since the Attorney General can neither add to nor take from the law, but must construe it as he finds it in accordance with his best judgment, such inequalities as may result from the law as it now stands are matters for legislative consideration and not for correction by construction.

We have not failed to note Article 3887 of the Revised Civil Statutes of 1911 to the effect that "the last United States census shall govern as to population in all cases." This expression, as it appears in the Act approved June 16, 1897, merely states "the last United States census shall govern as to the population of cities." The codifiers carried this expression forward into the Revised Civil Statutes of 1911, making it read: "the last United States census shall govern as to population in all cases." This expression as brought forward in the codification of 1911 was adopted by the Legislature and constitutes Article 3887 as amended by the act approved April 3, 1913. We find, however, that Article 3883 was amended by the act approved March 29, 1917, and again amended by the act approved June 17, 1920, both of which amendments are later enactments than that of April 3, 1913, and both of which expressly provide that "in counties containing a city of over 25,000 inhabitants, or in such counties as shown by the *United States census of 1910*, shall contain as many as 37,000 inhabitants, the following amount of fees shall be allowed." These being later en-

actments than that of April 3, 1913, we must conclude that the Legislature intended to do what it actually did, that is, to change the rule from the population "as shown by the last United States census," as prescribed by the Act of April 3, 1913, to the population "as shown by the United States census of 1910."

You are, therefore, advised that in the opinion of the Attorney General the amount of maximum fees that the officers of Milam County are entitled to retain is as prescribed by Article 3882 of the Revised Civil Statutes of 1911.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2340, Bk. 56, P. 397.

OFFICERS—FEES AND COMPENSATION—COUNTY ATTORNEY.

1. The fee provided by law for the county or district attorney "for the work of filing" delinquent tax suits is exclusive, and a county attorney is not entitled to additional compensation for attending to such suits.

2. Where a former county attorney wrote the complaint in an assault and battery case in November of last year and the defendant pleaded guilty before a justice of the peace in December during the term of the present county attorney and in his absence, the present county attorney is entitled to a fee of \$5.

Art. 7688, Revised Civil Statutes.
Arts. 1179, 1180, Code of Criminal Procedure.

AUSTIN, TEXAS, April 28, 1921.

Honorable E. W. Smith, County Attorney, George West, Texas.

DEAR SIR: I have yours of the 13th instant, addressed to the Attorney General, reading as follows:

"The county attorney 'for the work of filing' a delinquent tax suit receives four dollars for the first tract and one dollar for each additional tract. Does he receive additional pay for attending to the suit after it is filed? If so, how much?"

"The former county attorney wrote the complaint in an assault and battery case in November of last year, and the defendant pleaded guilty before the justice of the peace in December, during my term of office, and in my absence, who is entitled to the fee under the law?"

Answering your first inquiry, beg to advise that it is the opinion of this Department that the compensation provided for by statute, that is, Article 7688a, Revised Civil Statutes of 1911, is exclusive, and that the county attorney is not entitled to any additional compensation for his services in connection with delinquent tax suits affected by Chapter 15, Title 126, Revised Civil Statutes.

It is true that the wording of this statute is *for the work of filing such suits* the county attorney or district attorney shall receive a fee of \$4 for the first tract of land included in each suit, and \$1 for each additional tract of land included therein, etc., but since this is the only place in the statutes expressly allowing compensation to the county or district attorney in such cases, it would seem that if it had been the intention of the Legislature to allow additional compensation, it would have expressly so provided. Having failed to do so, we

are not justified in holding that additional compensation is contemplated by law. The rule is that where no compensation is provided for a particular service, and the law requires a public officer to do that service, it follows that he must do it without pay. It is true that Article 363, Revised Civil Statutes, provides a commission for the county attorney upon moneys collected for the State or county. However, we believe it was the intention of the Legislature that the fees provided in Article 7688a are exclusive, so far as delinquent tax suits are concerned, and you are so advised.

It would not be contended that under the old delinquent tax law the fees provided were not exclusive. The wording was that "in no case shall the compensation of said county attorney be greater than three dollars for the first tract, etc." The new statute increased the amount of the fee, and this strengthens our view that the mere change in the phraseology to "for the work of filing" did not have the effect of authorizing the commission of ten per cent in addition to the fees. Article 363 evidently applies where no other method of compensation has been provided for specifically. To hold that Article 363 applies in a case of delinquent taxes on lands and lots would be to allow double compensation for the same service; for if said article is applicable at all it furnishes entire compensation for the work of collecting the money, and a part of the work in a delinquent tax case is filing the suit.

To reiterate in part, if under the old statute it could not well be contended that the ten per cent commission was allowable in addition to the fees, we do not believe it tenable that this commission is allowable by implication under the new statute in addition to the larger fees. If it be argued that the new statute limits the fees to the work of filing the suits, technically speaking, the answer is that the fee allowed is one under a statute dealing with a specific subject, whereas Article 363 is general in its nature, and that therefore, the method of compensation provided as to delinquent tax suits specifically, controls over the method of compensation for collecting moneys generally.

Your second question is controlled by Articles 1179 and 1180 of the Code of Criminal Procedure, which articles are in the following language:

"Art. 1179. Where several defendants are prosecuted jointly, and do not sever on trial, but one attorney's fee shall be allowed; and where a defendant pleads guilty to a charge before a justice, mayor or recorder, the fee allowed the attorney representing the State shall be five dollars.

"Art. 1180. No fee shall be allowed a district or county attorney in any case where he is not present and representing the State, upon the trial thereof, unless he has taken some action therein for the State, or is present and ready to represent the State at each regular term of the court in which such criminal action is pending; provided, however, that when pleas of guilty are entertained and accepted in any justice court, at any other time than the regular term thereof, the county attorney shall receive the sum of five dollars; and in no case shall the county attorney, in consideration of a plea of guilty, remit any part of his lawful fee."

It will be noted that the first part of Article 1180 provides that no fee shall be allowed unless the prosecuting officer is present and representing the State upon the trial, or unless he has taken some

action therein for the State, or is present and ready to represent the State; whereas the latter part of this article provides that when pleas of guilty are entertained and accepted in a justice court at any other time than the regular term thereof, the county attorney shall receive the sum of five dollars. The evident intention of the Legislature in enacting this latter provision was that if the plea of guilty was entertained and accepted in a justice court at any other time than the regular term thereof, the county attorney shall receive a fee of five dollars, even though he did not comply with the provisions of the first portion of Article 1180, that is, even though he has taken no action in the case and is not present and representing or ready to represent the State. So, if the plea of guilty was entertained and accepted at any time other than the regular term thereof, it is clear that you are entitled to a fee of five dollars in the case about which you inquire.

If the plea of guilty, however, was entertained and accepted during the regular term thereof, the county attorney is not entitled to the fee of five dollars unless he was present and representing the State upon the trial, or unless he took some action therein for the State, or was present and ready to represent the State. You state that you were not present, so the question is whether the action of the former county attorney in filing the complaint would entitle you to the fee. It is the opinion of this Department that in no event under these facts could the former county attorney claim the fee. The fee is for the plea of guilty, and this plea of guilty was taken during your term. It is our view that within the meaning of this statute, the county attorney took "some action therein for the State," and hence that you, as county attorney, are entitled to the fee. The action of the former county attorney in filing the complaint inures to the office of county attorney, and it is upon this theory that we hold that you are entitled to the fee.

The effect of our holding in this opinion is that under your statement of facts, you are entitled to a fee of five dollars in the case mentioned whether the plea of guilty was taken during the regular term, or otherwise.

Very truly yours,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2336, Bk. 56, P. 417.

OFFICERS—COUNTY ATTORNEY—EXPENSES FOR TRAVELING AND
TELEPHONE.

1. Article 3897, Revised Civil Statutes, authorizing "actual and necessary expenses * * * such as traveling expenses and other necessary expense" authorizes the county attorney to hire a conveyance, such as an automobile or horse-drawn vehicle, when there is no other cheaper mode of conveyance to convey him to a distant point in the county to attend justice court in his official capacity, and to deduct such expense in making his report from the amount, if any, due by him to the county under the "Fee Bill."

2. He may also under the provisions of this article authorizing telephone

expenses deduct in a similar manner a telephone expense necessarily incurred in connection with the performing of the duty of advising in writing a precinct officer.

3. These items of expense, however, are subject to the audit of the county auditor and if it appear that any item of such expense was not incurred by such officer or that such item was not necessary, such item may be by such auditor or by the commissioners court, rejected.

AUSTIN, TEXAS, April 26, 1921.

Honorable Louis B. Reed, County Attorney, Clarksville, Texas.

DEAR SIR: I have yours of the 15th instant, addressed to the Attorney General, reading as follows:

"Article 3897 of the statutes provides that the county attorney, among other officials, shall each month make 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 expense.'

"Would not an expense incurred by hiring a conveyance to go to a distant justice court to try a case be a necessary expense within the meaning of the statute?

"Likewise would the long distance telephone calls of the county attorney that are necessary to instruct various precinct officers be within the statute?"

Article 3897, Revised Civil Statutes of 1911, as amended by Acts of 1913, page 246, Section 1, reads 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 expense. If such expense be incurred in connection with any particular case, such statement shall name such case. Such expense account shall be subject to the audit of the county auditor, and if it appear that any item of such expense was not incurred by such officer, or that such item was not necessary thereto, such item may be by such auditor or court rejected. In which case the correctness of such item may be adjudicated in any court of competent jurisdiction. The amount of such expense, 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 each such report, from the amount, if any, due by him to the county under the provisions of this act."

This article authorizes the amount of the expenses provided for therein to be deducted by the officer in making his report from the amount, if any, due by him to the county under the provisions of "this act." So that whatever may be said in this opinion, relative to the allowing of expenses contemplates the allowing of them in this manner.

The statute authorizes "necessary expenses incurred * * * such as traveling expenses and other necessary expense." This means expenses necessarily incurred in traveling from place to place in the performance of official duty by the usual and ordinary means of conveyance. You do not state what kind of conveyance is to be or has been hired. For the purpose of this opinion I assume you mean a conveyance such as a horse-drawn vehicle or an automobile, and also that there is no other available and cheaper means of conveyance; for in the event the justice court could be reached as

easily by railroad train, street car, or interurban car cheaper than by automobile or horse-drawn vehicle, it would be your duty to avail yourself of this cheaper means of travel.

It being the duty of the county attorney to attend justice court at times, it is the opinion of this Department that the words "necessary expenses such as traveling expenses and other necessary expense" would include a reasonable expense incurred by the county attorney in hiring an automobile or horse-drawn vehicle to convey him to a distant point in the county to attend a justice court on official business and to deduct such expense from the amount, if any, due by him to the county under the provisions of the "Fec Bill." It will be remembered, of course, that such expense account is subject to the audit of the county auditor and if it appear that any item of such expenses was not incurred by the county attorney or that such item was unnecessary, it may be by the county auditor or commissioners' court rejected.

There are very few decisions upon the question of what the words "necessary traveling expenses" mean. In the case of *In re Bensel et al.*, 124 N. Y., 716, it was held that an expense for the hire of an automobile was not authorized by a statute allowing "necessary traveling expenses," but that case was decided in 1909 upon an expense account incurred in 1905 and the court based its decision upon the theory that the words of the statute contemplates "the ordinary method of travel," and in that connection the court said that "automobiles are not yet in common use. They are expensive. They are used by a few professional men and by some business firms, but for the most part they were in 1905, and are still, on account of the great expense involved in their purchase and maintenance, the dangerous plaything of the wealthy." Moreover, it appeared that there were plenty of railroad trains upon which the officials might have ridden in traveling to the place of official business involved in that case. The court also stated that the persons incurring this expense might have availed themselves of the services of a "rig" or a "horse and carriage." The question of whether an automobile was an ordinary or usual means of travel in 1905 is an entirely different one from whether it is such in 1921. No one would contend that this means of conveyance is not an ordinary and usual one at the present time. It has largely superseded the horse-drawn vehicle and in fact is a much more extensive, if not universal, means of travel in this country than ever the horse-drawn vehicle was.

Our own courts have not passed upon this question so far as we know. In *Harris County vs. Hammon*, 203 S. W., 451, the Court thiorize an expense by the sheriff for gasoline and repairs for auto- of Civil Appeals at Galveston, held that Article 3897 does not automobiles owned and used by the sheriff in performing the duties of his office. The court's decision was based upon the idea that the automobiles involved in that case were owned by the sheriff himself, and that the expense incurred in connection with such vehicles should be borne by the sheriff himself for that reason.

The *Harris County vs. Hammon* case is not authority for the proposition that a conveyance of this kind could not be hired by an

officer mentioned in Article 3897 when it is necessary to do so as a means of conveyance in the performance of official duty.

Your second inquiry is whether the long distance telephone calls of the county attorney that are necessary to instruct various precinct officers are within the statute.

It is the duty of the county attorney under the law to give to county and precinct officers opinions and advice in writing touching the official duties of such officers. See Article 356a, Vernon's Complete Statutes, 1920. Article 3897 expressly authorizes telephone expenses actually and necessarily incurred in the conduct of the county attorney's office. The county attorney is not required by statute to officially advise precinct officers except in writing, and for this reason we do not believe the county attorney would be authorized to incur a telephone expense to advise a precinct officer directly by telephone. However, we are not prepared to say that under no circumstances would the county attorney be authorized to incur a telephone expense in connection with the giving of written opinions or advice to precinct officers. If it should become necessary to do so in the performance of this official duty, it necessarily follows that the expense would be authorized. For example, it might become necessary to secure information by telephone in case of emergency to enable the county attorney to prepare an opinion, and it is upon the theory that it might be necessary to use the 'phone as an incident to the performance of the duty mentioned that we hold that there might be conditions under which an expense of this kind would be authorized by the statute. However, the same statement above made relative to the expense of hiring a conveyance applies here; that is that such expense account is subject to the audit of the county auditor, and if it appear that any item of such expense was not incurred or that such item was not necessary, then the same may be by the auditor or the commissioners' court rejected. It would be a question of fact in each particular case as to whether a telephone expense in connection with advising precinct officers was actual and necessary, and if the amount thereof be deducted from the amount due the county, this question of fact will be decided by the county auditor and the commissioners' court as to whether the item or items of expense was actual and necessary and should or should not be rejected.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2345, Bk. 56, P. 388.

OFFICERS—EXPENSES—COUNTY ATTORNEY—BOARD AND LODGING—
AUTOMOBILE EXPENSE—EXPENSE FOR CLERICAL WORK.

1. Expenses for board and lodging are included within the meaning of the words "traveling expenses" in Art. 3897, R. C. S. Hence the county attorney may deduct such expenses necessarily incurred in traveling on official business to a place outside the county seat from the amount of fees due by him to the county, if any.

2. Expenses for gasoline, oil, repairs and tires, etc., in connection with an

automobile owned by the county attorney himself cannot be treated as traveling expenses and cannot be allowed under Article 3897, Revised Civil Statutes.

3. Under the rule of statutory construction, known as the rule of *ejusdem generis*, the expenses authorized by Article 3897 are limited to those of a like or similar nature to those enumerated, and therefore the county attorney cannot be reimbursed for an expense incurred for "transferring cases from justice docket to my docket."

4. Even those expenses held in this opinion to be within the meaning of Article 3897, are not allowable except out of the amount of fees, if any, due the county, and even then if it appear that any item of such expense was not incurred by the officer or that it was not necessary, such item may be by the auditor or commissioners court rejected.

5. The county auditor would be acting within his authority in requiring the county attorney to name in his expense account the number and style of the case in connection with which any particular expense was incurred.

Article 3897, Revised Civil Statutes.

AUSTIN, TEXAS, May 11, 1921.

Honorable O. H. Howard, County Auditor, Palo Pinto, Texas.

DEAR SIR: I have yours of the 23rd ultimo, enclosing an expense account of your county attorney and requesting an opinion from this Department as to whether the expenses shown thereon are allowable under the law.

You also request us to advise you whether you would have authority to require the county attorney, in his expense account, to show the style and number of the cause in which a particular item of expense was incurred.

A further inquiry you submit is whether it is your duty to see that county officers make their reports for prior years where they have not done so.

The expense account submitted shows three classes of expenses, to wit: 1. Expenses incurred for meals while absent from the county seat on official business. 2. Expenses incurred in connection with an automobile owned by the county attorney himself and used by him in going from place to place in the performance of official duties. 3. Expenses incurred for clerical work in transferring cases from the justice docket to the docket of the county attorney.

We will first take up your question of whether board is included within the statute allowing certain expenses of county officials.

Article 3897 provides that actual and necessary expenses incurred by certain officers, including the county attorney, "in the conduct of his said office, such as stationery, stamps, telephone, traveling expenses and other necessary expenses," may be deducted by the officer in making his report from the amount, if any, due by him to the county. This Department is rather of the opinion that the term "traveling expenses" contemplates board and lodging. We find no decision in this State directly in point. There are, however, two decisions in other states; one holding that the expression "actual traveling expenses" includes board and lodging; the other holding that these words do not include board and lodging.

In *Van Veen vs. Graham County*, 108 Pac., 252, 13 Ariz., 167, the Supreme Court of Arizona had under consideration a statute providing that the "court reporter shall be allowed his actual traveling expenses in attending the district court away from his official residence."

The court held that in view of the long continued practical construction given to the statute by the officers required to act under it, and since the Legislature re-enacted the statute after this uniform construction had been placed upon it, the statute should be considered as authorizing the allowance for board and lodging at the place where the court is held which the court reporter was attending.

On the other hand, in *State vs. La Grave*, 42 Pac., 797, 23 Nev., 88, the Supreme Court of Nevada held under a similar statute that hotel bills are not allowable. The statute under consideration provided that the "actual traveling expenses" incurred by the superintendent of public instruction in the discharge of his duty should be allowed, audited and paid out of the general fund. The court decided that hotel bills incurred by the superintendent of public instruction while staying at a place, are not a part of the actual traveling expenses allowable under the statute. In its written opinion the court argued that travel in visiting a school is going to and returning from the place where the school is situated, but that after the superintendent arrives there, he is not, during his stay, traveling.

There is some force to this argument in the latter mentioned case. However, the situation in this State is the same with reference to practical construction as it was in Arizona as disclosed in the first above mentioned case; that is, statutes allowing "traveling expenses" or "actual traveling expenses" and the like, have been construed practically and contemporaneously to authorize the allowing of board and lodging. Especially is this true of departmental appropriation bills made biennially by the Legislature. It cannot reasonably be supposed that the Legislature is ignorant of the fact that hotel bills incurred in traveling have for many years been paid out of appropriations and statutes allowing traveling expenses, actual traveling expenses, necessary traveling expenses, or similar expressions, and having passed these measures in the light of such knowledge, we are justified in holding that the legislative intent was that these terms should include hotel bills.

We are inclined to advise you, therefore, that those items in the account submitted by you incurred while away from the county seat for meals are within the statute and are allowable as traveling expenses.

I assume that the items of expense for "gas," "oil," "car repair," "casing," "light globe," in fact those expenses incurred in connection with the use of an automobile, were incurred by the county attorney in connection with the use of an automobile owned by him. This being true, such items cannot be allowed under a holding of the Court of Civil Appeals at Galveston in the case of *Harris County vs. Hammond*, 203 S. W., 445. It is not improbable that this decision was based upon the idea that it is impracticable to calculate the actual expense incurred on a particular trip in the use of an automobile owned by the person traveling. It is difficult to figure, for instance, what amount of wear and tear was occasioned on a particular trip. Take the item of tires; it could not be said that the price of a tire should be charged up to a particular trip, for the tire will last a considerable time in the future. The same can be said of

other purchases made for the car, as well as repairs. It would not be just to charge a repair bill to a particular trip. Since the car is used for private as well as official business, it is all but impossible to divide the expense, and the temptation is to let the public foot the larger part of the bills. If it had been the intention of the Legislature to allow upkeep and expense of operating an automobile owned by the officer himself, it could have and doubtless would have said so in plain terms but the Legislature did not do this, and in view of the doubt and the holding of the Court of Civil Appeals in the case mentioned, you are advised that in the opinion of this Department, the expenses incurred by the county attorney in connection with his own automobile, cannot be allowed under the statute.

Under the rule of *ejusdem generis* this Department is also of the opinion that the expenses authorized by Article 3897 are those enumerated and other necessary expenses of like or similar kind to those enumerated; that the general words "other necessary expense" are limited by the use of the particular words preceding them. We are of the opinion, therefore, that the item of expense incurred "for transferring cases from the justice docket to my docket," is improper and under the statute cannot be allowed.

The rule of *ejusdem generis* has been stated as follows: "It is a principle of statutory construction everywhere recognized and acted upon, not only with respect to penal statutes, but to those affecting only civil rights and duties, that where words particularly designating specific acts or things are followed and associated with words of general import comprehensively designating acts or things, the latter are generally to be regarded as comprehending only matters of the same kind or class as those particularly stated. They are to be deemed to have been used not in the broad sense which they might bear if standing alone, but as relating to the words of more definite and particular meaning with which they are associated." Lewis' Sutherland's Statutory Construction, Second Edition, Section 422.

The rule is based upon reason and common sense. What purpose would be served by enumerating certain things, if the general words following are to be held to include all those things which would be included within the meaning of the general words standing alone? Take for example Article 3897. If the Legislature had intended to authorize all necessary expenses in connection with the duties of the county officers mentioned, it could have expressed this intention by stopping with the words "actual and necessary expenses incurred by him in the conduct of his said office." But it did not stop at this. It went further and enumerated certain kinds of expenses.

We must, if possible, give effect to every word, clause and sentence of a statute. The Legislature must have had some object in view in inserting in the statute this enumeration. Lewis Sutherland, Section 380.

It is quite true that this rule is not to be used to defeat the plain intention of the Legislature, and that where the enumeration of particular things is so complete and exhaustive as to leave nothing which can be called *ejusdem generis*, the rule does not apply. But such is not the case here. The enumeration in Article 3897 is not exhaustive,

nor is there anything in the statute disclosing an intention that the rule should not apply. In fact, there is little, if anything, in the statute throwing light upon the probable intention of the Legislature other than the words of Article 3897.

The organic act of Minnesota Territory, which pledges the general government to defray the expenses of a legislative assembly, the printing of the laws, and other incidental expenses, must be restricted to such expenses as were incident to the legislative assembly and the printing of the laws. *United States vs. Smith* (U. S.), 27 Fed. Cas., 1139, 1143.

The term "other moneys," in Rev. St., 1887, Section 3977, providing that any officer or person collecting or receiving money, fines, forfeitures, or other moneys, and refusing to pay over the same, shall forfeit double the amount, means other moneys of similar or like character to fines or forfeitures, and therefore the section does not apply to a retiring treasurer of a school district who fails to pay over a general balance of money in his hands. *People vs. Dolan*, 39 Pac., 752-754, 5 Wyo., 245.

"Other necessary town charges," as used in Revised Statutes, 1857, Chapter 3, Section 26, providing that the qualified voters of the town may raise such sums as are necessary for the maintenance and support of schools and the poor, for making and repairing highways and townways and bridges, for purchasing and fencing burying grounds, for purchasing or building and keeping in repair a hearse, and house therefor, for the exclusive use of its citizens, and for other necessary town charges, embraces all the incidental expenses arising directly or indirectly in the due and legitimate exercise of the various powers conferred by the statute, and does not constitute a new and distinct grant of indefinite and unlimited power to raise money for any purpose whatsoever at the will and pleasure of a majority. Opinion of the Justices of the Supreme Judicial Court, 52 Me., 595, 598.

As used in Act Congress, June 26, 1884, Chapter 121, Section 2, 23 Stat. 54 (U. S. Comp. St., 1901, p. 3106), providing that if any seaman after his discharge shall have incurred any expense for board and other necessaries at the place of his discharge before shipping again, or for transportation to the United States, such expense shall be paid out of the arrears of wages and extra wages received by the consular officer, which shall be retained for that purpose, and the balance only paid over to such seaman, though literally broad enough to cover expenses of cure in a case of the previous hurt, are equally applicable to the ordinary expenses of seamen who are uninjured and well, and has no such special claim against the ship. The words "other necessaries" must be held to refer to the ordinary expenses of a well seaman, who has no special claim against the ship on account of previous injury or sickness. *The Hanson vs. W. L. White* (U. S.), 25 Fed., 503, 505.

Charter of the City of St. Louis, Article 5, Section 14, provides that no money shall be expended except by ordinance, the provisions of which shall be specific and definite. An appropriation ordinance provided for "publishing proceedings, printing, stationery, office expenses, furniture, rent of telephone and other expenses of house of delegates."

Held that the term "other expenses" means expenses of the character theretofore mentioned in that clause of the appropriation act, and does not include an appropriation for expenses incurred by a committee appointed by a resolution of the house of delegates to investigate tax returns. *State ex rel., Gavigan vs. Dierks*, 113 S. W., 1077, 1081, 214 Mo., 578; *State ex rel., Barrett vs. Same*, 113 S. W., 1081, 214 Mo., 592.

In view of what has been said, together with the rule that statutes relating to fees and compensation of public officers are to be strictly construed, and that such officers are entitled only to what is clearly given by law (*Lewis' Sutherland*, Section 714), we express the opinion that the expenses allowable under Article 3897 are limited to those enumerated and others of a like or similar kind or class, and that an expense for transferring cases from the justice docket to the docket of the county attorney is not contemplated or allowable under said article.

The courts of this State have specifically passed upon the question whether the rule of *ejusdem generis* is applicable to Article 3897. The Court of Civil Appeals at Galveston, in the case of *Harris County vs. Hammond*, 203 S. W., 445, did hold allowable expenses of the sheriff in connection with civil cases that would possibly be outside of the classes of expenses enumerated. But the rule seems not to have been invoked, nor was it discussed in the court's opinion. We are therefore not inclined to treat the case as decisive of this point.

Wherever we hold in this opinion that expenses are allowable, we mean that such expenses are allowable in the manner prescribed by Article 3897; that is, that the amount thereof may be deducted by the officer in making his report from the amount of fees, if any, due by him to the county, and that they are not allowable in any other manner.

You further inquire whether you will be within your authority in requiring the county attorney to state in his account the cause number, etc., in connection with which a particular item of expense is incurred. You clearly have authority to require this. Article 3897 says that if such expense be incurred in connection with any particular case, such statement shall name such case.

You are further advised that the expense account of the county attorney is subject to the audit of the county auditor and if it appears that any item of such expense was not actually incurred, or was not necessary, such item may be rejected by the county auditor or the commissioners' court. So that wherever we hold in this opinion that certain kinds of expenses are allowable, we do not mean to be understood as holding that they are allowable if they were not actually incurred, or if, in the opinion of the county auditor or the commissioners' court, the same were not necessary.

Your question as to the duty of the county auditor to require county officers to make reports for previous years will be answered in a separate communication.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2334, Bk. 55, P. 417.

OFFICERS—FEES AND COMPENSATION—COUNTY ATTORNEY.

In a case in which it is the duty of the county attorney under the Constitution and laws of this State to institute suit for the collection of moneys in behalf of the county, and under such authority suit is instituted and the county attorney signs the petition officially, the fact that the county employed additional counsel will not deprive the county attorney of his compensation as provided by law.

Article 363, Revised Civil Statutes, 1911.

AUSTIN, TEXAS, April 15, 1921.

Honorable Roy F. Formway, County Attorney, Rotan, Texas.

DEAR SIR: I beg to acknowledge receipt of yours of the 13th instant. This Department recently rendered you an opinion to the effect that in a case in which it is not the duty of the county attorney to represent the county, the county attorney is not entitled to commissions on moneys collected, but in such a case must look to his contract with the commissioners' court, if any, for his compensation. Yours of the 13th instant is as follows:

"The information that the commissioners court wants is in reference to the special attorney that they employed to assist in the suit. Does the fact that the commissioners court employed special attorneys change in any way Article 363 of the Revised Civil Statutes of 1911? That is the only question that the commissioners court is not clear on and they want information on that one question. I will appreciate it very much if you will give me your opinion of that question and I would like very much to have your opinion by the 20th of this month, as the court meets on that date."

The case of Terrell, County Attorney, vs. Greene, District Judge, et al., 88 Texas, 539, 31 S. W., 631, is authority for the proposition that where the law imposes a duty upon the county or district attorney to bring suit for the county, such official has a right to perform the duty, of which right and duty he cannot be deprived by the employment of additional attorneys by the commissioners' court. In the case mentioned, the Supreme Court of Texas held that under the Revised Statutes, Article 260, providing that when any district attorney shall learn that any officer in his district, entrusted with the safekeeping of any public funds, is abusing his trust, or failing to discharge his duties, he shall institute proceedings necessary to protect the public interest, it is such attorney's right and duty to prosecute an action against the county treasurer and his bondsmen for failure of the treasurer to account for public funds due to the failure of the bank in which he had deposited the same in his own name, though the commissioners' court has employed other counsel by whom the action has been commenced; and also that mandamus will lie in such a case to compel the district judge to permit the district attorney to appear for the county in an action which it is his right and duty to prosecute.

If an officer cannot be deprived of his right and duty to perform a particular service, he certainly cannot be deprived of the compensation provided by law for the performance of that service. I am expressing no opinion as to whether yours was a suit which it was your official duty to institute for the county, since I am not sufficiently advised to justify me in doing so. However, it is undoubtedly the law

that where the county attorney is charged by law with the duty of bringing suit in behalf of the county, the commissioners' court cannot lawfully deprive him of the right to perform that duty or to receive his statutory compensation by employing special counsel.

If, then, suit which by law the county attorney is directed to bring was instituted in behalf of the county, the county attorney officially signing the petition, and by virtue of such suit moneys were collected for the county, the fact that special attorneys were employed by the commissioners' court would seem to be immaterial so far as the lawful commissions of the county attorney upon the amount collected are concerned, and if the suit was of such a nature as that the commissions provided by Article 363, Revised Civil Statutes, are otherwise payable to the county attorney, we hold that the fact that special attorneys were employed will not preclude the payment of the commissions.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2325, Bk. 55, P. 399.

FEES AND COMPENSATION—COUNTY ATTORNEY—COMMISSION ON
MONEYS COLLECTED—COMMISSIONERS COURT—CONTRACT WITH
COUNTY ATTORNEY.

1. The county attorney is not entitled to commissions under Article 363, Revised Civil Statutes, on money collected for the county in a suit which it was not the duty of the county attorney to bring in behalf of the county.

2. The commissioners court has authority to employ the county attorney in connection with special attorneys to collect money by suit for the county where it is not the official duty of the county attorney to bring the suit, and when so employed, the county attorney must look to his contract with the commissioners court for his compensation.

AUSTIN, TEXAS, April 6, 1921.

Honorable Roy F. Formway, County Attorney, Rotan, Texas.

DEAR SIR: From your recent communications to this Department, it appears that special attorneys were employed by the county in connection with the county attorney to bring suit against a contractor and an engineer for \$4000. The suit was compromised, the defendants agreeing to pay \$2500, and the county agreeing to pay the costs of suit.

You desire to be advised whether you, as county attorney, are entitled to the full amount of your commissions, \$175, under Article 363 of the Revised Civil Statutes of 1911.

It is not clear from your communications just what character of suit it was, but for the purpose of this opinion, I assume that it was not a suit which it was your duty as county attorney to bring in behalf of the county; in other words, that there is no constitutional or statutory provision making it your duty to bring such a suit.

This being true, you, as county attorney, are not entitled to any commission under Article 363. The commissions there provided for are for services rendered in the collection of money by the county

attorney in the performance of duty required of him by law. The county attorney is not entitled to the commissions provided for by Article 363 upon moneys which the law does not require him to collect. A county officer claiming compensation or fees must be able to show not only that the services were performed for the duty as such, but also a statute or a constitutional provision authorizing compensation for the particular services in question, or else a contract therefor authorized by law.

Spencer vs. Galveston County, 56 Texas, 384.

15th Corpus Juris, 496.

Ellis County vs. Thompson, 95th Texas, 22.

64 S. W., 927.

66 S. W., 48.

Wharton County vs. Ahldag, 84 Texas, 12.

19 S. W., 291.

State vs. Moore, 57 Texas, 307.

However, the county has authority to employ the county attorney to represent the county in a suit in which the law does not make it a part of the official duty of the county attorney to represent the county.

Jones vs. Veltmann, 171 S. W., 291.

Lattimore vs. Tarrant County, 124 S. W., 205.

At page 498 of 15th Corpus Juris, will be found the following language:

"However, compensation may be recovered by a county official for the performance of services entirely outside the scope of the duties of the office where the services were performed under a lawful contract with the county commissioners."

It follows from what has been said that whatever compensation you are entitled to for your services in connection with the lawsuit in question is by virtue of contract between you and the commissioners' court. Assuming that it was a suit which it was not your official duty as county attorney to bring in behalf of the county, the commissioners' court had authority to make a contract with you for your services. Of course, as to the terms of that contract, if there was one, we are not advised.

You are therefore advised that you are not entitled to commissions under Article 363, and that if you are entitled to compensation at all, it is by reason of contract between you and the commissioners' court.

Very truly yours,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2287, Bk. 55, P. 167.

FEEES OF OFFICE—COUNTY ATTORNEY—COLLECTION OF UNPAID TAXES
ON PERSONAL PROPERTY.

The county attorney is entitled to commission, under Article 363 of the Revised Civil Statutes of 1911, for collections of overdue taxes on personal property

collected by virtue of authority vested in him by Article 7661 of the Revised Civil Statutes of 1911, and the compensation of the county attorney, under Article 7688a and Article 7691 of the Revised Civil Statutes, does not apply to such collections of taxes upon personal property, said articles relating only to delinquent taxes upon lands and lots.

AUSTIN, TEXAS, February 12, 1921.

Honorable A. R. Anderson, County Attorney of Garza County, Post, Texas.

DEAR SIR: I acknowledge receipt of your verbal request for an opinion as to whether you are entitled to ten per cent (10%) commission upon taxes on personal property collected by you, under Article 7661 of the Revised Civil Statutes of 1911.

It seems that you are of the opinion that you are entitled to ten per cent (10%) upon the amount collected under Article 363 of the Revised Civil Statutes of 1911, since the delinquent tax statutes fixing the fees of county and district attorneys for delinquent tax suits refer to taxes on real property only and not to taxes on personal property.

The statutes of this State relative to the collection of delinquent taxes generally will be found in Chapters 14 and 15 of Title 126 of the Revised Civil Statutes as amended and as contained in said chapters and title in Complete Texas Statutes of 1920, published by Vernon Law Book Company.

The only references in the above mentioned chapters, that I find to the compensation of county and district attorneys in delinquent tax suits, are in Articles 7688a and 7691 of said Complete Texas Statutes of 1920. Article 7688a above mentioned is Section 3 of Chapter 147 of the General Laws of the Regular Session of the Thirty-fourth Legislature, as amended by Chapter 64, Acts of 1919, Second Called Session, and Article 7691 seems to be brought forward from acts prior to the Revised Civil Statutes of 1911. Neither the Act of 1915 nor the prior acts above mentioned have any reference whatever to delinquent taxes upon personal property.

Said Article 7688a provides that 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, penalty and costs when due, as otherwise provided by law.* Then follows this language:

"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."

This clearly has reference to suits for delinquent taxes on lands and lots only.

Article 7691, after providing that it shall be the duty of the county attorney and district attorneys to represent the State and

county in all suits against delinquent taxpayers provided for in the act, contains the following language:

"In no case shall the compensation for said county attorney be greater than three (\$3.00) dollars for the *first tract* in one suit, and one (\$1.00) dollar for each additional *tract*, if more than one *tract* is embraced in some suit to recover taxes, penalties and cost."

This language likewise makes clear that the compensation mentioned relates only to delinquent tax suits on lands and lots.

I find no provision in the statutes indicating that the compensation mentioned in Article 7688a and Article 7691 applies to the collection of overdue taxes on personal property.

The next question is, is the county attorney entitled to the commissions mentioned in Article 363 upon the amount of delinquent personal property taxes collected by him under the authority vested in him by statute to make such collections? Article 363 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 commissions 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."

The language used in the article is undoubtedly broad enough to include such collections as inquired about by you. Note the language "on the first thousand dollars collected by him in any one case for the state or county," etc., and also "all collections made for the State or for any county." Delinquent taxes on personal property collected by the county attorney pursuant to specific authority are certainly money "collected" and "collections" as used in this article.

The only cases construing Article 363 above quoted, that we find, are the following:

Lattimore vs. Tarrant County, 57 C. A., 610, 124 S. W., 205.

Flint vs. Jones County, 20 C. A., 631, 50 S. W., 203.

State vs. Bratton, 192 S. W., 814.

We have examined these cases and find nothing therein contrary to our holding in this opinion.

I understand that you collected for the State and county approximately \$2700 in taxes overdue on personal property and that such collection was made pursuant to your authority under Article 7661 of the Revised Civil Statutes of 1911, which article reads as follows:

"Hereafter it shall be the duty of the district or county attorney of the respective counties of this State, by order of the commissioners court, to institute suit in the name of the State for the recovery of all money due the State and county as taxes due and unpaid on unrendered personal property; and, in all suits where judgments are obtained under this act, the person owning the property on which there are taxes due the State and county shall be liable for all costs; provided, such suits may be brought for all taxes so due and unpaid for

which such delinquent taxpayer may be in arrears for and since the year 1886; and provided further, the State and county shall be exempt from liability for any costs growing out of such action; provided, all suits brought under this article for the recovery of taxes due on personal property shall be brought against the person or persons who owned the property at the time such property should have been listed or assessed for taxation; provided, that no suit shall be brought until after demand is made by the collector for taxes due; and provided further, that no suit shall be brought for an amount less than twenty-five dollars."

Having had the authority to collect such taxes, and the law providing that the county attorney shall be entitled to retain the commissions mentioned in Article 363 on all collections made for the State or for any county, you are respectfully advised that in the opinion of this Department, you are entitled to the commissions as provided in Article 363, on such sum as you collected and that Articles 7688a and 7691 above mentioned do not apply.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2337, Bk. 56, P. 354.

OFFICERS—FEES AND COMPENSATION—DELINQUENT FEES.

Where the county clerk made his maximum fees and compensation for the fiscal year next preceding the current year, he is not entitled to the full amount of delinquent fees collected during the current year, but in that event is entitled to ten per cent of the amount of such delinquent fees collected and the remainder shall be paid into the county treasury.

AUSTIN, TEXAS, April 26, 1921.

Honorable W. D. Carroll, County Auditor, Comanche, Texas.

DEAR SIR: I have yours of the 12th instant, addressed to the Attorney General, reading as follows:

"Will you please make me ruling on the following: The county clerk during the year 1920 recorded births and deaths as required, but made no entry of same on her books, and since December 1, 1920, she has received statement from the Bureau of Vital Statistics, and the county has paid her the amount specified, etc. The county clerk during the year 1920 received more than the \$2400 allowed and paid money into the county treasury as excess fees.

"Question: Should she now refund three-fourths of the amount paid as above stated, or can she carry that and report same on this year's work at the close of the year December 1, 1921?"

Your question is controlled by Articles 3890 and 3892, Revised Civil Statutes of 1911, which articles read as follows:

"Art. 3890. Officer not collecting maximum fees, etc., may retain out of delinquent fees collected, remainder paid to treasurer.—Any officer mentioned in Articles 3881 to 3886, who does not collect the maximum amount of his fees for any fiscal year and who reports delinquent fees for that year, shall be entitled to retain, when collected, such part of such delinquent fees as is sufficient to complete the maximum compensation for the year in which delinquent fees were charged, and also to retain the one-fourth of the excess belonging to him, and the remainder of the delinquent fees for that fiscal year shall be paid as herein provided for when collected. (Acts 1897, S. S., p. 9, Sec. 11. Acts 1907, p. 50.)"

"Art. 3892. Delinquent fees, collection of, commissions on, remainder paid to treasurer.—All fees due and not collected as shown in the report required by Article 3895 shall be collected by the officer to whose office the fees accrued; and, out of such part of delinquent fees as may be due the county, the officer making such collection shall be entitled to ten per cent of the amount collected by him, and the remainder shall be paid into the county treasury, as provided in Article 3889 of this act. It shall not be legal for any officer to remit any fee that may be due under the law fixing fees. (Acts 1897, S. S., p. 10, Sec. 13.)"

It is clear from a reading of these articles that the county clerk is not entitled to delinquent fees collected during the current year where he made his maximum for the year next preceding, except as provided in Article 3892. This article clearly contemplates that under the circumstances, above mentioned, the county clerk is entitled to retain ten per cent of the amount of such delinquent fees collected by him during the current year, and that the remainder thereof shall be paid into the county treasury. It goes without saying that the amount of this ten per cent must be accounted for by the county clerk in arriving at his maximum for the current year.

You are therefore advised that the fees mentioned by you, accruing during the fiscal year of 1920, but collected since December 1, 1920, are delinquent fees within the meaning of the articles of the statute above quoted; and it appearing that you made your maximum for the fiscal year ending November 30, 1920, you are authorized to retain only ten per cent of these delinquent fees during the current year and that the remainder thereof must be paid into the county treasury by virtue of Article 3892.

But when I speak of your maximum in this connection I mean maximum and excess fees you are allowed to retain. For instance, suppose your county has 26,000 population according to the last United States census. You could have retained last year \$2400 plus one-fourth of the excess until the excess reached \$1250. If one-fourth of your excess did not amount to as much as \$1250 last year, you may make it up out of delinquent fees which accrued last year but which are collected this year to the same extent as if collected last year. Of the remainder due the county you may retain ten per cent of the amount collected as per Article 3892. In the event you made enough last year that one-fourth of the excess amounted to \$1250 then you get ten per cent of all delinquent fees collected this year and turned over to the county. I do not know the population of your county and hence cannot say whether these figures are applicable in your case or not. However, the rules stated are applicable.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2265, Bk. 55, P. 6.

FEEs OF OFFICE—OFFICERS AND OFFICES—COUNTY JUDGE.

The Act of 1907 (Art. 1798) allowing the county judge of Dallas County not less than \$1200 ex officio "in addition to the fees allowed him by law" was re-

pealed by the Act of 1913 (amending Article 3893), which declares that the commissioners court is not authorized to make ex officio allowances to a county official where the compensation and excess fees which said officer is allowed to retain reach the maximum prescribed by law.

AUSTIN, TEXAS, December 17, 1920.

Mr. Charles E. Gross, County Auditor, Dallas, Texas.

DEAR SIR: Your letter dated November 20, 1920, addressed to Assistant Attorney General Stone, and copies of your letter to the Attorney General, dated October 21, 1920, and Judge Cecil L. Simpson's letter to the Attorney General, dated October 22, 1920, were referred to me for attention yesterday morning.

The question is clearly submitted in your letter of October 21, 1920, which reads, in part, as follows:

"Articles 3883 and 3889 of the Revised Civil Statutes fixes the maximum fees which may be retained by the county officials. In Dallas County the county judge may retain \$3500, and one-fourth the excess to the additional amount of \$1500, making the total \$5000. Article 3893 limits the ex officio salary and fees to the maximum of \$5000. This article was first enacted in 1897 and re-enacted with slight change in 1913. However, Article 1798 of the Revised Civil States, same being a portion of the law creating a county court at law for Dallas County enacted in 1907, provides that the county judge of Dallas County shall receive a salary for ex officio services, and in addition to the fees allowed him by law, of not less than \$1200 per year. The county judge is now receiving the sum of \$1200 per year ex officio salary.

"The question therefore is, should this \$1200 ex officio salary be excluded and not computed in arriving at the total amount which under the law the county judge may retain as compensation and fees of office, or should same be counted a part of the \$5000 maximum allowed by Articles 3883 and 3889 of the Revised Civil Statutes as aforesaid?"

Replying, I beg to say:

(1) The Thirtieth Legislature, at its Regular Session in 1907, passed an act creating the "County Court of Dallas County at Law" (Acts 1907, page 115), and Section 13 thereof reads as follows:

"The county judge of Dallas County shall hereafter receive from the county treasury, in addition to the fees allowed him by law, such a salary, for the ex officio duties of his office, as may be allowed him by the commissioners court, not less than twelve hundred dollars per year."

This section is now Article 1798, Revised Statutes, 1911.

Clearly it was the intent of the Legislature to authorize the commissioners' court of Dallas County to allow the county judge of Dallas County not less than \$1200 per year for "ex-officio duties of his office" and which amount was "in addition to the fees allowed him by law" *at that time*. It will be observed that *no maximum amount of ex-officio compensation was prescribed by this act.*

(2) By Article 3883, Revised Statutes, 1911, as amended by Chapter 130, Acts 1917, it is provided:

"In counties containing a city of over twenty-five thousand inhabitants, or in such counties as shown by the United States census of 1910, shall contain as many as thirty-seven thousand inhabitants, the following amount of fees shall be allowed, viz.: County judge, an amount not exceeding thirty-five hundred dollars per annum. * * *"

In counties having more than 38,000 inhabitants, an officer is authorized to retain "one-fourth of the excess fees until such one-

fourth amounts to the sum of fifteen hundred dollars." (Art. 3889 as amended by Chapter 20, Acts 1919, Second Called Session.)

Since Dallas County contains a city of over 25,000 inhabitants, the maximum amount of fees allowed the county judge of that county is \$3500 per annum and the maximum amount of excess fees allowed such officer is \$1500 per annum, making a total of \$5000.

(3) The Thirty-third Legislature, at its Regular Session in 1913, amended Article 3893, Revised Statutes, 1911, and this article as amended now 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."

The Supreme Court, in *Veltman vs. Slator*, 217 S. W., 378 (opinion by Chief Justice Phillips), placed the following construction on this amendment:

"The purpose of the act of the Thirty-third Legislature (Chapter 121, Laws of 1913), in its amendment of Article 3893, was still to authorize the allowance of compensation for such services when necessary in the judgment of the commissioners court, *but only where the compensation of the particular official and the excess fees permitted to be retained by him, as fixed in other parts of the act, did not reach the maximum also provided by the act; and then, only in such an amount as with his other compensation and the excess fees allowed to be retained would not exceed that maximum.*" Italics ours.

The opinion further declares:

"Article 3893 in the Revised Statutes was originally Section 15 of the Act of 1897 (Chapter 5, Acts of the Special Session). Its language as an article in the revision of 1911 is the same as that of Section 15 of the Act of 1897, except that the word 'chapter' instead of 'act' is used in the opening and concluding lines.

"Section 15 of the Act of 1897 reads:

"It is not intended by this act that the commissioners court shall be debarred from allowing compensation for ex-officio services to county officials not to be included in estimating the maximum provided for in this act, when in their judgment such compensation is necessary; provided, such compensation for ex-officio services shall not exceed the amounts now allowed under the law for ex-officio services; provided further, the fees allowed by law to district and county clerks, county attorneys and tax collectors in suits to collect taxes shall be in addition to the maximum salaries fixed by this act."

"The purpose of the section—exclusive of the last proviso which is not material here—was to warrant, when necessary in the judgment of the commissioners court, the allowance to county officials of compensation for ex-officio services to the extent of the amounts then fixed by law for such services; and to exclude such allowance, where made, from the estimation of the general maximum of compensation provided in the act."

In passing a law the Legislature is presumed to have had in mind and in contemplation existing laws on the same subject and to have shaped the new act with reference thereto. *Black's Int. Laws*, p. 204.

The maximum amount of fees which county officials may retain is determined by Chapter 4, Title 58, Revised Statutes, 1911, as amended by Chapter 121, Acts 1913; Chapter 130, Acts 1917; Chapter 34, Acts 1917, First Called Session, and Chapter 20, Acts 1919, Second Called Session.

Article 3881 of said chapter and title was amended in 1913 so as to provide:

"Hereafter the maximum amount of fees of all kinds that may be retained by any officer mentioned in this section (article) as compensation for services shall be as follows: * * *"

The article then provides for the maximum compensation allowed certain county officers, including county judge.

In *Ellis County vs. Thompson*, 95 Texas, 29, the Supreme Court said:

"The phrase 'fees of all kinds' embraces every kind of compensation allowed by law * * * unless excepted by some provision of the statute."

The fees involved in that case had accrued to the office of the county clerk. The construction there given the phrase, however, is the same that would have to be applied in determining the amount of compensation and fees of office which the county judge, or any other official named in Chapter 4 of Title 58 might retain.

In *Navarro County vs. Howard*, 129 S. W., 859, the Court of Civil Appeals held:

"In the case of *Ellis County vs. Thompson*, 95 Texas, 22, 64 S. W., 927, 66 S. W., 48, our Supreme Court held that the phrase 'fees of all kind,' mentioned in the foregoing section of the Act of 1897, embraces every kind of compensation allowed by law to the clerk of the county court unless excepted by some provision of said act."

This Department, in an opinion to the county attorney of Johnson County, dated November 6, 1914, after quoting from the above decisions, held as follows:

"It may then be safely said that no officer mentioned in Articles 3881, 3882 and 3883, R. S., is entitled to receive any fees or compensation of any kind beyond the amount allowed by Chapter 4, Title 58, R. S., unless it may be some fees of his office which are 'excepted by a provision of said act' itself." (1914-16 Attorney General's Report, page 246.)

The maximum amounts prescribed by Article 3881, above, do not apply to county officials in the following counties:

In any county shown by the "last United States census" to contain as many as 25,000 inhabitants. (Article 3882, as amended by Chapter 121, Acts 1913.)

In any county "containing a city of over twenty-five thousand inhabitants," or in any county as show by the "United States census of 1910" to contain as many as 37,000 inhabitants.

The maximum fees of the county attorney in counties having more than 100,000 population are prescribed by Article 3883a in Chapter 34, Acts 1917, First Called Session.

In counties having more than 38,000 inhabitants, each county official is authorized to "retain one-fourth of the excess fees until such one-fourth amounts to the sum of fifteen hundred dollars." (Article 3889, as amended by Chapter 20, Acts 1919, Second Called Session.)

It will thus be seen that the exceptions prescribed by the above articles of the statute are the only provisions of the fee bill allowing compensation in addition to the amounts prescribed for all county officials by Article 3881, as amended by the Act of 1913. In other words, if Dallas County could not be listed with the counties referred to in Article 3883, or in Article 3882, then the fees of county officials therein would be subject to the maximum amount prescribed by Article 3881, and if Article 3889 had not been enacted, then the "fees of all kinds" that could be retained by Dallas County officials could not exceed the maximum prescribed by Article 3881.

(4) In the brief submitted by Judge Simpson to the Attorney General he uses the following language:

"If Article 1798 controls then it follows that the ex-officio salary allowed is to be excluded and not considered in arriving at the maximum amount which I am allowed as county judge under Articles 3883 and 3889 of the Statutes. The language of Article 1798 is clear and under your ruling construing the compensation allowed county judges for certification and collection of inheritance taxes you would of course necessarily rule that if Article 1798 governs, then the ex-officio salary allowed would be no part of the fees of office. The wording of the statute governing the compensation of the county judge in the collection of inheritance taxes is in part as follows: 'Which fees shall be cumulative of all other fees and compensation provided by law.' The wording of Article 1798 is in part as follows: 'In addition to the fees allowed him by law.'"

This position is not tenable. The opinion of the Attorney General, referred to by Judge Simpson, holds, in substance, that the fees of county judges provided for under Articles 7490 and 7491, as amended by Chapter 164, Acts 1919, Regular Session, providing for certain fees in the collection of inheritance taxes "are cumulative of all other fees" allowed the county judge by law and need not be accounted for as fees of office. The amendment to said articles expressly exempted the fees allowed the county judge from the provisions of the fee bill. It appears that an amendment to Article 3889 and the amendment to Articles 7490 and 7491 were all passed at the Regular Session of the Thirty-sixth Legislature (1919) and all became effective at the same time. Had the Legislature enacted the amendment to the Inheritance Tax Law prior to 1913, then such compensation would be subject to the provisions of the fee bill and the officials named in the law would be required to account therefor the same as other fees of office.

From all the above, it is concluded:

(a) There is absolute antagonism between the Act of 1907 (Art. 1798), allowing the county judge of Dallas County *not less* than twelve hundred dollars ex officio "in addition to the fees allowed him by law," and the Act of 1913 (amending Article 3893) which declares that the commissioners court is not authorized to make ex officio allowances to a county official where the compensation and excess fees which such officer is allowed to retain reach the maximum prescribed by law.

(b) Since it appears that the "compensation and excess fees" of the county judge of Dallas County during the past fiscal year have reached the prescribed maximum of \$5000 a year, that officer is not entitled to any compensation in excess of that amount.

We regret delay in answering your letter, but owing to the fact that

our Mr. Stone has been compelled to be absent from the office for some time on official business, it has been almost unavoidable.

Yours very truly,

W. P. DUMAS,
Assistant Attorney General.

Op. No. 2324, Bk. 55, P. 352.

OFFICERS—TRAVELLING EXPENSES—AUTOMOBILES—COUNTY JUDGE—
COUNTY COMMISSIONERS—SHERIFF—COUNTY SUPERINTENDENT.

1. It is unlawful for the commissioners court to expend county funds to furnish either of the following officers an automobile: county judge, each of the four county commissioners, sheriff, county superintendent of public instruction.

2. In the case of the county judge and sheriff, the statute authorizes "actual and necessary expenses * * * such as traveling expenses." Held, that the use of these words does not authorize expenditure of county funds for automobiles for such officers.

3. The statutes are silent as to traveling expenses of county commissioners, and there being no statute authorizing the purchase of automobiles for such officers, none can be purchased out of county funds.

4. The county superintendent is entitled to not exceeding three hundred dollars for office and traveling expenses. Held, that no automobile can be purchased by the county for the county superintendent.

5. Suit will lie in behalf of the county against the members of the commissioners court and their bondsmen for the unlawful expenditures, and also against each officer unlawfully furnished an automobile out of county funds.

AUSTIN, TEXAS, March 31, 1921.

Hon. F. A. Tompkins, County Auditor, Nueces County, Corpus Christi, Texas.

DEAR SIR: I have yours of March 18, 1921, addressed to Honorable C. M. Cureton, Attorney General, reading as follows:

"It has been the custom of the commissioners court of Nueces County to furnish an automobile to each of the following officers, to wit: County judge, each of the four county commissioners, sheriff and superintendent of public instruction.

"Will you please give me an opinion as to what authority, if any, such action is permissible and legal? If not legal, are these officers hable to the county for having heretofore made such illegal purchases?"

In order to answer your inquiry, it is necessary to examine the statutes providing for compensation, and expenses if any, of the officers named.

The county judge is paid by fees and ex officio compensation. This officer is one of those provided for as to expenses in Article 3897, Revised Civil Statutes of 1911, as amended by Acts of 1915, page 246. This article authorizes "actual and necessary expenses incurred by him in the conduct of his said office, such as stationery, stamps, telephone, traveling expenses, and other necessary expense."

The statutes prescribe the compensation of county commissioners for all purposes without saying anything about expenses or travelling expenses. (See Article 6901a, Vernon's Complete Statutes of 1920.)

The above statement with respect to the county judge applies equally in the case of the sheriff.

The controlling statute relative to compensation and expenses of a county superintendent of public instruction is Article 2758, Revised Civil Statutes, as amended by Chapter 57, page 100, General Laws of the Third Called Session of the Thirty-sixth Legislature. This statute provides that the county board of trustees may make such further provision as it deems necessary for office and travelling expenses for the county superintendent of public instruction and any assistant he may have, with the following proviso:

"* * * provided, that expenditures for office and traveling expenses shall not exceed three hundred dollars."

Taking these officers up in the order above set forth, we answer your inquiry as to the authority of the commissioners court to use county funds to purchase each an automobile, as follows:

The County Judge and the Sheriff.

It is the opinion of this Department that the expression "actual and necessary expenses, including travelling expenses" does not authorize the purchase of an automobile for either the county judge or the sheriff out of county funds. This means travelling expenses actually incurred, and it is the opinion of this Department that an expenditure for an automobile is not travelling expense actually incurred within the meaning of this statute. A statute authorizing actual travelling expenses, in the absence of language to the contrary, means ordinary expenses already incurred, and it would seem does not authorize the expenditure of money for future travelling expenses. An automobile, in the nature of things, will last longer than a month, and will be calculated to last a considerable time in the future. It seems to us that the provisions of Article 3897 would preclude the idea that lump sums may be expended for more or less permanent means of transportation such as an automobile, for such statute requires an itemized statement of expenses at the close of each month, evidently contemplating that only expenses properly incurred during the month shall be included. As has been suggested in an opinion heretofore rendered by this Department, the line must be drawn somewhere. It would not seriously be contended that county funds, for instance, could be used to purchase a railroad train for the convenience of county officials in travelling, and the same reasoning would apply to the question of purchasing an automobile.

This Department has held that an appropriation for the Game, Fish and Oyster Commissioner for, among other things, "all necessary expenses of the department, including means of transportation for the Commissioner and deputies and for travelling expenses in the enforcement of the law," did not authorize an expenditure for automobiles for the use of the Commissioner and deputies. (Opinion No. 1437, of date February 24, 1915, addressed to Hon. L. W. Tittle, Acting Comptroller.)

The Department also held that the State Health Department was not authorized to purchase an automobile under an appropriation, having very broad language authorizing expenditure of funds to prevent and eradicate certain diseases. (Opinions of the Attorney General, 1916-18, page 793.)

In the case of *In re Bensel*, 124 N. Y. Supp., 716, 723, it was held

that the use of the words "necessary travelling expenses" in a statute did not authorize the use of automobiles by commissioners of appraisal in condemnation proceedings.

In the case of *Harris County vs. Hammond*, 203 S. W., 445, the Court of Civil Appeals at Galveston went so far as to hold that Article 3897 does not authorize the expenditure of county funds to pay the gasoline and repair bills in connection with the use of an automobile owned by the sheriff and used in official business.

If the Legislature had intended that the various counties of the State should purchase automobiles for county officials, it is our opinion that it would have said so in plain terms, such purchases involving as they do the expenditure of large sums of money, and such purchases providing as they do, at least to a certain extent, for future travelling expenses as distinguished from those which have already been incurred.

The County Commissioners.

If an automobile cannot be purchased for the county judge or sheriff, certainly one cannot be purchased for the county commissioners, there being a total absence of any statute authorizing even travelling expenses for county commissioners. This Department has recently held, for instance, that county funds cannot be used to pay for gasoline or other automobile supplies for county commissioners. (Opinions of the Attorney General, 1918-20, page 114.) There being no statute authorizing it, an automobile cannot be purchased out of county funds for a county commissioner.

The County Superintendent.

The case of the county superintendent presents no difficult problem. The statute expressly limits the amount of office and traveling expenses for this officer to three hundred dollars. How could it be contended that this contemplates the purchase of an automobile? But in the event the price of "Tin Henrys," or other makes of cars, should be reduced to the point that the sum of three hundred dollars would cover the purchase price of a car, besides office expenses, then the same reasoning applies here as was applied above with respect to the county judge and sheriff; that is, that the authority to use funds for travelling expenses does not authorize the expenditure of such funds for automobiles.

The Remedy.

Having determined that it is unlawful to use county funds for such a purpose, we proceed to answer your inquiry as to whether these officers "are liable to the county for having heretofore made such illegal purchases."

Members of the commissioners court (being members of the body making the unlawful expenditures) are liable to the county, and a suit will also lie against each officer for whom the unlawful purchase was made. Suit will also undoubtedly lie against the bondsmen of the members of the commissioners court for the illegal action of such members in making the expenditures, but in view of the decisions, it is doubtful

whether suit will lie against the bondsmen of the sheriff or county superintendent in this instance.

It is fundamental that a public officer authorized to expend public funds and the sureties on his official bond are liable for the illegal expenditure of any such funds. 23 American and English Encyclopaedia of Law, at page 372, states the rule as follows:

"It is the duty of a public officer charged with the custody and expenditure of public money to keep it safely, and disburse and account for it in accordance with law, and to turn over to the proper authority any sum remaining in his hands at the expiration of his term. For any failure to do so he and the sureties upon his official bond are liable."

It has been held in this State that a sheriff who received county moneys under orders of the commissioners court upon claims which under no circumstances could he lawfully collect from the county, was liable to refund such moneys on an implied contract as for money unlawfully had and received, but that his bondsmen were not liable. (Jeff Davis County vs. Davis et al., 192 S. W., 291.) There is no doubt in our minds as to the correctness of the proposition that the officers mentioned by you receiving the benefit of the unlawfully expended funds would be liable to the county.

Summing up, beg to advise that the commissioners court was and is unauthorized to purchase each and all of the automobiles for the officers named in your inquiry, and that the members of the commissioners court and their bondsmen are liable to the county for such unlawful expenditures; and that those receiving the automobiles are also liable to the county,

Suit will therefore lie in behalf of the county against the members of the commissioners court and their bondsmen, and against each officer unlawfully furnished an automobile by the county.

We have not gone into the question of removal from office or criminal liability since your inquiry does not make it necessary to do so.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2310, Bk. 55, P. 275.

OFFICERS—COMPENSATION—COUNTY JUDGE.

The county judge is not entitled to the compensation provided by statute when acting as ex-officio county superintendent over and above his maximum compensation and excess fees, but must account for said ex-officio compensation when arriving at his maximum by reason of Article 3893, Revised Civil Statutes.

AUSTIN, TEXAS, March 9, 1921.

Hon. Parke N. Dalton, County Attorney, Crosbyton, Texas.

DEAR SIR: In answering yours of February 19, I failed to answer your second inquiry.

You desired advice as to whether the county judge is entitled to his ex-officio compensation when acting as county superintendent, over and above the maximum he is authorized to retain under Article 3881 et seq.

Article 3886 provides that in counties where a county judge acts as superintendent of public instruction, he shall receive such other salary as may be provided by the commissioners court, not to exceed the sum of \$600 per annum.

Article 3893 provides that the commissioners court is 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 Chapter 4 of Title 58.

Article 2763 provides that in each county in this State, having no school superintendent, the county judge shall be ex-officio county superintendent of public instruction, and shall perform all the duties required of the county superintendent.

It is clear, therefore, that the compensation provided for the county judge, when acting as county superintendent, is ex-officio compensation within the meaning of Article 3893. Therefore, the county judge is not entitled to such compensation over and above his maximum compensation and excess fees provided for in Articles 3881 et seq. The county judge could not, under the Constitution, hold two offices (with certain exceptions, not including county superintendent), and hence his duties, when acting as county superintendent are simply additional duties as county judge, and the compensation for such services will be considered in arriving at his maximum by reason of Article 3893.

In arriving at the amount of his maximum compensation and excess fees, I desire to call your attention to the case of Anderson County vs. Hopkins, 187 S. W., 1019.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2327, Bk. 55, P. 370.

FEES AND COMPENSATION—COUNTY JUDGE AND COUNTY COMMISSIONERS—TRANSFER OF COUNTY FUNDS.

1. The per diem of the county judge for attendance upon the sessions of the commissioners court is controlled by Article 3870, Revised Civil Statutes, and not by the statute passed subsequent thereto relative to the compensation of county commissioners.
2. Moneys in the general county fund raised by taxation cannot lawfully be transferred to the road and bridge fund.
3. Chapter 29, General Laws of the Fourth Called Session, Thirty-fifth Legislature, as amended by Chapter 98, General Laws, Regular Session of the Thirty-sixth Legislature, controls exclusively as to the compensation of county commissioners for all purposes, notwithstanding the terms of Articles 3870, 6901 and 6987, Revised Civil Statutes.

AUSTIN, TEXAS, April 2, 1921.

Hon. Parke N. Dalton, County Attorney, Crosbyton, Texas.

DEAR SIR: This is in answer to your first and third inquiries of March 29, reading as follows:

- "1. What is the county judge allowed as compensation for his attendance on the commissioners court per day?
- "2. Is the commissioners court authorized to transfer funds from the general

fund to the road and bridge fund? It is my opinion that where there is a surplus in the general fund and after transferring such surplus to the road and bridge fund same does not exceed the maximum allowed by the Constitution, the court is allowed to make the transfer, but the county judge has some doubt about this, and has requested me to obtain your opinion on same.

"3. Crosby County has a population of less than seven thousand inhabitants. What is the commissioner allowed as compensation for acting as road supervisor? I think this is either ten days in each month, at \$4 per day, or not to exceed \$50 per month."

First: Article 3870, Revised Civil Statutes, 1911, reads as follows:

"Each county commissioner, and the county judge when acting as such, shall receive from the county treasury, to be paid on the order of the commissioners court, the sum of three dollars for each day he is engaged in holding a term of the commissioners court, but such commissioners shall receive no pay for holding more than one special term of their court per month."

The Legislature, in this article, evidently deemed it necessary to mention county judges, as well as county commissioners. Chapter 29, General Laws, Fourth Called Session of the Thirty-fifth Legislature, as amended by Chapter 98, General Laws, Regular Session, Thirty-sixth Legislature, fixes the compensation of county commissioners without mentioning county judges.

The later acts do not expressly repeal or amend Article 3870, nor in our opinion do they effect a repeal of that article by implication so far as the compensation of county judges is concerned. The words "county commissioners" are not sufficient to include county judges in this instance. A statute will not be held to be altered by a later statute by implication unless the provisions of the statutes are clearly repugnant to each other, and then only to the extent of the repugnancy. Lewis' Sutherland's Statutory Construction, 2nd Ed., page 464.

If it had been the purpose of the Legislature to change the compensation of county judges in the latter enactments, it is reasonable to suppose it would have expressly mentioned the county judge, having done so in Article 3870, and having mentioned only county commissioners, Article 3870 was not affected as applied to county judges.

You are therefore advised that Article 3870, Revised Civil Statutes of 1911, controls as to the per diem of the county judge for services rendered in holding terms of the county commissioners court.

Second: Your second question is answered in the negative. Whatever may have been thought to be the law prior to the decision of the Supreme Court of this State in *Carroll vs. Williams*, 109 Texas, 155, 208 S. W., 504, it would seem that it is now settled that moneys raised by taxation cannot be transferred from the general county fund to the road and bridge fund. This decision is instructive, also, as regards other county funds.

Your third inquiry involves a construction of the Act of the Thirty-fifth Legislature and the amendment thereto by the Thirty-sixth Legislature, in connection with Articles 3870, 6901 and 6987, Revised Civil Statutes. Before the passage of Chapter 29, General Laws of the Fourth Called Session of the Thirty-fifth Legislature, there were articles of the Revised Civil Statutes dealing with the compensation of county commissioners, viz.:

Article 3870, providing that county commissioners should receive \$3

per day for every day the commissioners court was in session; Article 6901, allowing each \$3 per day for services performed as "road supervisors" for not more than ten days in each year, and as amended by Acts of 1913, page 255, allowing each commissioner for services as "road supervisor" \$3 per day for not more than ten days in any one month; and Article 6987 allowing each commissioner as "ex-officio road commissioner of his precinct" not to exceed \$4 per day, not to exceed \$50 per month.

Chapter 29, General Laws, Fourth Called Session, Thirty-fifth Legislature, amended Chapter 1, Title 119, Revised Civil Statutes of 1911, by adding thereto five new articles, numbered from 6901a to 6901e, inclusive, and it seems from the caption that the main purpose of the Act was "fixing the compensation of county commissioners." The emergency clause recited the fact that the various counties of the State were attempting to operate under special road laws providing for different and various compensations and salaries for county commissioners, and that there was some question as to the validity of such provisions in special road laws.

The Act fixed the compensation of "county commissioners" in the various counties of the State, the amount depending upon population, with the provision that "this salary shall be in lieu of all other fees and per diem now allowed by law," except that in counties containing a population of less than 30,000, the compensation was fixed without this clause being included. However, as to the latter mentioned counties, compensation was fixed for commissioners for services "as commissioner" and "when acting as ex-officio road supervisors."

Now, it will be remembered that Article 3870, as well as Article 6987, used the word "commissioner," and that Article 6901 used the words "road supervisor."

Chapter 29, Acts of the Fourth Called Session, Thirty-fifth Legislature, when read as a whole, evidences an intention upon the part of the Legislature to fix the compensation of county commissioners for all their services, whether in connection with the county roads or county's business generally. As to counties of less than 30,000 population, the Act prescribes the compensation of commissioners "as commissioners" and when acting as "ex-officio road supervisors."

It is the opinion of the Department that by reason of the Act, so far as the compensation of county commissioners is concerned, such commissioners perform all their services as commissioners, or as ex-officio road supervisors, and that said Act, as amended, prescribes their compensation for all their services.

The writer is aware of the rule of construction that an act will not be held to repeal the provisions of a former act by implication unless the intention to do so is clear, and unless the provisions of the two acts are in irreconcilable conflict. However, it is our view that the Act of the Thirty-fifth Legislature above discussed is in irreconcilable conflict with the former acts mentioned as to compensation of county commissioners, and that the Legislature intended to prescribe in said act of the Thirty-fifth Legislature the compensation of county commissioners for all purposes.

We here call attention to the fact that the statute was further

amended by the Thirty-sixth Legislature, Chapter 98, General Laws, Regular Session, making the \$4 per day schedule apply to counties of less than 29,000 population, instead of less than 30,000. We are not advised as to whether any amending act was passed at the recent session of the Thirty-seventh Legislature.

The effect of our holding in this opinion is that the Act of the Fourth Called Session of the Thirty-fifth Legislature, as amended, controls exclusively as to the compensation of county commissioners, and no other statute in existence before the passage of those acts controls either as to the amount or the maximum compensation of county commissioners.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2338, Bk. 56, P. 411.

OFFICERS—FEES AND COMPENSATION—COUNTY JUDGE.

Article 3850, Revised Civil Statutes of 1911, does not authorize a commission of one-half of one per cent to be taxed up as costs in favor of the county judge in cases of temporary administration, the commission therein provided being limited to actual cash receipts of regular or permanent administrators as distinguished from temporary administrators.

AUSTIN, TEXAS, April 28, 1921.

Hon. B. W. Boyd, County Attorney, Denton, Texas.

DEAR SIR: I have yours of the 16th instant, addressed to the Attorney General, enclosing a letter to you from Mr. Abney B. Ivey, county clerk of your county. The question you desire answered by this Department is whether it is proper to tax as costs the one-half of one per cent commissions of the county judge mentioned in Article 3850 in cases of temporary administration the same as in the regular or permanent administration of an estate.

Article 3850, Revised Civil Statutes of 1911, is in the following language:

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

The nearest approach to an authority upon this question in this State is the case of *Bell vs. Goss*, 76 S. W., 315, the same being a case decided by the Court of Civil Appeals of this State on June 20, 1903. It may be noted that in this case writ of error was denied by our State Supreme Court. The court held that the statute allowing five per cent commissions to "administrators" does not apply to temporary administrators. The statute prescribing the commission of administrators, and which was before the court in that case, is Article 3621, Revised Civil Statutes, and is as follows:

"Executors and administrators shall be entitled to receive and may retain in

their hands five per cent on all sums they may actually receive in cash, and the same per cent on all sums they may pay away in cash in the course of their administration."

It will be seen from a reading of this article that the question turned on whether the word "administrators," as used in this article, included temporary administrators. The court held that it did not.

The instant case is analogous. Article 3850, above quoted, allows the county judge a commission of one-half of one per cent upon the actual cash receipts of each executor, administrator, or guardian, etc. If the word "administrator," as used in Article 3621, does not include a temporary administrator, there is no good reason for holding that this same word includes a temporary administrator in Article 3850.

It may be true that under this view a service is required of the county judge for which no specific compensation is provided. However, it is a well-known rule that where a duty is imposed upon a public officer by law and no specific compensation is provided, the duty must be performed without compensation. Moreover, it is presumed that the ex-officio compensation authorized to be allowed certain county officers covers those duties required of those officers where no specific compensation is allowed.

You are therefore advised that in the opinion of this Department the one-half of one per cent commission mentioned in Article 3850 is not taxable as costs in a case of temporary administration.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2403, Bk. 56, P. 326.

COUNTY OFFICERS—COUNTY JUDGE—STENOGRAPHER—EX-OFFICIO—
PAYMENT MONTHLY.

1. County judge may with consent of commissioners court employ stenographer under the statute authorizing employment of assistants. The commissioners court fixes the compensation within maximum provided by "assistant statute" to be paid out of fees of office. The word "assistant" includes a clerical assistant.

2. The amount of ex-officio authorized to be allowed a county officer is not reduced by the amount of compensation paid to a deputy or assistant out of fees of office. The difference between the amount of fees retained by the county judge and the maximum plus the authorized amount of excess fees is the maximum amount of ex-officio salary that may be allowed such officer, and the amount paid a deputy or assistant need not be considered in arriving at the authorized amount of ex-officio.

3. The ex-officio salary may be paid monthly.

AUSTIN, TEXAS, November 28, 1921.

Honorable Hubert Bookout, County Attorney, Sherman, Texas.

DEAR SIR: This is in answer to your inquiries presented in your letter to the Attorney General of October 27, 1921, in substance as follows:

"1. Has the commissioners court authority to authorize the county judge to appoint a stenographer to assist him in the performance of the duties of his office and to fix the salary of such stenographer and authorize it to be paid out of the fees earned by the county judge?"

"2. Must the compensation of the stenographer be taken into account in arriving at the authorized amount of ex-officio compensation of the county judge? Stated another way, is the amount of ex-officio which may be allowed reduced by the amount paid to the stenographer, or assistant?"

"3. May the ex-officio salary of a county officer be paid in monthly installments, or must it be paid in a lump sum at the end of the year?"

The appointment of deputies and assistants of certain county officers, those "named in Article 3881 to 3886," is governed by Article 3903, Revised Civil Statutes of 1911, as amended by Chapter 96, General Laws, Regular Session, Thirty-seventh Legislature. The county judge is one of those named in Articles 3881 to 3886. It is not necessary to quote in full Article 3903, just above mentioned. Suffice it to say that the article authorizes the appointment, in the prescribed manner, of "deputies or assistants." The officer must procure the permission of the commissioners' court to make the appointment. The commissioners' court grants or refuses this permission and if it grants it also fixes the compensation of the assistant or deputy within the prescribed maximum. The officer does the actual appointing.

The only question for determination in connection with your first inquiry is whether the words "deputy or assistants" are broad enough to include a stenographer.

In the nature of things, it is not to be supposed it was intended that the county judge should exercise many of his duties through a deputy. His judicial acts must, under the present state of the law, be exercised by him. A deputy, it has been said on good authority, is one appointed as a substitute of another and empowered to act for him in his name and on his behalf. Words and Phrases, Volume 3, page 2008. The Legislature contemplated this in enacting Article 3903. Some of the officials affected by the article do have deputies, properly so-called. The Legislature evidently used the word "assistants" to convey a little broader meaning than the word "deputies." All deputies would be assistants, but not vice versa. "The word 'assistant' is a more comprehensive word than deputy, and includes those who aid the principal, whether sworn or not, while deputy embraces only the sworn class." Words and Phrases, Volume 3, page 2008, citing *Ellison vs. Stevenson*, 22 Ky. (6 T. B. Mon.), 271, 276, 279.

It is our opinion that the use of the word "assistants" evidences an intention to describe something more than deputies; that "assistants" includes clerical assistants. A stenographer falls within the meaning of the word "assistants" as used in Article 3903.

(2) In answer to question number 2, Article 3893, Revised Civil Statutes of 1911, as amended by Act of 1913, page 246, Section 1, 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 if the official beyond the maximum amount of compensation and excess fees allowed to be retained by him under this chapter."

Under the holding of *Anderson County vs. Hopkins*, 187 S. W., 1019, so far as the county judge is concerned, the only limitation on the amount of ex-officio compensation that may be allowed is the maximum amount of fees plus the authorized amount of excess fees that may be retained. In your case, this means that ex-officio may be allowed so long as it does not increase the county judge's total compensation above five thousand dollars. This amount of five thousand dollars is arrived at by adding together the authorized maximum of \$3500, and the maximum authorized amount of excess fees, \$1500.

The question then arises, is the amount paid an assistant to be considered as "compensation of the official?" Is it to be considered a part of "the maximum amount of compensation and excess fees allowed to be retained by him?"

We hold that these questions should be answered in the negative. The amount authorized to be paid, and actually paid, to deputies and assistants out of fees of office are not "retained" by the officer himself. Any doubt on this point is dispelled by reading the deputy statute (Chapter 96, General Laws, Regular Session, Thirty-seventh Legislature), which contains this language:

"The county commissioners court in each order granting authority to appoint deputies or assistants shall state the number of deputies or assistants authorized and the amount of compensation to be allowed each deputy or assistant, which compensation shall be paid out of the fees of the office to which such deputies or assistants may be appointed and assigned, and shall not be included in estimating the maximum fees of the officers prescribed in said Articles 3881 to 3886; such salaries to be paid out of the fees of the office in the following manner:"

This statute specifically provides that the compensation of deputies or assistants shall not be included in estimating the maximum fees of officers prescribed in Articles 3881 to 3886, although such compensation must be paid out of fees of office.

Construing this deputy statute together with Article 3903, as amended, the ex-officio statute, we hold that the amount of ex-officio of the county judge that may be allowed is not reduced by the amount paid to a stenographer duly appointed and paid out of fees of office.

This means, in your case, that the total of the fees retained by the county judge, plus the amount of ex-officio allowed by the commissioners' court, may be as much as five thousand dollars annually, in addition to and without regard to the amount paid to a stenographer duly appointed and compensated under the deputy and assistant statute.

(3) The third question is as to the payment of ex-officio compensation monthly.

Prior to the amendment of Article 3893, Revised Civil Statutes of 1911, as it now appears, it was admittedly proper to pay the ex-officio salary of county officials monthly. The main purpose of the amendment of 1913 (page 246, Section 1), was to prevent the commissioners' court from increasing the compensation of the county officers affected beyond the authorized maximum and excess fees by granting sufficient ex-officio salary to accomplish that result. We do not believe it was intended to change the method of payment from monthly to yearly. We grant that it cannot be ascertained until the end of the

fiscal year exactly how much ex-officio compensation the various officers will be entitled to retain if allowed by the commissioners' court. However, the law contemplates that they shall account for the ex-officio along with the fees when they make their settlement with the county.

This Department has held that an order may properly be passed at the beginning of the fiscal year fixing the amount of the ex-officio and that the same may be fixed conditionally, that is at an indefinite amount, not to exceed the difference between the amount of fees and the authorized maximum and excess fees. (Op. No. 1326, Bk. 41, p. 93.) If it may be fixed in advance, we think it may be paid monthly. The amount paid monthly should not be beyond what may reasonably be expected may be retained. The commissioners' court should be guided by the facts confronting them, and of course our opinion is based on the theory that a good faith attempt will be made in this direction. The amount of ex-officio paid monthly could not be out of all proportion to what is apparent the officer will likely be entitled to. The probable amount of fees should be considered, and prior years' experience may furnish some guide. An amount allowed out of all proportion to the probable amount of fees, to be refunded at the end of the year, would be no more than a loan of that much money and hence would be unlawful.

We are of the opinion that ex-officio salary allowed in good faith, reasonably consistent with the probable amount of fees of office, may be paid monthly and annual settlement made accordingly.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2279, Book 55, P. 83.

OFFICERS—EX-OFFICIO COMPENSATION—SHERIFF.

1. The commissioners court is without authority to pass an order on the last day of the term of the sheriff, or subsequent thereto, increasing the ex-officio compensation of the sheriff for past services where such ex-officio compensation has already been fixed by order of the commissioners court, and which prior order has not been revoked or cancelled and the sheriff has been drawing his salary thereunder, up to and including the last month of his term.

2. Where the commissioners court at the beginning of the term of the sheriff, to wit, December 10, 1918, passed an order fixing the ex-officio compensation of the sheriff at five hundred dollars per annum, said order reciting that it was to be "effective from the first day of November, 1918," and which order was never revoked, and under which the sheriff had drawn his salary for his entire term, up to and including the last month of the term, there was a pre-existing order fixing the ex-officio compensation of the sheriff and said compensation had been fixed and arrived at within the meaning of the Constitution and decisions prohibiting extra compensation when on the last day of the term the commissioners court made an attempt to increase such compensation for services already rendered by the sheriff.

AUSTIN, TEXAS, January 21, 1921.

Honorable Amos Lee, County Auditor, Matagorda County, Bay City, Texas.

DEAR SIR: Your request for an opinion from this Department as

to the validity of two orders of the commissioners' court of your county, relative to the ex-officio compensation of the sheriff, embodied in your communications of December 20, 21, and 24, and January 9 and 17, respectively, has been referred to me for attention. As we have heretofore advised, the delay in giving your inquiry attention has been unavoidable, owing to the large amount of work devolving upon us at this time.

The facts, as gathered from your different communications, seem to be as follows:

On the 10th day of December, 1918, after fixing the salary of the county auditor and jailer, the commissioners' court of your county passed in open court the following order: "That the salaries of all other county officers be as heretofore fixed by orders of this court, and that the order be effective from the 1st day of December, 1918."

The salary of the sheriff immediately prior to December, 1918, or "as heretofore fixed by orders of this court," was five hundred dollars per annum.

On January 1, 1919 and on the first of each month since said date, up to and including December 1, 1920, scrip was drawn in favor of the sheriff, Bert Carr, in the amount of \$41.65, being one-twelfth of five hundred dollars, and the said sheriff received payment of \$41.65 for each month during his term of office, beginning December 1, 1918, and up to and including the month of November, 1920.

To quote from your letter of December 21st:

"Our case here embraces a condition where an ex-officio salary had formerly been fixed and under which order the sheriff had regularly received his monthly allowance, and did so receive and accept said allowance on December 1, 1920, for the payment of the November salary, as had been heretofore allowed by the commissioners court, and had so been receiving same for the whole term of office."

And in your letter of January 17, 1921, you state:

"The amount allowed the sheriff in Article 3866 has been the same from the taking effect of the amendment in 1905, to December 1, 1920, the same being paid in monthly installments of \$41.65. There has never been any change in this amount, and that is the amount meant by the orders since that time when they contain the clause, 'as heretofore fixed by orders of this court.' The ex-officio salary of the sheriff had been fixed as above, and was so understood by the commissioners and the sheriff, as is shown by both of the orders, one November 30th, and one December 13th, for they specifically refer to this fact."

The Orders in Question.

On November 30, 1920, as shown by the records, the commissioners' court of your county passed the following order:

"State of Texas,
"County of Matagorda.

"On this the 30th day of November, 1920, came on for consideration, by the court, the fixing of ex-officio fees of office of the sheriff as provided by Chapter 45, Third Called Session, Thirty-sixth Legislature, and it appearing to the court that the allowing to the sheriff compensation at the rate of \$1000 per year from and after September 19, 1920, to date, there would be due him the sum of \$97.18.

"It is therefore ordered by the court that the compensation of the sheriff from and after September 19, 1920, be and the same is hereby fixed at the rate of

\$1000 per annum. It is further appearing to the court that the sheriff has been paid from said date to November 30, 1920, at the rate \$500 per annum, and that the amount now due him for said period, by reason of said compensation being fixed at \$1000 per annum, is \$97.18.

"It is ordered, therefore, that a warrant for the said sum of \$97.18, payable out of the general funds of the county be drawn by the clerk, payable to Bert Carr, sheriff, in addition to the warrants heretofore ordered drawn, as payment of ex-officio services as hereinbefore provided.

"Passed in open court, this 30th day of November, 1920.

(Signed) "JOHN F. PERRY, County Judge."

On December 13, 1920, said commissioners' court passed an order reading as follows:

"The State of Texas,
County of Matagorda.

"Whereas, on the 30th day of November, 1920, this court passed an order fixing the compensation for ex-officio services of the sheriff of Matagorda County at \$1000 per annum, and ordered that the sum of \$97.18 be paid out of the third class funds of Matagorda County, the court then being under the impression that this was the maximum amount that should be allowed under Chapter 43, Third Called Session of Thirty-sixth Legislature, and that said warrant is now outstanding and unpaid.

"It is therefore ordered by the court that the ex-officio compensation of Bert Carr, sheriff of Matagorda County for the fiscal year beginning December 1, 1919, and ending November 30, 1920, be and the same is hereby fixed at one thousand dollars, for said year; that the warrant issued to Bert Carr on November 30, 1920, for \$97.18 and numbered 6250, be and the same is hereby cancelled; that the letter pertaining to said and giving opinion on said law of the Attorney General's Department hereto attached be made a part of this order and placed of record.

"And it appearing to the court that five hundred dollars of the one thousand dollars herein allowed has already heretofore been paid the said Bert Carr, and that the balance after cancelling said warrant No. 6250 is five hundred dollars; it is therefore ordered,

"That the clerk is hereby ordered to draw a warrant out of the third class funds of Matagorda County for the sum of five hundred dollars in favor of Bert Carr, as payment of balance of ex-officio compensation as sheriff for fiscal year ending November 30, 1920.

"Passed in open court this the 13th day of December, 1920.

"JOHN F. PERRY, County Judge."

At the time of the passage of the order above mentioned, dated December 10, 1918, Article 3886, Revised Civil Statutes of 1911, was in force and effect, which article is in the following language:

"For summoning jurors in district and county courts, serving all election notices, notices to overseers of roads and doing all other public business not otherwise provided for, the sheriff may receive annually not exceeding five hundred dollars, to be fixed by the commissioners court at the same time other ex-officio salaries are fixed; provided, that in counties exceeding twenty-five thousand population at last decennial census, sheriffs may receive an additional amount not exceeding fifty dollars for each five thousand population in excess of twenty-five thousand up to fifty thousand population, to be paid out of the general funds of the county on the order of the commissioners court. Provided, that the total amount of compensation which may be paid annually under the provisions of this act shall not exceed the sum of eight hundred dollars."

This article of the statutes was amended by Chapter 43 of the General Laws of the Third Called Session of the Thirty-sixth Legislature so as to read as follows:

"For summoning jurors in district and county courts, serving all election notices, notices to overseers of roads, and doing all other public business not

otherwise provided for, the sheriffs may receive annually not exceed one thousand dollars, to be fixed by the commissioners court at the same time other ex-officio salaries are fixed, to be paid out of the general funds of the court on the order of the commissioners court. Provided, however, that no such ex-officio salary shall be allowed to any sheriff who had received the maximum salary allowed by law."

The amending statute, above mentioned, contained an emergency clause, but it appears there was no recorded vote taken in the Legislature, and hence the same did not take immediate effect, but went into effect ninety days after adjournment of the session of the Legislature at which it was passed. The adjournment was on June 18, 1920, which would make the act go into effect September 17, 1920.

Upon the foregoing statement of facts, you ask three questions:

"1. Was and is the order of the commissioners court of date November 30, 1920, purporting to fix and allow the sheriff ex-officio compensation at the rate of one thousand dollars per annum, from and after September 19, 1920, to November 30, 1920, valid and lawful?

"2. Was and is the order of the commissioners court of date December 13, 1920, purporting to fix and allow the sheriff ex-officio compensation at the rate of one thousand dollars per annum for the entire fiscal year, beginning December 1, 1919, and ending November 30, 1920, valid and lawful?

"3. In view of the provisions of the statute, authorizing the fixing of ex-officio compensation 'at the same time other ex-officio salaries are fixed,' were said orders of the commissioners court valid, having been passed at a time when no other ex-officio compensation was fixed or allowed than that of the sheriff?"

In view of our holding in answer to questions 1 and 2, it will not be necessary to answer question 3.

I assume that the sheriff did not make his maximum compensation in fees, and that so far as such maximum is concerned he was entitled to the full amount of ex-officio compensation allowed by law. Article 3893, Revised Civil Statutes; *Veltman et al. vs. Slater et al.*, 217 S. W., 378.

If the orders of the commissioners' court can stand, they must do so in the face of Sections 44 and 53 of Article 3 of the Constitution of this State. These provisions of the Constitution read as follows:

"Sec. 44. 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 anyone in the name of the State, unless authorized by pre-existing law."

"Sec. 53. 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 or a contract has been entered into, and performed in whole or in part; nor pay, nor authorize the payment of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law."

There is another provision in the Constitution designed to prevent the passage of retroactive legislation, Section 16, Article 1, Constitution of Texas.

Attention might also be called to Section 51 of Article 3, inhibit-

ing the Legislature from making any grant, or authorizing the making of any grant, of public money to any individual.

It will thus be seen that the framers of the Constitution, by including these various provisions in the fundamental law of the State, sought to safeguard public funds against the granting of same, except for public purposes, and the idea seems to prevail throughout these provisions that where public servants enter upon and perform their duties with a knowledge of what they are to receive for their services, and where provision is made by law and their compensation fixed, and especially where they actually receive their compensation as so fixed, they ought not, and cannot, claim further and extra compensation for such services.

It will be readily admitted that the commissioners' court was limited by Article 3866 fixing a maximum ex-officio compensation for sheriffs that may be allowed of five hundred dollars in counties of twenty-five thousand population or less before the passage of the new act raising the maximum to one thousand dollars. *Veltman et al. vs. Slater et al.*, 217 S. W., 278.

It will not be presumed that the Legislature intended to attempt to pass a statute in violation of the Constitution, unless such an intention is clearly manifest from the terms of the statute itself; and indeed there is absolutely nothing in Chapter 43 of the Acts of the Third Called Session of the Thirty-sixth Legislature, the act increasing the maximum ex-officio compensation for sheriffs, disclosing an intention on the part of the Legislature to make the provisions of such act retrospective. We must conclude, therefore, that the Legislature intended that the act should be prospective only. *Cooley's Constitutional Limitations*, 6th Ed., 77, 455. Any attempt by the Legislature to make the act retroactive would have been futile, and since the act in question discloses no such attempt, we cannot see how it could be contended that the commissioners' court would have authority attempted to be exercised in the passage of the orders in question. The salary of the sheriff had theretofore been provided for and fixed by law and an attempt on the part of the Legislature, or the commissioners' court, to make the act take effect and be in force from the beginning of the fiscal year, would beyond question be retroactive legislation and the allowance of extra compensation to the sheriff in violation of the plain provisions of the Constitution.

There is no doubt therefore that the commissioners' court had no authority to fix or allow the sheriff the maximum amount of ex-officio compensation authorized in the new act for services rendered up to the time the new act took effect, which was September 17, 1920. To hold otherwise would be to hold contrary to the plain intention of the statute, and moreover would be to hold that retroactive compensation and extra compensation and compensation not provided for by pre-existing law, could be allowed by the Legislature and even by the commissioners' court in violation of the Constitution.

The decisions of this State are nowhere to be found contrary to this holding, but are in harmony with the same.

Dallas County vs. Lively, 106 Texas, 364, 167 S. W., 219.

Dalton et al. vs. Allen et al., 218 S. W., 73.

Collingsworth County vs. Myers, 35 S. W., 414.

These decisions of the courts recognize the authority of the commissioners' court under the statutes to fix and allow ex-officio compensation *unless the same has already been fixed or allowed*; that the commissioners' court is not debarred from allowing ex-officio compensation after the duties have been performed, provided the same has not been allowed and fixed in advance by said court; that the commissioners' court has authority to revoke its order on this subject at any time, but where ex-officio compensation has already been fixed and allowed for services, such revoking order cannot retroact as to such services and grant extra compensation therefor; and even where an order has been passed cancelling a prior order, allowing ex-officio compensation, the last order will not prevent the commissioners' court from subsequently passing an order allowing ex-officio compensation, such compensation to date from the time of the passage of the order cancelling the first order.

The case of Dallas County vs. Lively, *supra*, was decided by the Supreme Court of Texas, May 28, 1914. The order of the commissioners court of Dallas County in controversy in that case was dated September 14, 1906, and allowed the county judge, Lively, \$75 per month for ex-officio services, such compensation to begin December 1, 1905, and to end including, November 30, 1906. On February 24, 1905, the commissioners' court had passed an order allowing "until further ordered by the court" the county judge, for ex-officio services, the sum of one hundred dollars per month, and on June 15, 1905, the order allowing the ex-officio salary was rescinded for the reason in effect that the time devoted by the county judge to the affairs of the commissioners' court did not justify such allowance. From said date, June 15, 1905, until September 14, 1906, there was no further order, or agreement, in reference to an allowance for ex-officio services.

The Supreme Court held, through Chief Justice Brown, that the order in question was not unauthorized, since the compensation allowed was not "extra compensation or allowance," within the meaning of the Constitution, but based the decision solely upon the proposition that no allowance for such services had been made, nor any sum paid before the performance of the duties, saying: "If the law had specified the salary to be allowed or the commissioners court had fixed the amount, then additional compensation procured, after services were rendered, would be extra and forbidden. It is manifest that the allowance in this instance was not in addition to a previous allowance. Nothing having been paid, or sum fixed, it could not be extra allowance or compensation."

And again, in the same opinion, "The Constitution does not forbid the fixing of compensation for services 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."

There is no doubt as to the correctness of the proposition here expressed; that is, that where the compensation had theretofore been fixed and allowed and the services performed, a subsequent order cannot add to such compensation, since, in addition to the expressions of

the Supreme Court in the case above cited, the Constitution is plain to this effect.

The next question arising is whether, in the case presented by you, the ex-officio compensation of the sheriff had already been fixed or allowed before the passage of the two orders in question; in other words, was the order passed at the beginning of the sheriff's term of office still in force and effect on November 30, 1920, when the commissioners' court passed the order attempting to increase the salary of the sheriff? If so, the two orders in question cannot stand.

We are not without authority upon a very similar state of facts. The truth is, the facts presented by you do not, in my opinion, present as doubtful a case as the one decided in Dalton et al. vs. Allen et al., above cited, in which it was held that the order of the commissioners' court was void, there being a prior order in effect, covering the ex-officio services in question. The order in controversy in that case was passed in February, 1914, and was intended to increase the county judge's ex-officio salary as superintendent of public schools from \$87.50 per quarter to \$150 per quarter. This order seems to have been intended to raise such salary for the entire time of the term which the county judge was serving, one year and three months of which had passed prior to the time such order was passed. No order, fixing such salary, had been passed by the commissioners' court since November 1908, when an order was passed allowing \$87.50 per quarter for such services, that is, "for the quarter beginning November 1, 1908, and ending January 31st, and for each succeeding quarter thereafter until the further order of this court."

It was contended that the commissioners' court had authority to raise the salary as per the order of February 14th, on the ground that no order fixing his salary had been previously passed during his term. Upon this proposition the court, in the opinion referred to, said:

"With this contention we do not agree. We think the fact that he served during his entire first term without an order fixing his salary, and for more than a year of his second term without such order, during all of which time he drew \$87.50 per quarter for his services, and that his accounts were approved by the commissioners court, amount to an agreement between him and the court that the ex-officio salary as fixed for Judge Patterson applied to his successor until such order was changed. Otherwise Judge Allen illegally drew, with the knowledge and consent of the commissioners court, \$700 during his first term. It will not be presumed that such was the intention of either himself or of the commissioners court. Bastrop County vs. Hearn, 70 Texas, 567, 8 S. W., 302."

In the Bastrop County case, cited in the quotation above, it was held that where the commissioners' court is authorized by law to fix the allowance of the county treasurer within certain prescribed limits, and such court had for a long time invariably allowed the same percentage, a failure to make an order regulating the allowance in a particular case would raise an agreement by implication on the part of the county to continue to pay the same amount until it should notify the treasurer to the contrary.

In the instant case the order was passed at the beginning of the sheriff's term of office, and he drew his ex-officio compensation in the amount and according to the terms of said order. The sheriff would

be in no position to attack the validity, or legality, of the order, since he took advantage of it and drew his pay under it throughout the entire term, including the last month of the term. The commissioners' court knew that this order was in existence and knew that the sheriff was from month to month drawing his pay thereunder.

We think, therefore, beyond question, that there was a pre-existing order fixing and allowing the ex-officio compensation of the sheriff, and that the commissioners' court was, for that reason, precluded from passing either of the orders in question. There was ample authority at the time the new law went into effect and before the performance of the ex-officio duties of the sheriff from September 17, 1920, to the end of his term, for the commissioners' court to pass an order taking advantage of the new maximum provided for the sheriff's ex-officio compensation; but having waited until all the services, for which the compensation could be allowed, had been performed, and for which services right up to the last minute there was an ex-officio compensation provided by order of the commissioners' court, and even after the sheriff had been paid his salary for November, or at least on the same day scrip was issued under the old order for such salary for November, the order of November 30, 1920, came too late, and, of course, by the same token, the order of December 13, 1920, was too late.

You are, therefore, respectfully advised that in the opinion of this Department both the orders in question were, and are, void, and of no effect.

There is a reference in one of the orders of the commissioners' court to an opinion of this Department which was attached to the order of the commissioners' court, presumably as an authority for passing the order in question. This was a communication signed by Hon. Bruce W. Bryant, Assistant Attorney General, addressed to Hon. W. E. Davant, County Attorney, Bay City, Texas, and dated December 3, 1920. The opinion referred to states that, under the facts stated in Mr. Davant's letter, the commissioners' court had authority to allow the full amount of one thousand dollars as ex-officio compensation to the sheriff for the fiscal year, ending November 30, 1920. Nowhere in Mr. Davant's letter are the facts made known as disclosed by you in your various communications to this Department; in other words, Mr. Davant did not disclose in his letter that there was a pre-existing order fixing the compensation of the sheriff for ex-officio services, nor that the sheriff had been receiving each month his ex-officio pay, under and by virtue of such an order. I have talked to Mr. Bryant about this, and he states that had the facts been disclosed to him at the time he wrote the letter in question, his ruling would have been in harmony with the ruling we are giving you now.

The writer sincerely regrets that it is necessary to make the ruling herein made, since it appears that the sheriff of your county has made only \$1500 for the fiscal year; however, the Constitution and laws, as well as the decisions of the courts, settle the matter, and we have no alternative.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2291, Bk. 55, P. 177.

FEES OF OFFICERS—TAX COLLECTOR—TAXATION.

Tax collector, in collecting taxes levied in payment of county special road bonds, is entitled to same commission allowed by law for collecting other county taxes.

AUSTIN, TEXAS, February 15, 1921.

Honorable Lon A. Smith, Comptroller, Capitol.

DEAR SIR: In your communication of even date, you submit the following:

"Please give us your opinion as to the amount of commissions tax collectors are authorized to retain for the collecting of road bond taxes where the road bonds voted cover the county as a whole."

Replying, I beg to say:

(1) By Article 634, Revised Statutes, 1911, it is provided that a tax for interest and sinking fund on county special road bonds "shall be assessed and collected in the same manner as now provided by law for the assessment and collection of other road taxes."

The "other road taxes" which counties are authorized to levy and collect are (a) fifteen cents for roads and bridges, and (b) fifteen cents "for the further maintenance of the public roads" when authorized by a majority vote of the qualified voters of the county. Revised Statutes, 1911, Article 2342.

This Department has repeatedly held that bonds issued by a county under the provisions of Chapter 3, Title 18, Revised Statutes, 1911, or under any special law passed pursuant to the 1904 amendment to Section 52, Article 3, of the Constitution, are county bonds, and that the tax to provide for the payment of such bonds is a county tax. This view was sustained by the Austin Court of Civil Appeals in the case of *Bell County vs. Hines*, 219 S. W., 596.

(2) It is provided by Article 3872, Revised Statutes, 1911, as amended by Chapter 158, Section 2, Acts 1919, that the tax collector of each county shall receive "for collecting the county taxes, 5 per cent on the first \$5000 of such taxes collected, and 4 per cent on the next \$5000 collected, and 1½ per cent on all such taxes collected over that sum."

This article further declares that tax collectors "shall receive for collecting the taxes in all * * * road districts, or other political subdivisions of the county * * * one-half of one per cent on all such tax (taxes) collected."

It is therefore the opinion of this Department that a tax collector, in collecting taxes levied in payment of county special road bonds, is entitled to the same commission allowed by law for collecting other county taxes.

Yours very truly,

W. P. DUMAS,
Assistant Attorney General.

Op. No. 2335, Bk. 56, P. 382.

OFFICERS—FEES AND COMPENSATION—COUNTY TREASURER.

1. Chapter 35, General Laws, Third Called Session, Thirty-sixth Legislature, amending Article 3875, Revised Civil Statutes of 1911, so as to provide a maximum of \$2700 per annum which the county treasurer may retain as commissions in counties having assessed valuations of one hundred million dollars or more does not give the county treasurer \$2700 in such counties unless he earns that much on a commission basis.

2. The commissioners court has no authority to fix the compensation of the county treasurer on a salary basis or to fix the maximum amount which he may retain except in so far as the maximum may be affected by the rate of commissions fixed under the statutes.

AUSTIN, TEXAS, April 23, 1921.

Honorable D. A. McAskill, District Attorney, San Antonio, Texas.

DEAR SIR: I have yours of the 9th instant, addressed to the Attorney General, reading as follows:—

"I have been called upon in my official capacity to give a legal opinion as to whether or not the county treasurer of Bexar County should receive \$2700 a year or \$2000 a year. Art. 3875 as amended by the Fourth Called Session of the Thirty-sixth Legislature, reads as follows:

"The commissions allowed to any county treasurer shall not exceed two thousand dollars annually, provided, however, that in all counties in which the assessed value of the property of such counties shall be one hundred million dollars, or more, as shown by the last preceding assessment roll, the treasurers thereof shall receive as their commissions a sum not exceeding two thousand seven hundred dollars annually."

"Now the question is, is the county treasurer as a matter of law in Bexar County entitled to \$2700 or is it discretionary with those in power, say the commissioners court, or any other power to fix his salary at a less sum? Of course, you understand that Bexar County has an assessment value of property, as shown by the last preceding assessment roll of over one hundred million dollars.

"I regret to bother you with this matter, but feeling that probably you have rendered opinions covering this matter heretofore, I will ask you to favor me with an opinion covering this matter."

Article 3875, Revised Civil Statutes of 1911, until recently was in the following language:

"The commissions allowed to any county treasurer shall not exceed two thousand dollars annually."

As amended by Chapter 35, General Laws, Third Called Session, Thirty-sixth Legislature, this article is in the following language:

"The commissions allowed to any county treasurer shall not exceed two thousand dollars annually, provided, however, that in all counties in which the assessed value of the property of such counties shall be one hundred million dollars, or more, as shown by the last preceding assessment roll, the treasurers thereof shall receive as their commissions a sum not exceeding two thousand seven hundred dollars annually."

This article of the statutes does not grant any additional authority to the commissioners' court, nor does it provide a salary of \$2700 for the county treasurer in counties having assessed property valuations of one hundred million dollars or more. The commissioners' court has the same authority it formerly had in fixing the rate of commissions of the county treasurer, and no more. The new act simply prescribes

a different maximum which the county treasurer may retain as commissions in counties having assessed property valuations of one hundred million dollars or more.

In order to answer your inquiry, it is necessary to decide whether the commissioners' court has any authority whatever in prescribing the maximum amount of commissions which the county treasurer may retain other than as such maximum may be controlled by the rate of commissions fixed by said court under Article 3873.

There appears to be no conflict in the decisions upon the proposition that the commissioners' court has no authority to fix the compensation of the county treasurer at a stipulated salary. The decisions are to the effect that said court has no such authority.

Montgomery vs. Talley, 169 S. W., 1141.
Smith vs. Wise County, 187 S. W., 705.
Rusk County vs. Hightower, 202 S. W., 803.
Hunt County vs. Greer, 214 S. W., 605.

However, there is a conflict in the decisions upon the question of the authority of the commissioners' court to fix the maximum amount which the county treasurer may retain as commissions less than that fixed by the statute.

The opposing cases upon this point are, Smith vs. Wise County, 187 S. W., 705, and Wood County vs. Leath, 204 S. W., 454. In the former case, the Court of Civil Appeals at Fort Worth held that the commissioners' court exceeded its authority in passing an order to the effect that "the county treasurer of Wise County shall receive as compensation for his services for the year beginning November 28, 1906, and ending November 29, 1907, such commissions on the amount of funds he may receive and disburse as when added to the commissions he receives on the school funds and the commissions he has already received on other funds as will aggregate him a total fee of \$1600, and in no event shall his commission from all sources amount to more than \$1600 for said year." While in the latter mentioned case, the Court of Civil Appeals at Texarkana held a similar order valid. The order of the commissioners' court passed upon in this latter mentioned case recited that the "county treasurer is allowed a commission on receipts and disbursements not to exceed \$1200 a year for the next ensuing year."

These two cases are in direct conflict; the effect of the one being to hold that the commissioners' court exercises the limit of its authority when it fixes the rate of commissions which the county treasurer shall receive in accordance with the statute, and that it cannot go further and provide a maximum amount less than that fixed by statute; and the other that the court may fix a maximum amount which the treasurer shall receive in commissions less than the maximum provided by statute, and that this has the effect of fixing the rate of commissions.

It cannot be that both of these decisions are correct. We must therefore decide the question upon its merits.

The only affirmative language the writer finds in the statutes conferring upon the commissioners court any authority to fix the com-

pensation of the county treasurer is Article 3873, which reads as follows:

"The 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 commissions for receiving money from his predecessor nor for paying over money to his successor in office."

This article does no more than confer upon the commissioners' court the authority to fix the rate of commissions within the limits prescribed. This Department has never considered that either this provision or Article 3875 authorizes the commissioners' court to prescribe a maximum amount, except in so far as the maximum may be controlled by fixing the rate of commissions. For example, the commissioners court has the authority to pass an order to the effect that the county treasurer shall receive, say, two per cent for receiving and two per cent for paying out, but it cannot go further and say that the treasurer may retain only \$1500 of the commissions based upon this two per cent. Its authority is ended when it fixes the rate of commissions within the limits prescribed in said article of the statute. It is, therefore, the opinion of this Department that the decision of the Court of Civil Appeals at Fort Worth in the *Smith vs. Wise County* case is correct.

Answering your question, therefore, beg to advise that in the opinion of this Department, the county treasurer in your county is not entitled to \$2700 annually unless his commissions amount to that sum; that under Article 3873, the commissioners court is authorized to fix the rate of commissions which the county treasurer may retain for receiving and paying out the funds affected by said article not to exceed two and one-half per cent for receiving and two and one-half per cent for paying out, but when the court fixes the rate, its authority ceases and it cannot go further and fix the maximum which may be retained less than that prescribed by statute, which, in your county seems to be \$2700 annually.

The treasurer may retain the commissions at the rate fixed by the commissioners court on certain funds, and as fixed by statute as to other funds, until such commissions amount to \$2000 or \$2700 as the case may be, but in no event is he authorized to retain more than these amounts; whereas if the commissions at such rates do not amount to \$2000 or \$2700, as the case may be, he can retain only the amount actually earned at the fixed rates. The law does not assure him these maximums at all events.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General

Op. No. 2310, Bk. 55, P. 275.

OFFICERS—COMPENSATION—COUNTY JUDGE.

The county judge is not entitled to the compensation provided by statute when acting as ex-officio county superintendent over and above his maximum

compensation and excess fees, but must account for said ex-officio compensation when arriving at his maximum by reason of Article 3893, Revised Civil Statutes.

AUSTIN, TEXAS, March 9, 1921.

Honorable Parke N. Dalton, County Attorney, Crosbyton, Texas.

DEAR SIR: In answering yours of February 19th. I failed to answer your second inquiry.

You desired advice as to whether the county judge is entitled to his ex-officio compensation when acting as county superintendent, over and above the maximum he is authorized to retain under Articles 3881 et seq.

Article 3886 provides that in counties where a county judge acts as superintendent of public instruction, he shall receive such other salary as may be provided by the commissioners court, not to exceed the sum of \$600 per annum.

Article 3893 provides that the commissioners court is 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 Chapter 4 of Title 58.

Article 2763 provides that in each county in this State, having no school superintendent, the county judge shall be *ex-officio* county superintendent of public instruction, and shall perform all the duties required of the county superintendent.

It is clear, therefore, that the compensation provided for the county judge, when acting as county superintendent, is *ex-officio* compensation within the meaning of Article 3893. Therefore, the county judge is not entitled to such compensation over and above his maximum compensation and excess fees provided for in Articles 3881 et seq. The county judge could not, under the Constitution, hold two offices (with certain exceptions, not including county superintendent), and hence his duties, when acting as county superintendent, are simply additional duties as county judge, and the compensation for such services will be considered in arriving at his maximum by reason of Article 3893.

In arriving at the amount of his maximum compensation and excess fees, I desire to call your attention to the case of Anderson County vs. Hopkins, 187 S. W., 1019.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

OPINIONS ON SCHOOLS AND SCHOOL DISTRICTS

Op. No. 2268, Bk. 55, P. 22.

SCHOOLS AND SCHOOL DISTRICTS—FOUR MILLION DOLLAR APPROPRIATION.

The four million dollars appropriated by the Third Called Session of the Thirty-sixth Legislature is to be distributed and expended as the other available school funds of this State are distributed and expended.

Articles 2725, 2726 and 2772, Chapter 122, Acts Regular Session, Thirty-sixth Legislature.

Chapter 20, Acts Third Called Session, Thirty-sixth Legislature.

AUSTIN, TEXAS, January 10, 1921.

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

DEAR MISS BLANTON: This Department has been requested to give an interpretation of Article 2772, Revised Civil Statutes of 1911, as amended by Chapter 122, General Laws of the Regular Session of the Thirty-sixth Legislature, with regard to the power of school boards to expend for purposes other than teachers' salaries the \$4,000,000 appropriated for school purposes by the Third Called Session of the Thirty-sixth Legislature. We take the liberty of addressing our reply to this inquiry directly to you.

By Chapter 20, Acts Third Called Session, Thirty-sixth Legislature, there is appropriated the sum of four million dollars (\$4,000,000), out of the general funds of the State, the same to be added to the available school funds for the scholastic year beginning September 1, 1920, and ending August 31, 1921. It is provided by Section 1 of this act that the same shall be "distributed in accordance with the statutes now controlling the distribution of the available school funds of the State, as shown by Articles 2725 and 2726, Chapter 9, Title 48, Revised Civil Statutes of Texas." The title to this act provides that the four million dollars (\$4,000,000) appropriated shall be distributed as the available school fund is now distributed, which is the identical language used in the body of the bill.

It is true that Section 2 of this act, being the emergency clause thereof, sets out the emergency to be: "The fact that many of the public schools of the State require additional funds to pay the salaries of teachers for the scholastic year beginning September 1, 1920, and ending August 31, 1921, creates an emergency," etc. The language used in the emergency clause, however, is to our minds not sufficient to overcome the specific language used in the caption of the bill and in the body of Section 1, to the effect that such funds are to be distributed in accordance with the statutes controlling the distribution of the available funds of the State, and that the language used in the emergency clause is not sufficient to limit the appropriation to the sole purpose of paying salaries, but on the other hand, the appropriation is available for all purposes to which the available school fund of the State may be applied.

It will be noted that the act making an appropriation of this four million dollars (\$4,000,000) provides that the same shall be distributed as shown by Articles 2725 and 2726 of the Revised Civil Statutes of Texas. The first of these two articles designates the available school fund and provides that the same shall be appropriated annually to the several counties of this State according to the scholastic population of each for the support and maintenance of the public free schools. The second of these articles (Article 2726) relates to the county school fund and provides that the proceeds of the leasing or renting of county school lands shall be appropriated by the commissioners courts of said counties in the same manner as is provided by law for the appropriation of the interest on bonds purchased with the proceeds of the sale of such land. It is therefore apparent that the two articles referred to in the act making this appropriation relate merely to the manner of distribution, and not to the purposes for which the same may be expended. In order, therefore, to determine for what this four million dollars (\$4,000,000) may be expended, we must resort to another article of the statute, to wit: Article 2772, Revised Statutes, 1911, and we find that this article has been amended by the Regular Session of the Thirty-sixth Legislature, and that Subdivision (a) of the amendment is in the following language:

"(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."

Subdivision (b) of this amendment, after specifying the purposes for which local funds may be expended, concludes as follows:

"* * * 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."

Having determined that the statutes dealing with the distribution of this fund do not control its expenditure, we must look to the above-quoted article for that purpose, and we find that the State available fund 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 under certain conditions. Were it not for the proviso in Section (b) of this amended act, then such fund could not be expended for any purpose other than those just mentioned, but this proviso expressly authorizes the expenditure of the State available school fund for the purposes mentioned for which local funds may be expended, provided that the available fund is sufficient to maintain the schools of the district in any year for at least eight months.

The statutes here under discussion are in *pari materia* and must be construed as a whole. It is also a well-established rule of statutory construction that the Legislature is presumed to know existing stat-

utes relating to the subjects with which it deals. *Laughter vs. Seela*, 58 Tex., 177. When the Legislature enacted, as it did, in the Four Million Dollar appropriation that the same should be distributed in accordance with Articles 2725 and 2726, it knew, or will be presumed to know, that those two articles merely provide for the distribution of the fund and did not control the purpose for which the same might be expended, and it is also presumed to have known that Article 2772, as amended, provided the purposes for which such available fund might be expended. In other words, the Legislature has added to the available school fund of this State the sum of four million dollars (\$4,000,000) that will be distributed through your department as other available funds are distributed, and when the same is so distributed, it will be expended as other available funds. The net result of the act of the Legislature is simply to add the sum of four million dollars (\$4,000,000) to the available school fund of this State for the scholastic year beginning September 1, 1920, and the same may be expended as other available funds are expended; that is, for all the purposes set out in Subdivision (a) of amended Article 2772, and if the available fund in any city or district is sufficient to maintain the schools for at least eight months and leave a surplus, then the surplus may be expended for the purposes for which the local funds are expended.

It is true that the necessity of increasing the salaries of teachers in the public schools brought about the appropriation of the four million dollars (\$4,000,000), and we take it that no trustees of any district in this State will disregard the intention of the Legislature so expressed, but as above held, there is nothing in the act which limits the expenditure of this four million dollars (\$4,000,000), solely to the increase of teachers' salaries.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

Op. No. 2350, Bk. 56, P. 32.

BONDS—SCHOOLS AND SCHOOL DISTRICTS—CITIES AND TOWNS—
TAXATION.

(1) The fact that Articles 881, 882 and 925, as amended, of the Revised Statutes of 1911, were particularly repealed by Chapter 9, Acts Thirty-seventh Legislature, all bonds issued by cities and towns incorporated under the general law must be issued in compliance with the provisions of such chapter; and in view of the repeal of Article 925, as amended, the recent decision of the Supreme Court in *City of Rockdale vs. Cureton*, does not empower cities to issue bonds based upon the district tax provided for in Section 3, Article 7, of the Constitution.

(2) Bonds issued for the purpose of construction or purchase of school buildings or for building sites under Chapter 9, Acts Thirty-seventh Legislature, are city bonds and taxes levied in payment thereof are city taxes; and no part of the taxes authorized by this act can be levied on territory embraced within the limits of a city for school purposes only.

(3) The only tax that can be levied in territory added to a city for school purposes only is the tax of \$1.00 prescribed by amended Section 3, of Article 7, of the Constitution, and it must be first authorized by a majority vote of the

qualified property taxpaying voters residing within the limits of the city for school purposes, as required by Chapter 169, Acts of 1917, Regular Session.

(4) The only cities that may levy an unlimited school district tax are those cities incorporated under the general law and whose territorial limits are the same for school purposes as they are for city purposes.

AUSTIN, TEXAS, May 21, 1921.

Honorable Ed P. Williams, Mayor, Van Alstyne, Texas.

DEAR SIR: In your communication of the 12th instant, addressed to the Attorney General, you state that the City of Van Alstyne contains less than five thousand inhabitants and is incorporated under the general law; that the city as provided by law assumed exclusive control and management of the public free schools within its limits and, after so assuming such control, extended its boundaries for school purposes only in the manner provided by Article 2883, so as to include territory outside of the corporate limits of the municipality; that the city desires to issue bonds for the purpose of constructing and installing a system of sanitary sewers, and you direct attention to the recent act of the Legislature putting into effect amended Section 4 of Article 11, of the Constitution relating to cities and towns having a population of five thousand or less, and request our advice on the following:

"Under Section 1, of said act, it is provided that the amount of the taxes levied, assessed and collected shall not exceed for any one year one and one-half per cent of the taxable property of such city or town, for current expenses and for the purpose of construction or the purchase of public buildings, waterworks, sewers, and other permanent improvements, within the limits of such city or town, and for the construction and improvement of the roads, bridges and streets of such city or town within its limits."

* * * * *

"Is the amount of money collected by taxation for school purposes under the circumstances stated, a part of the one and one-half per cent the city can lawfully assess, levy and collect or may the amount collected for school purposes be disregarded in arriving at the constitutional tax limit?"

Replying, I beg to say:

(1) The act above referred to is Chapter 9 of the General Laws passed at the Regular Session of the Thirty-seventh Legislature. This act carried an emergency clause and received the necessary favorable vote in both the House and Senate to put it into effect immediately, but it was filed in the Department of State without the approval of the Governor and therefore did not become a law until ten days (excepting Sundays) after it was received by the Governor. The bill was received at the Governor's office on February 11th and, excluding that date and counting two intervening Sundays, would make it have the force of a law on February 23, 1921. (See Constitution, Article 4, Section 14.) This answers the last question submitted by you as to the date on which the new law became effective.

(2) This act authorizes a blanket tax rate for all cities or towns incorporated under the General Law, and for each city or town having a population of 5000 or less the tax rate for all purposes cannot exceed \$1.50 on the \$100 valuation. The governing body of any such city or town has the power to make any apportionment of the total tax rate it may deem proper and to the best interests of the city, but from

the amount of the total tax rate authorized the city authorities will be required to levy annually taxes sufficient to pay the interest on and provide the necessary sinking funds for all bonds issued and sold prior to the time the act took effect or that may hereafter be issued as provided in Section 3 of the act.

(3) The language of Section 3 with reference to building sites and buildings for public free schools and institutions of learning within such cities and towns means that where a city has assumed control of the public schools within its limits all the school buildings are public buildings of the city and form a part of its public improvements and therefore bonds issued for the purpose of construction or the purchase of such school buildings or for building sites will be city bonds and taxes levied in payment of such bonds will be city taxes.

Peck-Smead Co. vs. City of Sherman, 63 S. W., 340.
Hamilton vs. Bowers, 146 S. W., 629.

Inasmuch as such taxes for school building purposes are city taxes, the city council would not be authorized to provide for the levy and collection of the same on territory outside of the corporate limits of the municipality. In other words, no part of the taxes authorized by the new law can be levied, assessed and collected on that territory embraced within the limits of the city for school purposes only.

While Article 2883 provides that added territory shall bear its pro rata part of any school debt or debts that may be owed or contracted by the city or town to which it shall have been added, yet no part of such territory, in our opinion, can be taxed under the present law in payment of city bonds issued for school building purposes. The only tax that can be levied in such added territory is the tax of \$1 authorized by amended Section 3, of Article 7, of the Constitution and it cannot be levied unless first authorized by a majority vote of the qualified property taxpaying voters residing within the limits of the city for school purposes. (See Chapter 169, Acts 1917, Regular Session.) Nor can the city issue school building bonds under the provisions of Chapter 169, Acts of 1917. (1916-18 Attorney General's Report, 559.)

The Thirty-fifth Legislature, at its Third Called Session, amended Article 925, Revised Statutes, 1911, so as to increase the taxing power of cities and towns incorporated under the general law for school building purposes. The Supreme Court, in the case of Rockdale vs. Cureton (not yet reported), held that by amended Article 925 and Article 2974 the City of Rockdale could issue the school building bonds in question. In this connection, however, I will state that amended Article 925 was particularly repealed by the Thirty-seventh Legislature subsequent to the submission of the Rockdale case to the Supreme Court and prior to that court's opinion upholding the validity of the amendment to that article.

By Section 6, of Chapter 9, Acts 1921, it is declared:

"All laws and parts of laws in conflict herewith are hereby repealed, and Articles 881, 882 and 925, as amended, of the Revised Civil Statutes, 1911, are hereby particularly repealed."

So the Rockdale case cannot now be relied upon as an authority for the issuance of school building bonds by cities and towns.

The City of Rockdale constitutes a separate and independent school district, that is, its boundaries are the same for school purposes as they are for city purposes. In the Rockdale case the court used the following language:

"In *Snyder vs. Baird Independent School District*, 102 Texas, 4, this court held that a special act of the Legislature attempting to constitute an independent school district, comprised by an incorporated city and additional territory, as well, did not result in the creation of a district such as is contemplated by the exception in Section 3 of Article 7 of the Constitution, above quoted, since that provision relates only to a district constituted by a city or town, and whose territorial limits, therefore, are the same as those of the city or town. It may accordingly be doubted whether that part of the amendment of Article 925 which applies that provision of Section 3 of Article 7 to cities and towns which have extended their limits for school purposes, is valid. *But the possible invalidity of that part of the amendment should not, and in our opinion does not, render invalid that part applying to cities and towns constituting independent school districts such as the Constitution contemplates. The city of Rockdale is of the latter class.*" (Italics ours.)

The City of Van Alstyne having extended its boundaries for school purposes only, it does not therefore constitute an independent school district and in authorizing the "district tax" provided for in Chapter 169, Acts 1917, the voters would be limited to the tax of \$1 prescribed by amended Section 3, of Article 7, of the Constitution, but, as above stated, no bonds can be based upon this school district tax.

(4) Prior to the amendment to Article 925 all cities and towns incorporated under the general law, and that had assumed control of the schools within their limits, issued school building bonds based upon and limited by the *city taxes* at that time authorized by Section 9, of Article 8, of the Constitution, and such school building bonds could not be issued for an amount where the 23-cent tax for public buildings would not be sufficient to pay current interest thereon and provide the necessary sinking funds therefor. The only school building bonds authorized under amended Article 925 is an issue of bonds approved by the Attorney General on July 9, 1918, for the City of Whitesboro and the recent issue for the City of Rockdale. The City at Whitesboro had not extended its boundaries for school purposes.

(5) From all of the above, it is concluded:

(a) The money collected by taxation for schoolhouse bonds heretofore issued or that may hereafter be issued by the City of Van Alstyne must be raised by taxes levied under the provisions of Chapter 9, Acts of 1921.

(b) The only tax that can be levied on the territory that has been added to the City of Van Alstyne for school purposes only is the school district tax provided for in Chapter 169, Acts 1917, if authorized by majority vote of the qualified voters and such tax cannot exceed the \$1 limit prescribed by amended Section 3, Article 7, of the Constitution.

Yours very truly,

W. P. DUMAS,
Assistant Attorney General.

Op. No. 2260, Bk. 54, P. 527.

SCHOOLS AND SCHOOL DISTRICTS—CONSOLIDATION OF SCHOOL DISTRICTS.

1. Where an independent school district and a contiguous common school district desire to consolidate, petitions therefor should be presented to the county judge of the county wherein such districts are situated and not to the board of trustees of such independent school district.

2. This opinion in part overrules Opinion No. 2178, dated January 28, 1920.

AUSTIN, TEXAS, November 13, 1920.

Honorable E. L. Dohoney, First Assistant Superintendent of Public Instruction, Capitol.

DEAR SIR: This Department, in an opinion by the writer, dated January 28, 1920, addressed to you with reference to the act relative to the consolidation of school districts (Chapter 65, Acts Thirty-fifth Legislature, Second Called Session), held that one or more common school districts may be consolidated with a contiguous independent school district in the same manner as is prescribed for the consolidation of two or more common school districts.

But the opinion further declares:

“* * * an election shall be held within the common school districts and also within the independent school district, but in our opinion, the petition therefor in the independent school district must be presented to the board of trustees of such district and the election order should be entered by the board of trustees of such district.”

I also quote the following from said opinion:

“The Thirty-sixth Legislature, at its Second Called Session, enacted a law authorizing the consolidation of common school districts with independent school districts. (Chap. 65, Acts Thirty-sixth Legislature, Second Called Session.)

“By Section 1 of said chapter it is provided that when any number of contiguous common school districts shall desire to consolidate for school purposes, a petition therefor, signed by twenty or a majority of the legally qualified voters in each district, shall be presented to the county judge of the county wherein such districts are situated, and it thereupon becomes the duty of the county judge to order an election to be held in each district so petitioning, which elections shall be held on the same date. Notice of the date of such elections shall be given by publication or by posting, or by both such publication and posting of notices ‘for twenty days prior to the date on which such election was ordered,’ and the commissioners court shall canvass the returns and declare the result and if favorable, ‘shall declare such common school districts consolidated.’

“The above section further provides:

“It is herein provided that in the same manner as is described in Section 1, common school districts may be consolidated with contiguous independent school districts, and that when common school districts are so consolidated with an independent school district, the district so created shall be known by the name of the independent school district included therein, and the management of the new district shall be under the existing board of trustees of the independent district, and that all the rights and privileges granted to independent districts by the laws of this State shall be given to the consolidated independent districts created under the provisions of this act.

“The term ‘district’ as hereinafter used shall be construed to mean ‘consolidated common school district,’ or ‘consolidated independent school district,’ as the case may be.”

“In reference to the above, I beg to state that it was the intent of the Legislature, in passing the above statute, to authorize:

- “(a) The consolidation of two or more common school districts.
 “(b) The consolidation of one or more common school districts with a contiguous independent school district; and
 “(c) The election notice shall be published or posted, or both published and posted, for twenty days before the date on which the election is held and not before the date on which the election is ordered.”

The purpose of this opinion is to overrule that portion of the opinion dated January 28, 1920, wherein it is held that the petition for the consolidation election “must be presented to the board of trustees of such (independent) district and the election order should be entered by the board of trustees of such (independent) district.”

The Consolidation Act declares that common school districts may be consolidated with adjacent independent school districts “in the same manner as is described in Section 1.”

If, therefore, an independent school district and a contiguous common school district desire to consolidate for school purposes, then “twenty or a majority of the legally qualified voters of each district so desiring to consolidate” must present a petition to the *county judge* of the county wherein such districts are situated and it is then the duty of the *county judge* to give notice of the date of such elections by publication of his orders therefor in some newspaper published in the county for twenty days prior to the date on which such elections are ordered to be held or such notice may be given by posting copies of the proper election order in each of the districts “or by both such publication and posted notices.”

Yours very truly,

W. P. DUMAS,
 Assistant Attorney General.

Op. No. 2373, Bk. 55, P. 24.

BONDS--ELECTIONS--BALLOT--SCHOOLS AND SCHOOL DISTRICTS.

(1) It is generally held that statutes concerning the manner of holding elections are directory and an election is not to be set aside for a mere informality or irregularity which cannot be said in any manner to have affected the result of the election.

(2) Where voters vote the ballots supplied to them by the election judges, their legally expressed will cannot be overthrown when they are not at fault by the fact that the officials who prepared the ballots in some way neglected their duty.

AUSTIN, TEXAS, July 15, 1921.

Messrs. Charles and Rutherford, Attorneys at Law, 807-808 Merchants-Laclede Building, St. Louis, Missouri.

GENTLEMEN: Referring to our conference on the 5th instant in reference to form of ballot for school district bond election and also in answer to your letter of the 8th instant directing attention to the case of Reynolds vs. McCabe, 72 Texas, 59:

I will not burden you with a too lengthy communication, but with a view of aiding you in understanding my idea of the matter, I will have to write at length and it may be less trouble for you to read this

than it would be for you to refer to the authorities and figure out what I mean if I should submit it in a shorter letter.

First: In 20 Corpus Juris, 96, will be found the following:

"It is essential to the validity of an election that the electors have notice thereof in some form, either actual or constructive, such as a notice in fact, or by proclamation, or by statutes of which they are bound to take notice. The test for determining whether an election is invalidated for want of a notice prescribed by statute is whether, on the one hand, the voters generally have had knowledge of the election and full opportunity to express their will, or whether, on the other hand, the omission has resulted in depriving a sufficient number of electors of the opportunity to exercise their franchise to change the result of the election."

Judge Dillon in his work on Municipal Corporations said:

"It is a canon of election law that an election is not to be set aside for a mere informality or irregularity which cannot be said in any manner to have affected the result of the election. Courts are more anxious to sustain than to defeat the popular will." Dillon on Municipal Corporations, 5th Ed., Vol. 1, page 642.

In 20 Corpus Juris, 152, the following rule is stated:

"Since electors cannot be disfranchised because of the neglect of the officers charged with the duty of preparing the ballots, technical errors on the part of an officer charged with the preparation of official ballots will not destroy the efficacy of the ballots nor invalidate the election, unless the statute expressly makes a specified irregularity fatal."

Second: In *People vs. Weller*, 11 Calif., 49, 70, American Decisions, 754, 763, the court used the following language:

"Notice to the electors lies at the foundation of any popular elective system. The elector cannot act through the ballot without notice that a vacancy exists to be filled. Necessity and sound policy demand that every elector shall have both the knowledge and the opportunity to enable him to exercise the elective right deliberately and intelligently."

In the case of *Wightman vs. Tecumseh*, 157 Mich., 326, 122 N. W., 122, it was held that the fact ballots instead of reading "shall a village loan * * * for sewer purposes be authorized?" as prescribed by the council, omitted the words "for sewer purposes," did not invalidate the election.

The opinion in that case declares:

"The proceedings of the council were regular. The resolution published distinctly stated the proposition upon which the voters were to cast their ballots. It was a special election. No other proposition was before the voters. It had been fully discussed in newspapers and by citizens. Every voter who went to the polls must have known that the sole proposition for him to vote upon was the authorization of a loan of \$29,000 for sewer purposes. The voters did not see the ballots until election day and probably at the polling places when they went to vote. The ballot then placed in their hands informed them that in accordance with the resolution of the common council they were to vote for a loan of \$29,000. The purpose for which that loan was to be made did not appear upon the ballots. It cannot be conceived that the words 'for sewer purposes' would have given the voters any information other than that already possessed by them before going to the polls. That provision of the charter above quoted, requiring the ordinance or resolution of the council to distinctly state the purpose of the expenditure, was fully complied with. By mistake of some one the exact form of the ballot was not followed. There is no possibility or claim that any voter was misled or prejudiced by the mistake. The object of the above provision of the statute is to notify the voters of the proposition to be voted upon at the future specified time so that they may have ample time for

consideration and discussion. The money to be received from the loan was for one purpose only, and could not be diverted to any other purpose. The omission of the words 'for sewer purposes,' from the ballot must, under the circumstances, be held not to have vitiated the election."

In *State vs. Fransham*, 19 Montana, 273, 48 Pacific 1, the court held that where the voters vote the official ballots supplied to them by the election judges, their legally expressed will cannot be overturned where they are not at fault by the fact that the official who prepared the ballots in some way neglected his duty.

In *Allen vs. Glenn*, 15 L. R. A., 743, 746, the Colorado Supreme Court—opinion by Chief Justice Hayt—declared:

"The fundamental object of all election laws is the freedom and purity of the ballot. It is to be observed that the voter has no control whatever over the publication of the names of candidates or the form of the ballots. If, for some defect in these particulars, the ballot must be rejected, the door would be open to fraud. To defeat the will of the people, it would only be necessary to have the county clerk furnish the electors, or some of them, with tickets slightly variant from those prescribed by law. * * * It may be said that all provisions of such laws are mandatory in the same sense that they place a duty upon those who come within their terms. But it does not follow that an election should be invalidated because of every departure on the part of public officers from the terms of the act. *Bowers vs. Smith* (Mo.), 17 S. W. Rep., 761. We do not feel at liberty to place a narrow construction upon this act. To overthrow the expressed will of a large number of voters for no fault of theirs, as we are asked to do, would be to defeat the purpose of all election laws, which is to obtain a full and fair expression of the wishes of the voters."

In *Short vs. Gouger*, 130 S. W., 267, 270, it was held by the Texas Court of Civil Appeals for the Third District:

"It is generally held that statutes concerning the manner of conducting elections are directory unless the non-compliance is expressly declared to be fatal to the validity of the election or will change or make doubtful the result. *McCrary on Elections*, Sec. 200; *Suth. on Stat. Construction*, 583; *Willeford vs. State*, 43 Ark., 62."

The opinion in this case further declares:

"Where electors vote the official ballots supplied to them by the judges of elections, their legally expressed will cannot be overthrown when they are not at fault by the fact that the public officers who prepared the ballots in some way neglected their duty."

In *Altgelt vs. Callaghan*, 144 S. W., 166, 1171, the Texas Court of Civil Appeals for the Fourth District, held as follows:

"It is provided in Section 46 of Act of 1905 that no ballot shall be used in voting at any election except the official ballot, and it requires those who prepare ballots to place the words 'official ballot' at the top of the ballot in large letters, but it is not declared that the omission of that duty will invalidate an election."

In *Walling vs. Malone Independent School District*, 195 S. W., 671, it was held by the Texas Court of Civil Appeals for the Fifth District, that although the statute (Article, 2860, Revised Statutes, 1911), provided that ballots on a school bond election shall read "*For the Tax*" or "*Against the Tax*," ballots reading "For the Bonds" or "Against the Bonds" did not invalidate the election, the levy of the tax following as a matter of course from the issuance of bonds.

The opinion in this case reads, in part, as follows:

"Was the manner of voting on the bonds as alleged such an irregularity as to render the levy of a tax to secure their payment void and subject the levy to an injunction? We think not. Voting for the bonds in this instance was substantially voting for the tax, as the law provides for such a levy upon the issuance of bonds, so the voter evidently understood that voting for the bonds was in effect a vote for the tax. It is not alleged that any voter was misled by the wording of the ballot or that any voter misunderstood what he was voting for or that any one voted different than he intended.

"The variance complained of in the wording of the ballot was a statutory one, and we think if the statute was substantially complied with the election should be held valid. Another reason why said irregularity should not affect the validity of the election is that said election had been held, said bonds been examined and approved by the Attorney General of Texas, and duly registered by the Comptroller, as required by law. This course having been complied with and it being so alleged, we think it renders the regularity of the bonds unimpeachable."

In *Clary vs. Hurst*, 104 Texas, 423, 429, 138 S. W., 566, the Texas Supreme Court held:

"Ballot and vote are sometimes confused, and while they are sometimes used synonymously, the ballot is, in fact, under our form of voting, the instrument by which the voter expresses his choice between candidates or in respect to propositions, and his vote is his choice or election as expressed by his ballot."

Third: I respectfully submit that the election notice is the source from which the voters must obtain information as to the purpose for which bonds are to be issued and not the ballot. When the voters cast their votes at this particular election, they voted for or against the issuance of bonds for the purpose stated in the notice of election, namely, the issuance of bonds for school building purposes. The amount of the bonds, the rate of interest, the time of maturity, and the purpose of the issue were no doubt all distinctly specified in the election notice. The ballot does not and is not intended to convey to the voters the question upon which they are voting, but is only the means by which they express their votes on the question submitted in the election notice.

It is my understanding that the bonds in question were authorized by an independent school district under the provisions of Section 13 et seq., Chapter 24, Acts of the Regular Session of the Thirty-seventh Legislature, and Section 15 thereof provides that the form of ballot shall be "For (or against) the issuance of the bonds and the levying of the tax in payment thereof." Before this act was passed the form of ballot prescribed in independent school district bond elections was "For (or against) the tax," but in preparing forms and directions for independent school districts *under the old law* this Department suggested that the form of ballot read "For (or against) the bonds and the tax" and in practically every independent school district bond election held under the old law the ballot read "For (or against) the bonds and the tax" notwithstanding the fact that the statutory form omitted the word "bonds." However, the voters expressed their choice both as to the bonds and the tax and your firm has no doubt approved independent school district bond issues authorized under the old law and wherein a form of ballot different from the statutory form was used.

In this connection, will say that in stock law elections in this

State to determine whether horses, etc., shall be permitted to run at large and in elections to determine whether or not hogs, etc., shall be permitted to run at large, the form of ballot in both cases is the same, to wit, "For the Stock Law" or "Against the Stock Law." Looking to the ballots alone, the voters are not informed whether they are voting on the one question or the other. They must look to the election notice for that information. (See Articles 7218 and 7245, Revised Statutes, 1911.)

In this instance the ballots were furnished by the board of trustees to the election judges and by the judges to the voters. The voters had nothing to do with the preparation of the ballots. They had to use either the ballots so furnished or to refrain from voting. If they had attempted to use any other ballot, it would have been rejected. They had no choice whatever in the matter, and yet they had the right to express their wishes upon the important question submitted to them in the election notice. They did so by using the ballots furnished to them from legal and official source. The language quoted from the decision in *Wightman vs. Tecumseh*, supra, clearly announces the rule to follow in such case and fully and clearly sets out the reason for such rule. The voters cannot be disfranchised in this manner by mistake and possibly by intentional mistake of officials charged with the duty of preparing the ballots. The courts in this State recognize and announce the justice of this rule, and I here repeat the quotation from the decision in *Short vs. Gouger*, supra:

"It is generally held that statutes concerning the manner of conducting elections are directory unless the non-compliance is expressly declared to be fatal to the validity of the election or will change or make doubtful the result."

The case of *Short vs. Gouger* was carried to the Texas Supreme Court and was dismissed for want of jurisdiction.

Fourth: Title 49, Chapter 8, Revised Statutes, 1911, deals with the subject of election contests. Notice of contest is required to be given within thirty days after the return day of the election. (See Articles 3050 and 3051, Revised Statutes, 1911.) This statute applies to school district bond elections. (*Dunne vs. Sayers*, 173 S. W., 503.) Therefore, the question as to an irregularity in the manner of submitting the proposition for the issuance of these bonds can only be raised by a proceeding attacking the validity of the elections instituted for that purpose and within thirty days after the return date of election. If no such proceeding is instituted, the question cannot be raised against the validity of the bonds issued.

I do not admit that the manner of submitting this question was illegal and improper but simply direct attention to the above statutory provisions in order to show the proper way to contest the question under the law.

Under the foregoing authorities I submit the following propositions:

(a) The ballot is not objectionable, in that in using it the people voted on a proposition entirely different from that for which the election was called.

(b) The ballots having been furnished by the proper district officials and election officers, the use of them does not render the election invalid.

(c) The voters were not misled by the contents of the ballots.

(d) Any action now alleging the invalidity of the election because of the use of the ballots furnished, would be in the nature of a contest of the election and would now come too late. (I feel reasonably sure that more than thirty days has expired since the return date of the bond election.)

Fifth: The case of Reynolds Land & Cattle Co. vs. McCabe, 72 Texas, 59, cited in your letter, does not, in my judgment, sustain you in disapproving the bonds in question. In that case no question was raised as to the form of ballot. The court held—and I think properly so—that an election order “to determine whether or not a tax shall be levied for school purposes” was sufficient to apprise the voters that “the tax was proposed for the two objects provided by the laws and named in the petition for the election.” It appears that the law provided that elections could be held in school districts to determine whether the taxpayers therein should tax themselves “for building of schoolhouses or supplementing the State school fund apportioned to said district”; and it further appears that the petition prayed that an election should be ordered “in said school district to determine whether or not a special tax be levied therein for the purpose of building schoolhouses and supplementing the State school fund apportioned to said district.” It was claimed that the court should have ordered the election for the specific purposes named in the petition and that as this was not done, the election should be declared void; but the court held that as “the form of the order” was not prescribed by statute, the language of the proposition submitted was not material, provided it substantially submitted the question which the law authorized with such definiteness and certainty that the voters were not misled.

The present law which authorizes the issuance of school building bonds by independent school districts does not prescribe the form of the election order nor does it prescribe the form of the election notice. It does state, however, that such bonds may be issued for the purpose of “purchasing, constructing, repairing or equipping public free school buildings within the limits of such district and the purchase of the necessary sites therefor.” I take it that the bond record submitted to you complied with the statute in reference to the purpose for which school district bonds may be issued.

So, as the statute which authorizes a school district bond election does not prescribe the form in which the question shall be submitted to popular vote, the decision in the case relied on by you is not in point, and, as above stated, does not sustain your position.

From all of the above, I feel sure that you will agree with my conclusion and approve the bond issue before you. While I did not examine this record, yet it is my understanding that it has been approved by the Attorney General, and that the only question causing you any concern was in reference to the form of the ballot.

With personal regards, I am,

Yours very truly,
W. P. DUMAS,
Assistant Attorney General.

Op. No. 2380, Bk. 56, P. 474.

INDEPENDENT SCHOOL DISTRICTS—COUNTY SCHOOL SUPERINTENDENTS
—CONSTITUTIONAL LAW—SPECIAL ACTS OF THE LEGISLATURE.

The Legislature has the authority to create an independent school district by a special act and to vest the management and control of its schools in a board of school trustees to the exclusion of all other school authorities.

Powell vs. Charco Independent School District, 203 S. W., 1178, and authorities there cited.

Articles 2752 and 2758, as amended by Chapter 57, General Laws, passed at the Third Called Session of the Thirty-sixth Legislature.

Chapter 51, Local and Special Laws, passed at the Regular Session, Thirty-fourth Legislature.

Section 3, Article 7, State Constitution.

AUSTIN, TEXAS, September 1, 1921.

*Miss Annie Webb Blanton, State Superintendent of Public Instruction,
Capitol.*

DEAR MISS BLANTON: Your letter of August 27, addressed to the Attorney General, has been received. It reads:

"Art. 2752, R. S., 1911, authorizes the county superintendent of public schools to exercise supervision over independent school districts having fewer than 500 scholastics and this Department has held that such districts should share in the expense of maintaining said office.

"The Charco Independent School District was created by the Thirty-fourth Legislature (S. B. 289, Chapter 51, Local and Special Laws), and Section 4 of said act reads as follows:

"The board of trustees of said district shall manage and control the public free schools within said district to the exclusion of every other authority, excepting in so far as the State Superintendent of Education and the State Board of Education may be vested with general supervisory authority to instruct said board."

"Query: Should the Charco Independent School District contribute its share in payment of the salary of the county superintendent?"

Article 2859, Revised Civil Statutes of 1911, provides that when a bond election has been ordered for school purposes in an independent school district that notices of such election shall be placed in three different portions of such district for at least *twenty* days before the date of the election.

In Section 21 of the act creating the Charco Independent School District it is provided that in bond elections in said district notices of the election shall be placed within said district for *ten* days prior to the date of election.

There is a direct conflict between the provisions of the general statute and the provisions of the special act with reference to the time required for notices to be posted in bond elections. Charco Independent School District issued bonds under the provisions of the act by which it was created, and the legality of the issue was contested in the courts. Among other issues raised upon the trial of the case was this conflict between the general statutes and the special statute relating to notices. The contestant contended that the Legislature did not have the authority to prescribe by special act a different period of time for which notices should be posted then fixed by general statute. The court sustained the

validity of the bonds. *Powell vs. Charco Independent School District*, 203 S. W., 1178. In its opinion the court used this language:

"There is nothing sacred about the provisions as to notices in Articles 2857 and 2859, Rev. Stats., for having the power to create a district by a local law the Legislature had the authority to provide for different notices of election for bonds than that prescribed in the articles cited."

We think what the court had to say about the question of notices applies equally as well to the provisions of Article 2752. The office of county superintendent is a statutory one and the duties, powers and authority of the county superintendent are fixed by statute, not by the Constitution. The same authority that gave powers to the county superintendent can take that power away. "The Legislature giveth, and the Legislature taketh away."

Section 3 of Article 7 of the State Constitution has conferred the power upon the Legislature to not only create school districts by a general or special law, but provides, "The Legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public school, or schools, of such district." This authority has been exercised by the Legislature in the creation of the Charco Independent School District. It has seen fit to provide, in Section 4 of the act, that the management and control of the schools in said district shall be exercised by the board of trustees to the exclusion of every other authority excepting in so far as the State Superintendent of Education and the State Board of Education may be vested with supervisory authority to instruct said board.

This provision clearly supersedes, in so far as this district is concerned, the following provision in Article 2752:

"He (county superintendent) shall have authority over all of the public schools in his county except such of the independent school districts as have a scholastic population of five hundred or more. In such independent school districts as have less than five hundred scholastic population, the reports of the presidents and treasurers to the State Department of Education shall be approved by the county superintendent before they are forwarded to the State Superintendent; and all appeals in such independent school district shall lie to the county superintendent, and from a decision of the county superintendent to the State Superintendent of Public Instruction, and to the State Board of Education."

In Article 2758, Revised Statutes of 1911, as amended by Chapter 57, General Laws passed at the Third Called Session of the Thirty-sixth Legislature, the salaries of county superintendents are fixed and provision made for the payment of the same in the following language:

"* * * 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 salaries and expenses of the office of the county superintendent of public instruction, and the same shall be prorated to the schools coming under the supervision of the county school superintendent."

The act creating the Charco Independent School District having taken away from the county superintendent the authority heretofore vested in him by that portion of Article 2752 quoted above, also takes this particular school district out of the class of schools which are to contribute

to the payment of the county superintendent's salary, as set forth in that portion of Article 2758 quoted above.

It is the opinion of this Department, and you are so advised, that the Charco Independent School District is not liable, and cannot be required to pay any portion of the salary of the county superintendent of public instruction of Goliad County.

Yours very truly,

BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 2318, Bk. 55, P. 338.

PUBLIC FREE SCHOOLS—ALIENS—SCHOOL TRUSTEES AND OTHER
SCHOOL OFFICIALS—DISCRIMINATION.

Alien children have the same right to attend the public free schools of the State as do the children of citizens of this State.

AUSTIN, TEXAS, March 28, 1921.

*Miss Annie Webb Blanton, State Superintendent of Public Instruction,
Capitol.*

DEAR MISS BLANTON: Your letter of the 15th instant, addressed to the Attorney General, has been received. You enclose in said letter the record of an appeal to you by Pete Peralez, a Mexican child, from the county school board of Coryell County. Your letter reads:

"I am enclosing copy of the statement of facts in an appeal case from Coryell County. It appears that the county board of trustees have denied school privileges to Mexican children because of the fact that the parents are not naturalized citizens of this country. It is not denied that these Mexicans are residents of the school district and I am respectfully asking you for your construction of the law. Is it necessary for foreigners to become naturalized citizens before their children may be entitled to school privileges in the State of Texas?"

The issue in controversy and the facts relative thereto are stated in this record, which reads as follows:

"The county school board of Coryell County, Texas, met in call session Maren 10, 1921, at which session the following business was had. The minutes of the last meeting being read and adopted, the following business was presented to the body:

"Pete Peralez, a Mexican child, about eight years of age, accompanied by his parents, and represented by Mr. Bud Tippit, having been refused the rights and privileges of attendance in school of Common School District No. 36, Hubbard, Coryell County, Texas, by the teacher and trustees thereof, appealed the matter to said county school board of Coryell County, Texas, and a quorum being present of said board, and the board after hearing the evidence and statement of the parents, which such statement was in substance, towit:

"Both parents, the father and mother of Pete Peralez (Mexican child), stated in person before said board that they each were born in Mexico. (An interpreter being used.) That neither parent was a naturalized citizen of the United States or the State in which they reside. That they owned no property or real estate of any kind. That the father of said child, Pete Peralez, had never at any time made before any court of competent jurisdiction his declaration of intention to become a citizen of the United States or the State and county in which he resides. That the said father had never at any time voted, or attempted to vote in any election of any kind or nature. That said child, Pete Peralez,

was also born in Mexico; that said parents desired said child to go to school; that neither of the parents could read and write, and neither could speak (to be understood) the English language (an interpreter being required to obtain their evidence). That said parents never intended to return to Mexico to make it their home; that said mother of said child was intending to return to Mexico in a short time to visit relatives, but not to make it her permanent home.

"(The above facts being agreed upon by all parties as the substance of the evidence presented to said board for consideration.)

"The board after considering all the matters and things, agreed to the following findings:

"We, the county school board, find that Pete Peralez is not entitled to the benefits of the public schools in Hubbard School District No. 36, located in Coryell County, Texas, for the following reasons, to-wit: That he nor his parents are citizens of the United States, both parents and child being born in Mexico, and never having applied for naturalization papers. (The child now eight years of age, past). We therefore find him ineligible to such privilege.'

"Mr. T. I. (Bud) Tippit being in doubt as to the justice of the above action with regard to Pete Peralez, and representing said child, requested that the matter be appealed to the State Department of Education, and agreed to the above as being the substance of the evidence heard by said board.

"After which the county board appointed Mr. S. P. Saffell, trustee of Hurst School in place of Mr. Windham (moved). There being no further business, the board adjourned till next meeting.

"A true copy, we certify.

(Signed) "R. D. A. THARP,

"Chairman.

(Signed) "H. T. HALL,

"Secretary."

It appears from this record that the Mexican child, Pete Peralez, lives with his parents in Common School District No. 36 in Coryell county, and that the child is within the scholastic age, but when he presented himself at the school he was denied admission thereto because he and his parents were born in the Republic of Mexico, and because his parents were not citizens of the United States of America and had never applied for naturalization papers in this country. From the action of the teacher in refusing to permit him to attend the school in the district in which he resided, action of the teacher having been sustained by the local trustees, he appealed to the county board of trustees of Coryell county, which body sustained the action of the board of local trustees. If an appeal was first taken to the county superintendent, it is not shown by the record, but we presume such an appeal was taken, as is provided for by statute. The county board of trustees having sustained the action of the teacher in refusing him admittance to which he claims to be entitled, he prosecutes his appeal to you and the matter is now properly before you for review.

The question propounded by you to this Department is:

"Is it necessary for foreigners to become naturalized citizens before their children may be entitled to school privileges in the State of Texas?"

Under the particular facts of this case, your question might be more properly stated as follows:

"It is necessary for foreigners to become naturalized citizens or to declare their intention of becoming citizens of the United States of America before their children, not born in the United States, may be entitled to attend the public free schools of this State?"

Section 1, Article 7 of the Constitution of the State of Texas,

declares the policy of our State towards public free schools in the following language:

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

A portion of Section 3, Article 7 of our State Constitution reads as follows:

"School taxes.—One-fourth of the revenue derived from the State occupation taxes and a poll tax of \$1 on every male inhabitant of this State between the ages of 21 and 60 years shall be set apart annually for the benefit of the public free school, and in addition thereto there shall be levied and collected an annual ad valorem State tax of such an amount, not to exceed 20 cents on the \$100 valuations, as with the available school fund arising from all other sources, will be sufficient to maintain and support the public free schools of this State for a period of not less than six months in each year."

In pursuance to the above mandate, the Legislature has enacted Articles 2899 and 2900 of the Revised Civil Statutes of 1911. These articles read:

"Article 2899. Every child in this State of scholastic age shall be permitted to attend the public free schools of the district or independent district in which it resides at the time it applies for admission, notwithstanding that it might have been enumerated elsewhere or may have attended school elsewhere part of the year; provided, that white children shall not attend the schools supported for colored children, nor shall colored children attend the schools supported for white children.

"Article 2900. All children, without regard to color, over seven years of age and under seventeen years of age at the beginning of any scholastic year, shall be entitled to the benefit of the public school fund for that year."

The provisions of the above quoted articles of our statutes are plain and unequivocal. The language used to express the intention and purpose of the Legislature is so clear that reasonable minds cannot differ as to what children the Legislature intended to open wide the doors of the public free schools of this State to.

Article 2899 starts out with the broad and sweeping declaration that "every child in this State, of scholastic age, shall be permitted to attend the public free schools of the district or independent district in which it resides at the time it applies for admission."

The adjective "every" means each one or all. It includes all the separate individuals which constitute the whole, regarded one by one. The Legislature took every precaution in this article to express in plain words its intention as to what children should be permitted to attend the public free schools of this State, yet, out of an abundance of precaution and to avoid any possible misunderstanding as to its intention in enacting said article, it saw fit to again declare its purpose and intention with reference to this matter when it enacted in the law the provisions of Article 2900 quoted above. Here again its language is clear and comprehensive, and instead of using the adjective "every" it used the broad and comprehensive adjective "all" and declares in effect that all children, without regard to color, within said ages shall be entitled to the benefit of the public school fund for the current year.

By the provisions of these two articles, enacted in obedience to the mandate of our State Constitution, the doors of every public school-house in Texas were opened to every child residing within the State, regardless of its color, sex or nationality, with only three limitations. These are: (a) the child must be within the ages prescribed by the statutes; (b) must attend the school in the district in which it resides at the time it applies for admission; (c) and white children shall not attend schools supported for colored children, nor shall colored children attend the schools supported for white children.

The county board of school trustees of Coryell county, in sustaining the action of the teacher in Common School District No. 36, justifies its action in the following language:

"That he (Pete Peralez) nor his parents are citizens of the United States, both parents and child being born in Mexico and never having applied for naturalization papers. We therefore find him ineligible to such privilege."

Section 1 of the Fourteenth Amendment of the Constitution of the United States defines who are citizens of the United States in the following language:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside."

The child, Pete Peralez, is evidently an alien and because of that fact alone he has been denied the right to attend a public school of this State. This question has never before arisen in this State in so far as we have been able to ascertain. We must therefore look to the decisions of other States for guidance in determining this question. In the case of *Ward vs. Flood*, 48 Cal., 36, the Supreme Court of California:

"The privilege accorded to a child attending the public schools of a State is not a privilege appertaining to a citizen of the United States as such, nor can any person demand admission into such schools on the mere status of citizenship. *The claim arises under, and is limited by, the State laws establishing and regulating the schools.*

"In California the opportunity of instruction in public schools given by the statutes to the youth of the State, is in obedience to the special command of the Constitution and the privilege thereby granted is a legal right, as much so as a vested right in property. It may be enforced by mandamus."

Judge Tucker, in his well known work "Limitations on the Treaty Making Power" on page 296, says:

"The right of controlling absolutely the educational systems of the State is an essential right which has never been parted with by the States and cannot be controlled by the Federal Government or any of its departments, and this fact is well known by the statesmen of foreign countries whose duties call them to the delicate task of framing and negotiating treaties with the United States."

It therefore appears that whether an alien child is permitted to attend the public schools of a State is a matter purely for the determination of that State. It is a matter over which the sovereign State has exclusive jurisdiction and is not and can not be controlled by the Federal Government, either by legislation or by its treaty making power.

In the case of *Tape vs. Hurley*, 6 Pac., 129, the question arose as to right of the Chinese child to be admitted in the public school of the district in which it resided in the State of California. The statute of

California, with reference to his question, is very similar to ours. It reads:

"Every school, unless otherwise provided by law, must be opened for the admission of all children between 6 and 21 years of age residing in the district; and the board of trustees, or city board of education have power to admit adults and children not residing in the district whenever good reasons exist therefor."

In this case it was admitted that the Chinese girl was between the ages of six and twenty-one and resided in the district in which was located the public school to which she applied for admission, which was denied her. In passing upon this case, the Supreme Court of California said:

"Where a law is plain and unambiguous, whether it be expressed in general or limited terms, *the Legislature should be intended to mean what they have plainly expressed*, and consequently, no room is left for construction. When the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislative and not judicial action. These rules are never controverted or doubted, although perhaps sometimes lost sight of. In this case, if effect be given to the intention of the Legislature, as indicated by the clear and unambiguous language used by them, respondent has the same right to enter a public school that any other child has. As the Legislature has not denied to the children of any race or nationality the right to enter our public schools, the question whether it might have done so does not arise in this case."

We therefore conclude that the Legislature of this State intended that an opportunity for instruction in the public schools of this State should be afforded the youth of Texas, and the advantages of attending a public school should be extended to all children regardless of their nationality or color, whether citizen or alien, and having declared such to be the rights and privileges of the children of this State, such right is a vested one, and as such it is protected and is entitled to be protected by all the guarantees by which other legal rights are protected and secured to the possessor.

It is the opinion of this Department, and you are so advised, that the school authorities of Coryell county have denied this Mexican boy a legal right guaranteed to him by positive law, and that it is your duty to overrule the action of the county board of education of Coryell county, and hold that Pete Peralez is entitled to attend the public school in Common School District No. 36, Hubbard, Coryell county, Texas.

Yours very truly,

BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 2444, Bk. 57, P. 303.

SCHOLASTICS—TRANSFERS WITHIN THE COUNTY—COUNTY
SCHOOL SUPERINTENDENTS.

Whenever an application is made to the county superintendent within the time and in the manner prescribed by Article 2760, Revised Civil Statutes, 1911, it

becomes the duty of the county superintendent to make the transfer and he has no discretion in the matter.

AUSTIN, TEXAS, July 29, 1922.

Miss Annie Webb Blanton, State Superintendent, Capitol.

DEAR MISS BLANTON: Your letter of the 27th instant requesting this Department to again consider the opinion rendered you by Honorable C. L. Stone, Assistant Attorney General, under date of April 27, 1920, construing Article 2760, Revised Civil Statutes, 1911, has been received.

The article under consideration reads:

"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 portions 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 1st, after the enrollment was made."

In construing this article for you in the above mentioned letter, Mr. Stone said:

"The word 'may' used in the above article is construed by the writer to mean 'shall,' making it mandatory and not directory upon the county superintendent to make such transfer as provided for in Article 2760, supra. This petition to transfer was filed on July 26, 1919, and the law provides that no transfers shall be made after August 1st so that in the instant case Mr. Shockley made his application in due time to have obtained such transfer."

In your letter of the 27th instant, with reference to this construction, you say:

"I believe that the word 'may' in this law does not mean 'shall,' as interpreted by your department, but that it was the intention of the Legislature to give the county superintendent discretion in the matter of transfers; otherwise, it will often happen that when a neighborhood quarrel occurs, a school might be almost broken up."

The construction of this statute depends upon the meaning of the word "may." This word, according to its ordinary construction, is permissive, and should receive that interpretation, unless such construction would be obviously repugnant to the intention of the Legislature or would lead to some other inconvenience or absurdity. The courts have many times construed the meaning of this word when used in statutes, but the general rule is that the ordinary meaning of the word is that there is involved a discretion, and it is to be construed in a mandatory sense only where such construction is necessary to give effect to the clear policy and intention of the Legislature. From these decisions, the following rules of construction seem now to be well established:

"Whether the word 'may' in a statute is to be construed as mandatory and imposing a duty, or merely as permissive and conferring discretion, is to be determined in each case from the apparent intention of the statute as gathered from the context, as well as the language of the particular provision.

"The word 'may' in a statute will be construed to mean 'shall' whenever the rights of the public or third persons depend upon the exercise of the power or the performance of the duty to which it refers, and such is its meaning in all cases where the public interests and rights are concerned, or a duty is imposed on public officers, of the public or third persons for a claim de jure that the power shall be exercised.

"The true rule of construction is that the word 'may' as used in a statute, is to be taken as meaning "must" or "shall" only in cases where the public interests and rights are considered, and where the public or third persons have claimed de jure that the right shall be exercised. In other cases the enactment is not imperative, but left to sound discretion."

A careful reading of Article 2760 conveys to our mind the impression that it was the intention of the Legislature to permit parents, guardians or persons having the lawful control of a child within the scholastic age which had lawfully been enrolled as a scholastic, to have transferred such child to any other district in the county by making application to the county superintendent for such transfer. The only limitation placed upon such a transfer by the statute is: (a) the child must lawfully be enrolled; (b) it cannot be transferred to a district in another county; (c) it cannot be transferred more than once; (d) it must be stated in the application that it is the bona fide intention of applicant to send the child to the school to which transfer is asked; (e) the transfer cannot be made after August 1st, after the enrollment was made.

The right of transfer is a privilege granted by the statute to the child. The county superintendent is the officer whose duty it is to transfer the child, and with the transfer goes the child's portion of the school fund. The statute does not in any way attempt to lay down any rule for the guidance of the county superintendent as to whether the transfer should be made or not. It simply provides that the child "may" be transferred under the rules and conditions set out in said article.

It occurs to me that if it had been the intention of the Legislature to leave the matter of transfer to the sound discretion and judgment of the county superintendent that it would have used language clearly expressing that purpose or to have set forth and enumerated the causes or conditions which would entitle the child to be transferred, when found to exist by the county superintendent. This it has not done, but simply granted to the child the right of transfer and made it the duty of the county superintendent to perform that duty when properly petitioned to do so.

We think the use of the word "may" in this statute clearly falls within the rule of construction heretofore quoted and that this word is equivalent to a direct command to the county superintendent to make the transfer when properly and seasonably presented to him. The public has an interest in this statute and a right is conferred upon all parents, guardians and other persons who lawfully control children of the scholastic age, to have said child or children transferred to any district in the county.

In this connection, it would be well to observe the provisions of the succeeding Article 2761. This article reads:

"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 resides on account of distance or some uncontrollable and dangerous obstacle is inaccessible to such child or children."

Here the Legislature has set forth certain conditions for the determination of the county superintendent, who is given discretion in the matter, as to whether such child or children should be transferred to a district in an adjoining county. These causes are "distance or some uncontrollable and dangerous obstacle" which renders the school of its district inaccessible to such child or children. Under this article application is made under the same conditions and within the same time as in the preceding article, but discretion is given to the county superintendent to determine whether, under the facts stated in the application, the child is entitled to such transfer.

It is the opinion of this Department, and you are so advised, that the construction placed upon this article by Mr. Stone is correct and that when an application for the transfer of a child is made within the time and in the manner prescribed in Article 2760 that it becomes the duty of the county superintendent to make such transfer and that he has no right to inquire into the motive that prompts the application. Neither can he take into consideration the consequences or the effect that such transfer will have upon the school in the district from which the application comes.

Yours very truly,
 BRUCE W. BRYANT,
 Assistant Attorney General.

Op. No. 2361, Bk. 56, P. 274.

INSURANCE—INDEPENDENT SCHOOL DISTRICTS.

An independent school district has no authority to insure school buildings in a mutual fire insurance company organized under Chapter 10, Title 71, Vernon's Complete Statutes of 1920.

AUSTIN, TEXAS, June 14, 1921.

*Miss Annie Webb Blanton, State Superintendent of Public Instruction,
 Capitol.*

DEAR MISS BLANTON: Under date of June 1, 1921, you submitted to this Department the following inquiry:

"The State Department of Education is in receipt of a letter from the president of the board of trustees of the Belton Independent District, a copy of which is inclosed. Since a legal question is at issue, I am referring the matter to you for an opinion.

"The question is: 'Can a board of trustees legally insure school buildings in a mutual fire insurance company?'"

We are informed that the precise ruling desired is whether the Belton Independent School District has authority to take out fire insurance, insuring against loss by fire its school buildings, in the Texas State Mutual Fire Insurance Company.

This company was organized and is doing business under an act of the Legislature passed in 1913, which will be found at page 54 of the Acts of 1913 and is carried forward as Chapter 10, Title 71, Vernon's Complete Statutes of 1920.

This statute, among other things, provides that every person to whom a policy of insurance has been issued by a mutual company incorporated in this State shall be a member of such company so long as his policy remains in force, and shall be entitled to one vote at the meetings of the members of such company, and shall further be entitled to his equitable share of all benefits derived from being a member of such company. (Article 4907c.)

The act also provides that the by-laws of every company organized under this act shall provide that every member, in addition to his annual premium, paid in cash or in cash and premium notes, shall be liable for a sum equal to another annual premium, or it may provide a sum equal to three or five annual premiums, such additional liability being assessable at the discretion of the Insurance Commissioner or the company's board of directors for the members' proportionate share of losses and expenses should the company's funds become impaired. (Article 4907d.)

Article 4907e states that the by-laws shall state clearly and plainly the extent of each member's liability to other members.

The by-laws of the Texas State Mutual Fire Insurance Company provide that every person to whom a policy of insurance is issued by this company shall be a member of such company so long as his policy remains in force, and he shall be entitled to one vote at the meetings of the members on all questions coming before such meeting, and shall further be entitled to his equitable share of all benefits derived from being a member of the company. (Article 1.)

It is provided in the by-laws that there shall be held each year upon a certain date an annual meeting of the members of the company for the selection of directors and officers and for all such business as may properly under the law come before a general meeting of the members of the company. Special meetings may also be held at the direction of a majority of the board of directors pursuant to notice in writing to the members. Each member has one vote, which may be cast either in person or by proxy. The vote of a majority of the members present at a meeting binds the corporation.

The members may, upon recommendation of the board of directors, declare such dividends at any annual meeting as may be consistent with the solvency of the company, as provided under the laws of this State. (Article 2.)

The members may, at a special meeting called for that purpose, declare by a two-thirds vote of all the members, including those absent, the office of any member of the board of directors vacant, provided that said meeting shall be called by at least one hundred members and thirty days notice thereof given to all members.

Article 9 declares that every member, in addition to his annual premium, whether paid in cash or in cash and premium notes, shall be liable for a sum equal to another annual premium to the other members, such additional liability being assessable at the discretion of the

Insurance Commissioner or the company's board of directors for the members' proportionate share of loss and expenses should the company's funds become impaired.

Under Article 10 the form of the policy is required to be a standard fire policy adopted by the State Fire Insurance Commission, in which shall be included a mutual provision required by law and in which shall be stated the members' liability as above shown.

Article 11 declares that these by-laws may be amended by three-fourths vote of the members at any meeting, etc.

On August 8, 1919, Assistant Attorney General E. F. Smith advised Hon. Fred L. Blundell, county attorney at Lockhart, Texas, "That a mutual fire insurance company is to a certain extent a partnership—that is, assessments are made against policy holders in such a company to pay fire losses incurred by other policy holders, and you are advised that the law does not permit school districts to become partners in any such arrangement. Therefore school trustees are not authorized under the law to insure school buildings or property in mutual fire insurance companies."

We are furnished a brief prepared by Messrs. Ekern, Meyers and Janisch of Chicago, treating the matter at some length. This brief is devoted to substantially the following propositions:

1. A school district and other political corporations and subdivisions have the implied power to take out fire insurance upon public buildings.

2. The school trustees have some discretion, in the absence of a statute to the contrary, in selecting the mode of exercising this implied power.

3. The school district would not violate the Constitution of Texas by taking out fire insurance in a mutual company, inhibiting political corporations or subdivisions of the State, etc., from lending their credit or granting money or aid to or becoming stockholders in any corporation, association or company.

Many authorities are cited in this brief in support of these propositions and among others the case of *French vs. Millville*, 66 N. J. L., 392, 49 Atl., 465, in which it was expressly held that the city of Millville had authority to insure public buildings in a mutual fire insurance company.

The propositions in this brief above indicated might, for the sake of argument, be accepted as correct and still it would not follow that an independent school district in this State has authority to insure in a mutual company. The real question is whether such authority has been conferred upon the independent school district, for everyone will admit that a public corporation of this kind has such authority and such authority only as is conferred upon it by law. It therefore becomes unnecessary to decide whether the Constitution of our State inhibits the insurance of school buildings by an independent school district in a mutual company. If the Legislature has not conferred such authority, no constitutional question is involved.

We cannot agree to the correctness of the conclusion reached by Messrs. Ekern, Meyers and Jarisch, for reasons which will presently appear.

We grant that the Millville case holds to the contrary, as to a city in

the State of New Jersey, but the question was not discussed in that case from the viewpoint controlling our opinion, and in so far as it may be analogous to our case here we must respectfully decline to treat it as authoritative.

According to our view the trustees of the Belton Independent School District would exceed their authority in insuring in the Texas State Mutual Fire Insurance Company, since to do so would involve becoming a member of that company, with the attendant duties and responsibilities, if not liabilities.

We are of the opinion that the authority to become a member of a corporation of this kind does not necessarily follow from the implied power to purchase fire insurance. It could as well be said that it might engage in a similar way in the hardware business because it has implied authority to purchase hardware, or the contracting business from its authority to construct school buildings; and thus there would be no end to the activities engaging the attention of the school district. The law never contemplated this in granting these general powers.

The law is to be construed in the light of common knowledge and facts. As a fact, insurance against loss by fire can be acquired without engaging, even in this manner, in the insurance business, and from this viewpoint, in the absence of express statutory law to the contrary, we are justified, we think, in presuming there was no legislative intent that independent school districts should become members of mutual fire insurance companies.

The duties and requirements incumbent upon a member of such a company are beyond and inconsistent with the scope and purposes of an independent school district in this State, and the authority of the trustees cannot extend beyond the legitimate sphere of the district.

It is quite true that a board of trustees could exercise some discretion in choosing a method of executing a general power or authority; but the method must be a proper one; it must be appropriate; it must be reasonable. For illustration, a public official having authority to travel on public business from Texas to New York, could reach New York by way of San Francisco, but it would not follow that he would have authority to travel that route and charge traveling expenses for the trip, though his objective would be accomplished by that route as certainly and as completely as by a more direct route.

Similarly, the authority and duty to insure school buildings might be accomplished by insuring in a mutual company, but such a course would entail burdens and liabilities wholly inconsistent with the functions of public school trustees and school districts, while there are available other methods not subject to these objections.

For argument, it will be granted that the pecuniary liability of members is limited to one additional annual premium. If this were the limit of the undertaking of each member, there would be some plausibility in the argument that an independent school district would not be inhibited from becoming a member; for in that event it might be contended that the amount of the additional premium should be treated as a consideration for the insurance purchased. But this money liability does not limit the responsibilities and obligations of the member. In a corporation of this character the members operate the business: they are

not only the insured, they are the insurers. As above shown, the members come together in general meetings and each member has a vote. The members thus assembled undoubtedly constitute the supreme power in the concern. In the words of the by-laws, "a vote of a majority of the members present at a meeting shall be the act of the corporation." In short, the Belton Independent School District would be a member of the Texas State Mutual Fire Insurance Company should it insure its school buildings in that company, and would therefore be participating in the operation of a general fire insurance company. This is inevitably true, as the corporation has no stockholders, strictly speaking, and the business is organized, operated and controlled by the members.

There is no escape from the conclusion that each member is in the insurance business. The school district has no authority to embark upon an enterprise of this kind.

You are therefore respectfully advised that in the opinion of this Department the Belton Independent School District is without authority to insure its school buildings in the Texas State Mutual Fire Insurance Company or a similar company.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2359, Bk. 56, P. 480.

INDEPENDENT SCHOOL DISTRICTS—TRUSTEES—ELECTIONS—
DE FACTO OFFICERS—VACANCIES.

Where elections have been held in an independent school district for several years at a time not authorized by law, the trustees elected at such election and who qualified by taking the oath of office prescribed by law, are de facto officers.

A de facto officer has the right to exercise the duties and functions of his office, without interference, and to have possession of the office and all the property belonging or appertaining thereto, until he is ousted in a proper proceeding brought for that purpose.

As a matter of public policy the courts may refuse to remove de facto officers when there are no de jure officers claiming such offices, and such removal would cause a suspension of the functions of the corporation.

Where the terms of office of a part of the trustees of an independent school district have expired and no election was held to elect their successors, there is a vacancy created which may be filled by a majority of the remaining members of such school board, and it is the duty of the remaining members of the board to fill such vacancy.

In view of the amendment to Article 2889, Revised Civil Statutes of 1911, adopted at the Regular Session of the Thirty-fifth Legislature, fixing the date for the holding of such elections in independent school districts for the purpose of electing school trustees, elections for this purpose should be held in the Sulphur Springs Independent School District on the first Saturday in April of each year.

Where an independent school district should have held an election on the first Saturday in April, 1921, for the purpose of electing trustees to succeed those whose terms of office expired in April of that year, there is a vacancy which may be filled by the hold-over members of the board, and those trustees so chosen may serve as such until their successors are elected and qualified at an election held on the first Saturday of April, 1923.

American & English Encyclopedia of Law, Vol. 8.

Art. 2889, Revised Civil Statutes, 1911, as amended by Chap. 132, Acts of the Regular Session of the Thirty-fifth Legislature.

Chap. 35, Special Laws, Regular Session, Thirtieth Legislature.

The State ex rel. Eckhardt vs. Hoff, 88 Texas, 297.

Tom vs. Klepper, 172 S. W., 721.

AUSTIN, TEXAS, May 28, 1921.

Miss Annie Webb Blanton, State Superintendent of Public Instruction, Capitol.

DEAR MADAM: A few days ago you submitted to this Department several letters from patrons of the Sulphur Springs Independent School District relating to the trustees of said district. You have submitted these several letters to our Department with the request that we advise you in the premises. From these letters we have secured the following statement of facts.

The Sulphur Springs Independent School District was created by a special act of the Thirtieth Legislature, which act became effective March 22, 1907. By Section 3 of said act it is provided that the management and control of the public free schools within said district shall be vested in a board of trustees, which board shall be composed of seven persons, resident citizens and qualified voters within said district, and each member of said board, before entering upon the discharge of his duties, shall make and subscribe to the usual oath for the faithful and impartial discharge of the duties of the office.

Section 5 of the act reads:

"Vacancies in the board shall be filled by a vote of the majority of the members continuing in office. The first board of trustees under this act shall be the present board of trustees of the city schools of Sulphur Springs. The term of office of the seven trustees shall be divided into two classes, determined by the division already established. The four members whose term of office would have expired on the first Saturday of May, 1907, shall serve until the first Saturday of May, 1907, and until their successors are elected and qualified. The three members whose terms of office would have expired on the first Saturday of May, 1908, shall serve until the first Saturday of May, 1908, and until their successors are elected and qualified; and regularly thereafter on the first Saturday in May of each year four trustees and three trustees alternately shall be elected for a term of years, to succeed the trustees whose terms expire at that time. All elections for school trustees in said district shall be ordered, conducted and held, and notice thereof given in accordance with the general laws of this State at the time regulating elections for school trustees in independent school districts."

By Chapter 132, Acts of the Regular Session of the Thirty-fourth Legislature, Articles 2887 and 2889, Revised Civil Statutes of 1911, were amended. These articles deal with the election, classification and terms of office of school trustees in independent school districts, such as the independent school district under consideration.

Article 2889, as amended, reads:

"The terms of office of the seven trustees chosen at the first election shall be divided into two classes, and the members shall draw for the different classes; the four members drawing the numbers one, two, three and four shall serve for one year or part thereof; that is, until the first of April thereafter, and until their successors are elected and qualified; and the three members drawing the numbers five, six and seven shall serve two years; that is, until the second of April thereafter, and until their successors are elected and qualified; and regularly thereafter on the first Saturday in April of each year, four trustees and

three trustees, alternately, shall be elected for a term of two years, to succeed the trustees whose term shall at that time expire."

It appears that after the creation of the Sulphur Springs Independent School District regular elections were held in said district at the time fixed in the act for the purpose of electing trustees for the district, the last election held for that purpose being in May, 1920. In 1921 an election was ordered by the board of trustees to be held in May of said year, and at the time fixed by the act for said elections, for the purpose of electing trustees to succeed those whose terms of office expired in May of that year. It appears that after the election had been ordered that the board, for the first time since the adoption of the amendment to Article 2889, had called to its attention this amendment, which provides that elections for trustees in independent school districts, as well as in common school districts, shall be held on the first Saturday in April of each year. This time having passed, the order for the election was withdrawn and none was held. The board evidently having concluded that the provisions of the general statutes fixing the date on which such elections should be held as controlling the provisions of the special act creating the district.

With these facts before us we are called upon to determine the status of the Sulphur Springs Independent School Board. This leads us to inquire, first, is there a conflict between the provisions of Section 5 of the act creating said district and those of Article 2889, as amended, relating to the time when an election shall be held in said district?

Article 2889 of the Revised Civil Statutes of 1911 became a law in 1905, before this district was created. Before said article was amended in 1915, it read:

"The terms of office of the seven trustees chosen at the first election shall be divided into two classes, and the members shall draw for the different classes, the four members drawing the numbers one, two, three, and four shall serve for one year or part thereof; that is, until the first May thereafter, and until their successors are elected and qualified; and the three members drawing the numbers five, six, and seven shall serve for two years; that is, until the second May thereafter, and until their successors are elected and qualified; and regularly thereafter, on the first Saturday in May of each year, four trustees and three trustees, alternately, shall be elected for a term of two years, to succeed the trustees whose term shall at that time expire."

The above article carried a provision requiring trustees of independent school districts to be elected on the first Saturday in May of each year. Section 5 of the act creating this district carried a similar provision. At that time there was no conflict between the general law and the special act creating this district in so far as the date on which elections were to be held for the election of school trustees.

By the provisions of Article 2889, as amended by the acts of 1915, it is provided that elections should be held on the first Saturday in April of each year for the purpose of electing school trustees in independent school districts, this date being the same as fixed by Article 2818, Revised Civil Statutes of 1911, for holding elections for the purpose of electing school trustees in common school districts. If we stop here we have a direct conflict between the provision of Section 5 and Article 2889, as amended, but the last clause of Section 5 reads:

"* * * All elections for school trustees in said district shall be ordered, conducted and held, and notice thereof given in accordance with the general laws of this State at the time regulating elections for school trustees in independent school districts."

This is a proviso or a qualifying clause to that portion of said act which fixes the date for holding of elections at the first Saturday in May of each year. It will, therefore, be seen that the Legislature, in passing this special act creating this district, intended that its provisions should not conflict with the provisions of the general law relative to the time and manner of holding elections for like purpose, as fixed by general law. It seemed to have contemplated that the Legislature might, at some future time, amend the statute fixing the time for elections of school trustees, and took the precaution to so word the act that in the event such amendments were adopted that this special act would not conflict with the general law.

We, therefore, conclude that there is no conflict between the provisions of Section 5 and Article 2889, as amended, and that the proper time for holding elections for the election of school trustees in said district is the first Saturday in April of each year.

This brings us to a consideration of the status of the present board of school trustees. It appears that the last legal election held in said district for the purpose of electing school trustees was held on the first Saturday in May, 1915, the amendment to Article 2889 not having become effective at that time. The elections held in May, 1916, 1917, 1918, 1919 and 1920 were held on the first Saturday in May of each year, and, being held at a time not authorized by statute, were illegal. The trustees elected on those dates, and the trustees that may have been appointed by the school board since 1915, became de facto officers. A de facto officer has been defined as follows:

"An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised; first, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like; third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such." (See Am. & Eng. Ency. of Law, Vol. 8, pp. 781-2-3.)

"A person in possession of an office under a claim of being entitled thereto is an officer de facto, though he may have been illegally or irregularly elected or appointed." (See Am. & Eng. Ency. of Law, Vol. 8, p. 791.)

"A de facto officer has a right to exercise the duties and functions of his office, without interference, and to have possession of the office and all the property belonging or appertaining thereto, until he is ousted in a proper proceeding brought for that purpose." (See Am. & Eng. Ency. of Law, Vol. 8, pp. 802-803.)

"It is the general rule that the title of a de facto officer, whether a public officer or an officer of a private corporation, cannot be collaterally attacked in

an action to which he is not a party, nor in an action to which he is a party, where he has no personal interest in such action, but is merely prosecuting or defending the same in an official capacity, nor can an officer's title be questioned in any other collateral way." (See Am. & Eng. Ency. of Law, Vol. 8, p. 823.)

As a matter of public policy the courts may refuse to remove de facto officers of a municipality on quo warranto, where there are no de jure officers claiming such offices, and such removal would cause a suspension of the functions of the corporation.

In the case of *The State ex rel. Eckhardt vs. Hoff*, 88 Tex., 297, it was held that where officers of an incorporated town were elected at a time not authorized by the act of incorporation, but where the elections were fair, and succeeding elections were held at the same wrong date, but no corrupt intention or disadvantage to the town or such administration of its officers were shown, and where no one could show a better title to the offices than those who held the same; that the district judge properly exercised discretion in denying leave to file the information, for the reason that its prosecution would be a public injury, while no private right was sought to be vindicated.

We, therefore, conclude that the trustees heretofore elected by the Sulphur Springs Independent School District, although elected at a time unauthorized by law, and all trustees appointed under the provisions of the act creating said district to fill vacancies, which may have occurred on said board, are de facto officers and their acts have been valid and are binding on the public and third persons. Therefore, the present board of school trustees of Sulphur Springs Independent School District are at this time, to all intents and purposes, a valid board.

The above was true at the date when the last election should have been held in said district for the purpose of electing school trustees. We think those trustees whose terms of office would not expire until 1922, if their election had been legal, are entitled to continue in office and perform the duties thereof until their successors are elected and qualified at an election to be held in said district on the first Saturday in April, 1922.

The status of those officers whose terms expired this year is different to those whose terms have not expired. Article 2889, as amended, provides that trustees of independent school districts shall be elected for a period of two years. The term of two years has expired as to the members of this board who were elected at the May election in 1919. There has been no one elected or appointed to succeed them. They are now evidently continuing to act as members of the board, and as such they are de facto officers because no one has been legally elected or appointed to succeed them. A de facto officer has the right to exercise the duties and functions of his office without interference and to have possession of the office and all the property belonging or appertaining thereto, until he is ousted in a proper proceeding brought for that purpose. This applies to all these trustees whether their terms of office have expired or not, and for the entire period dating from the

first illegal election up to and including the present incumbents, whether their time has expired or not.

We have heretofore stated that those trustees whose terms of office do not expire until 1922 should continue in office, but this does not apply necessarily to those trustees whose terms of office expired in 1921. The first sentence in Section 5 of the act creating the district reads:

"Vacancies on the board shall be filled by a vote of the majority of the members continuing in office."

Under this provision of the act, a majority of those members whose terms of office do not expire until 1922 may proceed to elect the same number of trustees as those whose terms expired this year, and under our construction of the law they should do so. In reaching this conclusion we are not unmindful of the provisions of Section 17, Article 16 of our State Constitution, which provides that: "All officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified." This provision of our State Constitution was commented upon in the case of *Tom vs. Klepper*, 172 S. W., 721. In that case Tom alleged in his petition that at the general election held in Martin County, Texas, on the fifth day of November, 1912, he was duly elected county commissioner for commissioners precinct No. 2 in said county, and duly qualified as such officer on the 23rd day of November, 1912, by giving bond and taking the oath of office as required by law, and at once entered upon the discharge of the duties of that office. He alleged that under Section 18, Article 5, he was, and still is, the legal incumbent of said office, for the reason that, while the general biennial election was held in Martin County on November 3, 1914, there was a failure to hold any such election in and for said commissioners precinct No. 2, and that because of said failure there was no election of his successor to such office as required by law, and that he is entitled to serve and act as such commissioner for that precinct until such time as his successor is elected and qualified, and that he is the de jure commissioner until such time.

He further alleged that on November 12, 1914, the county judge of Martin County, holding that there was a vacancy in the office of county commissioner for said precinct on account of the failure to elect a county commissioner at the general election on November 3, 1914, undertook to, and did, appoint P. L. Klepper to serve as such commissioner until the next general election; that, under said appointment, Klepper undertook to qualify by giving bond and taking the oath of office as required by law, and thereby usurp the vacancies of said office and undertaking to prevent him from discharging the duties thereof. In passing upon this question, the Court of Civil Appeals at El Paso, after discussing the provisions of Section 17 of Article 16 of the Constitution quoted above, used this language:

"Our opinion is that there was a vacancy in the office of county commissioner for that precinct, within the meaning of Article 2240, Revised Statutes, above quoted, at the expiration of appellant's full two years' service, by reason of the failure to elect a commissioner for that precinct at the general election in 1914. We think this view accords with the settled policy of our State Constitution restraining the duration of the terms of office, as provided in the articles of the Constitution and statute quoted. A holding beyond the two

years would be by sufferance rather than from any intrinsic title to the office. The question has frequently been the subject of jurisdictional investigation, and has given occasion to disagreement of opinion in other jurisdictions. A review of the various holdings and the reasons given would be of little value. We are of the opinion that, while the very question presented, without some qualifying effect, has not been before our courts for decision, the courts in this State in several cases have established principles that fix the rule of construction and interpretation of the principle involved."

It appears to us that by analogy the facts in this case are very similar to the facts in the above case and that the law applicable to the above case applies with equal force to this case. This being true, the question naturally arises, how long may the trustees appointed to fill the vacancies occasioned by the termination of the terms of office of those trustees who were elected in 1919, continue in office? We think the great weight of American authorities is to the effect that such appointees will hold over until their successors qualify after the election of 1923. (See American and English Encyclopedia of Law, Volume 13, pages 412, 413.)

Our conclusions may be summed up as follows:

First. Elections for the purpose of electing trustees in the Sulphur Springs Independent School District should be held on the first Saturday in April of each year and that the provisions of Section 5 of the act creating the Sulphur Springs Independent School District and Article 2889, Revised Civil Statutes of 1911, as amended, are in harmony to that effect.

Second. The trustees of the Sulphur Springs Independent School District, although elected at a time different from that provided by law, are de facto officers.

Third. Those trustees elected in 1920 are entitled to continue in office until their successors are elected and qualified at an election held on the first Saturday in April, 1922.

Fourth. Those trustees who were elected in 1919 and those trustees who were appointed, but whose terms of office expired by operation of law in 1921, are de facto trustees, and may continue to act as such until their successors have been appointed and qualified, and in the event a majority of those trustees, whose terms of office do not expire until 1922, fail, neglect or refuse to appoint their successors, may continue to serve as trustees.

It is the duty of those trustees, whose terms have not expired, to appoint trustees to fill the vacancies occasioned by the expiration of the term of office of those trustees elected in 1919.

We hope we have given you the information desired.

Yours very truly,

BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 2303, Bk. 55, P. 294.

SCHOOLS AND SCHOOL DISTRICTS—TAXATION.

(1) Where a school district votes taxes or bonds under House Bill 118, General Laws of the Thirty-seventh Legislature, and the order authorizing the

issuance of the bonds, or levy of the tax, is passed before the tax rolls are completed, then the tax should be levied for the current year, but if such bond order, or tax order, is passed after the final approval of the tax rolls, then the tax should be levied for the ensuing year.

(2) School districts have the same authority in the levy, assessment, and collection of taxes as heretofore conferred upon them by law, except the new statute—House Bill No. 118—gives such districts the right to levy taxes not to exceed one dollar on the one hundred dollars valuation of taxable property for maintenance of schools and a tax not to exceed fifty cents in payment of school building bonds, but the maintenance tax together with the bond tax cannot exceed one dollar.

AUSTIN, TEXAS, March 11, 1921.

*Miss Annie Webb Blanton, State Superintendent of Public Instruction,
Capitol.*

DEAR MISS BLANTON: You have referred to the Attorney General the following telegram and request an official opinion on the question therein submitted:

"It is contended special school tax under enabling act cannot be collected for this year. If possible, get opinion Attorney General and advise us. Need taxes for this next school year."

The enabling act above referred to is House Bill No. 118 of the General Laws of the Regular Session of the Thirty-seventh Legislature and authorizes common school districts and independent school districts to levy and collect an annual ad valorem tax not to exceed one dollar on the one hundred dollars valuation of taxable property of the district for the maintenance of schools therein and a tax not to exceed fifty cents in payment of school building bonds, but the amount of maintenance tax, together with the amount of bond tax, cannot exceed one dollar. This bill passed the House of Representatives by a vote of 118 yeas and no nays and passed the Senate by a vote of 25 yeas and no nays and was approved by the Governor on March 5, 1921, and became a law on that date. It was passed pursuant to amended Section 3 of Article 7 of the Constitution. Its purpose is to increase the taxing powers of school districts in this State. It provides in express terms that no tax can be levied unless first authorized by a majority vote of the qualified property tax paying voters of a school district.

The inquiry submitted by you comes from authorities at Plainview. It is presumed that the Plainview Independent School District has its own fiscal year and has made all necessary rules and regulations to secure the proper rendition of property and to enforce the collection of taxes due thereon. If, therefore, the Plainview Independent School District should now order an election for the purpose of voting a school maintenance tax of not exceeding one dollar and the proposition receives a favorable vote, such tax can be collected for the year 1921.

The Attorney General in an opinion dated October 4, 1913, to authorities at New Braunfels held that the board of trustees of an independent school district may fix the time for the levy and collection of taxes within such district. The question submitted from New Braunfels was as follows:

"In regard to the \$14,000 bonds of the New Braunfels Independent School District which will be dated October 1, 1913, and the record of which you approved September 16th, numerous influential parties have declared that they

would not pay this year the additional 5 cents on the \$100 valuation levied for this year. Now, in order to avoid any opposition when the collector of this district goes out to collect these taxes, the board of trustees of this district has requested me to write you for a written opinion to the effect that these taxes can be collected and must be paid for this year. The board wishes to publish this in the local papers."

The opinion refers to Article 2853, Revised Statutes of 1911, which confers upon the board of trustees of an independent school district all the rights, powers and duties relative to the establishment and maintenance of public schools, including the *powers and manner of taxation* for free school purposes conferred by statute upon the council of incorporated cities and towns; and the opinion further declares:

"By a reference to the provisions of the statutes with reference to the assessment and collection of taxes by cities and towns by which therefore the board of trustees of an independent school district must be governed in the assessment and collection of taxes, we find that by Article 938 it is provided that the city council shall have full power to provide for the prompt collection of all taxes assessed, levied and imposed and shall have authority to sell property, real and personal, for taxes, and shall make all such rules and regulations, and ordain and pass all ordinances as they may deem necessary to the levying, laying, imposing, assessing and collecting of any of the taxes in that chapter provided.

"Article 939 provides that the city council shall have power to regulate the manner and mode of making out tax lists or inventories and appraisements of property therein, and to prescribe how and when property shall be rendered, and fix the duties and define the powers of the assessor and collector, and adopt such measures as they may deem advisable to secure the assessment of all property within the limits of the city, and collect the taxes thereupon, and that the city council may by ordinance provide that any person having property subject to taxation and neglecting to render same for taxation, shall be liable to fine and imprisonment.

"Article 941 prescribes the duties of the city assessor and collector and further provides that he shall perform such other duties, and in such manner and according to such rules and regulations as the city council may prescribe.

"Although you do not state in your letter, we presume that the objection the taxpayers have to the payment of the extra five cents levied for additional school building bonds, is because it was levied subsequent to the usual and customary time for the levying of taxes.

"It will be noticed by a reference to the statutes above quoted from that the city council may, by ordinance, fix the time for the assessment and collection of taxes. The city council may fix its own fiscal year and may make all necessary rules and regulations to secure the rendition of property and to enforce the collection of taxes due thereon and this necessarily includes the authority to fix the time for the levying and collection of taxes.

"We therefore beg to advise you that, in our opinion, the board of trustees of your independent school district would have the authority to levy, assess and collect for the year 1913 the five-cent tax necessary to provide interest and sinking fund for the bonds voted by your district and to be dated October 1, 1913. The board of trustees would have the authority to order the assessor to make up the rolls of the district and extend thereon the levy of the five-cent tax and would have authority to prescribe the time within which the payment of such taxes should be made, and in case of delinquency, the board should present a list of such delinquents to the county attorney of the county and request that suit be instituted for the taxes due. The valuations of property in the district for the year 1913 have been equalized and there could be no legal objection to extending the tax upon the rolls of the district." (1912-14 Attorney General's Opinions, pages 123-124.)

If, therefore, a bond or tax election is now ordered for a school district—*independent or common*—and the proposition submitted

receives a favorable vote, the proper authorities of the district should provide for the levy of the new tax in the following manner:

(a) If an independent school district, *and if the tax rolls therefor are not completed*, then *such tax* should be levied for the current year, that is, for the year 1921, and the tax assessor should extend the tax on the rolls and such additional tax should be collected the same as other taxes levied for the year 1921 by the trustees of such district.

(b) If a common school district, then the commissioners court should levy the tax for the year 1921, which is the current year, because it is a matter of general knowledge that the county tax rolls for the current year have not been completed. So, such increased tax should be levied on the taxable property in a common school district for the current year of 1921, and the tax assessor should extend the tax on the rolls.

This Department has repeatedly held that where a school district votes bonds and the order authorizing the issuance of such bonds is passed *before the tax rolls are completed*, then the bond tax should be levied for the *current year*, but if such bond order is passed *after the final approval of the tax rolls*, then the tax should be levied for the *ensuing year*.

From all of the above, it is concluded that school districts have the same authority in the levy, assessment, and collection of taxes as heretofore conferred upon them by law, except the new statute—House Bill No. 118—gives such districts the right to levy taxes not to exceed one dollar on the one hundred dollars valuation of taxable property for maintenance of schools and a tax not to exceed fifty cents in payment of school building bonds, but the maintenance tax together with the bond tax cannot exceed one dollar.

Yours very truly,

W. P. DUMAS,
Assistant Attorney General.

OPINIONS ON TAXATION

Op. No. 2425, Bk. 57, P. 366.

COLLECTION OF DELINQUENT TAXES BY TAX COLLECTOR OF INDEPENDENT SCHOOL DISTRICT—LIABILITY OF PERSONAL PROPERTY FOR SUCH TAXES—LEGAL LEVY—PERSONAL PROPERTY NOT REDEEMABLE AFTER BEING SOLD FOR TAXES.

1. Failure of member of board of equalization to take oath does not invalidate the action of the board.
2. Tax collector of independent school district should not levy upon personal property that has been disposed of since same was assessed for taxes if such delinquent taxpayer had other property subject to the payment of such taxes. However, such disposal does not defeat the tax lien which was attached at the time such property was assessed.
3. Any property belonging to a delinquent taxpayer is subject to the enforcement of the constitutional lien for taxes regardless of when acquired except the homestead is only liable for the taxes due on such homestead.
4. A party who formerly had personal property assessed for taxation in an independent school district but thereafter removed such property from such independent school district is still liable for such tax and the same can be collected as is authorized in Article 7628.
5. Personal property cannot be redeemed after the same has been sold for taxes.
6. The tax collector would have to take property in his possession thereby having power and control of such property to constitute a legal levy.
7. The tax collector of an independent school district is not required to have an order from the board of trustees authorizing him to collect delinquent taxes due such school district.

AUSTIN, TEXAS, April 8, 1922.

Hon. A. S. McKee, County Attorney, Jasper, Texas.

DEAR SIR: Your letter of January 31 addressed to the Attorney General has just recently been referred to me for attention. In your letter of above date you submit the following inquiries:

- "1. Will the fact that one member of the board of equalization fails to take oath invalidate action of the board?
- "2. Can collector of independent school district levy upon personal property that has been transferred since taxes were assessed, if original owner has other property?
- "3. If 'A' sells personal property after same has been assessed for taxes, and later trades same to 'B' for other personal property, can collector levy upon 'A's' new acquired property and sell same for his taxes?
- "4. 'A' while living within school district renders personal property for school taxes, afterwards moves out of school district, or out of county and carries property with him. How may collector proceed to get taxes?
- "5. Has property owner the right to redeem personal property after same has been sold for taxes?
- "6. If collector levies upon personal property, is it necessary for him to take same in his possession, or may same be left in hands of owner until sales day?
- "7. Is an order of school board necessary for tax collector to make levies upon personal property?"

The questions above propounded will be discussed in their order of submission.

A board of trustees for independent school districts is provided for in Article 2853, Complete Texas Statutes, 1920, such board to be vested with the full management and control of the free schools of such independent school district, including power and manner of taxation for free schools that are conferred by the laws of this State upon the council or board of aldermen of incorporated cities or towns. That we might better understand just what powers are vested in the board of trustees it is necessary to determine what authority and powers are vested in the council or board of aldermen of incorporated cities and towns.

The provisions made in Article 945, Complete Texas Statutes, 1920, authorizes the board of aldermen or the city council of the various cities and towns of this State incorporated under the general laws, annually at their first meeting, or as soon thereafter as practicable, to appoint three commissioners, each being a qualified voter and a resident and property owner of such city or town for which he is appointed, such board to be styled "The Board of Equalization."

Article 751 provides for the meetings of the board of equalization to hear all persons with reference to the value of their property as indicated by the assessment rolls of such independent school district. This equalization board has power to raise or lower the assessed valuation of the taxpayers' property.

Article 953 makes the acts of said board provided for in Article 951 final and shall not be subject to revision by said board or by any other tribunal thereafter.

Article 955 requires the members of said board, before entering upon their duties, to be sworn by any officer authorized by law to administer oaths, to faithfully and impartially discharge all such duties incumbent upon them by law. "Cyc.," Volume 37, page 1086, lays down this ruling:

"If the officer, or a majority of those acting as a board of equalization, do not possess the statutory qualifications or have no legal title to their office, the actions of the officer or board will be void; but it is otherwise where this objection applies only to one member or to a minority, in which case no objection can be raised to the action of the board in any collateral proceeding. Although the members of the board are required to be sworn, their official actions are not invalidated by the fact that the records fail to show that they took the oath of office."

The above rule is supported by the following authorities:

- Texas Pacific Ry. Co. vs. Harrison County, 54 Texas, 119.
- State National Bank vs. Memphis, 94 S. W., 606.
- Bratton vs. Johnson, 45 N. W., 412.
- State vs. Buchanan County Board of Equalization, 18 S. W., 782.
- Mena Real Estate Co. vs. Cooner, 58 Atlantic, 918.

You are therefore advised that we are of the opinion that the failure of one member of the board of equalization to take the oath would not invalidate the action of such board.

Second. In view of Articles 957, 958, 961, 7626 to 7628, and Article 2853 conferring power of taxation on trustees of independent school districts, and such independent school districts acquired a lien on personal property within the district, and the fact that such owner and delinquent taxpayer had disposed of such property since the same was assessed, at which time the lien attached, would not prevent the tax

collector of such independent school district from levying upon and selling same to satisfy the taxes due by such delinquent taxpayer, as a subsequent purchaser or owner acquired such property subject to the lien in favor of the independent school district. However, if the delinquent taxpayer owned other property other than his homestead, it would be a better practice to levy and sell such other property. The provisions made in Article 3738 may not be deemed applicable to the collection of delinquent taxes. However, such articles do provide that "property which the judgment debtor has sold, mortgaged or conveyed in trust shall not be seized in execution, if the purchaser, mortgagee or trustee shall point out other property of the debtor in the county sufficient to satisfy the execution." Notwithstanding the fact that the Supreme Court in the case of Mission Independent School District vs. Armstrong, 222 S. W., 201, held that where a purchaser under deed of trust took the property subject to the right of the district to its collector to enforce collection by levying on and advertising the property for sale to satisfy the lien.

We are of the opinion that in keeping with the common rules of right and justice, as well as the rule of law and equity, that the tax collector of such independent school district should levy on other property, if such delinquent taxpayer owned same, and provision is made in Articles 7627 and 7630 making all real and personal property held or owned by any person in this State liable for State and county taxes except those specifically exempted in Article 7627, and Article 7693 makes the provisions of Articles 7627 and 7630 available to incorporated cities, towns and school districts for the enforcement and collection of delinquent taxes due such city or independent school district.

You are therefore advised that we are of the opinion that the tax collector for an independent school district should levy upon and sell all other property held or owned by such delinquent taxpayer before proceeding to levy upon and sell the personal property theretofore disposed of by such taxpayer.

Mission Independent School District vs. Armstrong, 222 S. W., 201.

Crawford vs. Roch., 125 N. W., 339.

Carswell & Co. vs. Habberzettle, 37 Texas Civ. App., 494, 87 S. W., 911.
37 Cyc., 1142.

Third. We do not understand just how "A" could sell personal property, thereby parting title with and possession of said property, and thereafter trading the same property to "B" for other property unless "A" again acquired title to such property. However, in this discussion that is immaterial, but since Article 7630 makes all property, real and personal, held or owned by any person in this State liable for all taxes due by the owner thereof, except the homestead, which is only liable for the taxes due on such homestead, and Article 7630 further authorizes the collector of taxes to levy on all personal or real property to be found in his county to satisfy all delinquent taxes, any law to the contrary notwithstanding.

The above liability for the payment of taxes created by the provisions of Article 7630 deals with State and county taxes, but Article 7693 makes the provisions of Article 7630 available to incorporated cities and towns, also to independent school districts, for the enforcement and

collection of delinquent taxes due such city, town or independent school district.

You are therefore advised that it is our opinion that any property subject to the payment of such delinquent taxes, regardless of when acquired, would be subject to levy and sale by the tax collector of such independent school district in satisfaction of the delinquent taxes due such district.

Fourth. As heretofore indicated, an incorporated city or town or independent school district enjoys the same legal rights and authorities to enforce the collection of delinquent taxes as are conferred by our statutes upon the county and State. Then, if this be true, it necessarily follows that under the provisions of Article 7628 the collector of taxes for an independent school district would be authorized to make out from the assessment list a true and complete list or schedule of the taxes due by such person, the same to be certified under the official seal and signature of such collector, and then forward the same to the collector of taxes of any county or counties where he has reason to believe that such delinquent taxpayer has property of any description, and it would be the duty of such tax collector on receipt of such list or schedule to at once proceed to the collection of such taxes by seizure and sale of such property liable therefor in the same manner as if said tax were originally assessed and due in his county, and to thereafter report to the collector from whom said list was received the taxes so collected by him.

Fifth. You are advised that we know of no statutory provision authorizing the redemption of personal property after same has been sold for payment of delinquent taxes.

Sixth. It is rather difficult to determine from this question as to what it would take to constitute a levy, as we are not advised as to whether the levy is to be made on real or personal property. If such levy was to be made on real property it would not be necessary for the officer to go upon the ground, but would be sufficient for him to endorse such levy on the writ in a way sufficient to identify the real estate levied upon. (Art. 3729.)

The word "levy" when employed in relation to a public tax has reference rather to the collection than to the assessment of such tax. One of the legal definitions of the word "levy" given by Webster is: "The taking or seizure of property; the execution to satisfy judgment or on warrant for the collection of taxes." Words and Phrases, Volume 5, page 4103.

The legal definition of the word "levy" is to have the property within the power and control of the officer.

Cary vs. German American Insurance Co., 54 N. W., 18; 20 L. R. A., 267; 36 Am. St. Rep., 907. (Quote, Boviers Law Dictionary); Words and Phrases, Vol. 5, page 4103.

The term "levy" in its legal significance means taking possession of. Burchell vs. Green, 27 N. Y. Sup., 82. To constitute a levy on personal property the officer must assume dominion over it. He must not only have a view of the property but he must assert his title to it so as to render himself chargeable as a trespasser. Craft vs. Memphis, 96 Atl., 447.

Our statutes by Article 3740 provide that "a levy upon personal

property is made by taking possession thereof, when the defendant in execution is entitled to the possession; where the defendant in execution has an interest in personal property, but is not entitled to the possession thereof, a levy is made thereon by giving notice thereof to the person who is entitled to the possession, or one of them when there are several."

See Sayles' Practice, pp. 755-7, 1204.
 Summer vs. Crawford, 41 S. W., 994.
 Sutton vs. Gregory, 45 S. W., 932.
 Kressler vs. Half, 51 S. W., 48.
 Davis vs. Jones, 75 S. W., 63.
 Hubert vs. Hubert, 102 S. W., 948.
 Jones & Nixon vs. First State Bank of Hamlin, 140 S. W., 116.
 Needham vs. Conny, 173 S. W., 797.
 Kimbrough vs. Bevering, 182 S. W., 403.
 Burch vs. Mounts, 185 S. W., 889.

Article 3741 to Article 3744, inclusive, further define the manner in which levies are authorized to be made. However, if such property levied upon belonged exclusively to the person against whom the enforced collection of the delinquent taxes is attempted to be made, we are of the opinion that it would be necessary to take such personal property into actual possession of the party making such levy before it would legally constitute a levy and we are of the further opinion that this would also be true of community property and you are so advised.

Seventh. We are of the opinion that it would not be necessary for the school board to pass an order authorizing the tax collector to levy upon property in the enforcement of the collection of delinquent taxes as this is not required by the board of aldermen or council of incorporated cities and towns in this State and we have heretofore seen that independent school districts under the provisions of Article 2853 vests in the trustees of an independent school district all the rights, powers and authority as are conferred by the laws of this State upon the council or board of aldermen of incorporated cities or towns and you are therefore advised that it would not be necessary for the board of trustees to pass an order instructing or authorizing the tax collector to make levy upon property in independent school districts for the purpose of collecting delinquent taxes due such independent school district.

Yours very truly,
 C. L. STONE,
 Assistant Attorney General.

Op. No. 2377, Bk. 56, P. 513.

TAXATION.

So called "oil royalties" are an interest in land and are taxable as real property.

AUSTIN, TEXAS, September 6, 1921.

Honorable Lon A. Smith, Comptroller of Public Accounts, Capitol.

DEAR SIR: On September 3rd you wrote the Attorney General as follows:

"I desire an opinion from your Department on the following questions:
 "First: Are oil royalties subject to taxation?"

"Second: If subject to taxation, should they be assessed as part of the realty or should they be considered as personal property?"

"Third: If considered as personal property, should they be assessed to the owner in the county of his residence or should they be assessed in the county in which the land is situated from which such royalty are produced?"

"I would greatly appreciate an early reply to these questions."

Your letter does not state just what is meant by the use of the term "oil royalties." However, the writer has discussed the question with Mr. Stevens of your Department and what he wants to know is this: Suppose that the owner leases his land to an oil company and a part of the consideration is that the lessee will pay to the owner one-eighth of the oil produced. Later the owner of the land sells to a third party an interest in this one-eighth royalty. Query: Is this royalty interest purchased by the third party taxable; if so, should it be taxed as real or personal property?

This Department has heretofore held that a lease that conveys an interest in land is taxable and as real property. See opinions Nos. 2183 and 2185, both addressed to your predecessor in office.

In the present case the owner of the land is to receive one-eighth of the oil that may be in his land as consideration for the execution of the lease. Afterwards, the land owner conveys all or a part of the one-eighth interest in any oil that may be in the land, the oil not yet being separated from the soil. The person who purchases all or a part of the land owner's interest of any oil that may be in the land has, as pointed out in our opinion No. 2183, an interest in the land for the reason that oil in place is susceptible of separate ownership from the ownership of the surface and is taxable against its owners. If a land owner executes a lease and as a part of the consideration is to receive one-eighth of the oil produced and the lease is an actual conveyance of seven-eighths of the oil from the land owner to the lessee, and afterwards the land owner sells and conveys his one-eighth interest to a third party, then and in that case you are advised:

(a) The land owner must pay taxes on the value of the surface of the land.

(b) The lessee must pay taxes on the value of a seven-eighths interest in any oil that may be in the land.

(c) The third party must pay taxes on the value of a one-eighth interest in any oil that may be in the land.

If the land owner disposes of his one-eighth interest to several people, then each person is liable for taxes according to the value of the interest that he or she may own in the one-eighth royalty interest originally retained by the land owner.

In this connection, we suggest for your own information a careful reading of the two opinions above referred to.

I am, with respect,

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2381, Bk. 56, P. 250.

INHERITANCE TAX STATUTES.

Inheritance tax statutes are construed strictly in favor of the taxpayer.

The penalties provided for failure to pay inheritance tax when due begin to accrue after the expiration of one year after the executor, administrator, or trustee of the estate, or other person entitled to the possession of the same, has come into possession of any part of the estate and does not, like interest, begin to accrue from death of the decedent.

The commissions allowed county attorneys under Articles 7490 and 7491, R. C. S., 1911, as amended by Chapter 164, General Laws, passed at the Regular Session of the Thirty-sixth Legislature, and the commission allowed county judges under Article 7491, *supra*, should be calculated on the taxes collected, exclusive of interest and penalties.

Revised Statutes, Articles 7487, 7490 and 7491, as amended by Chapter 164, General Laws, passed at the Regular Session of the Thirty-sixth Legislature. Chapter 166, General Laws, passed at the Regular Session of the Thirty-fifth Legislature.

Inheritance Taxation by Gleason & Otis.

People vs. Griffith, 92 N. E., 313.

Eidman vs. Martinez, 184 U. S., 575.

AUSTIN, TEXAS, September 16, 1921.

Hon. Chester M. Bryan, County Judge, Harris County, Houston, Texas.

DEAR SIR: Your letter of recent date, addressed to the Attorney General, has been received. It reads:

"A decedent whose estate is now presented to me for calculation of inheritance tax due the State of Texas, died October 17, 1911. He left an independent will which was probated in this court at the November term, 1911, letters testamentary issuing November 9th to the independent executrix. The executrix is also the devisee of one-half of decedent's estate. Other persons receiving property were not subject to tax; her portion, however, being over the two thousand dollar exemption allowed her as sister of decedent is subject to tax. She filed due inventory and appraisal of the estate within sixty days, as provided by law. Although all the debts known to the executrix were paid within a few months after the will was probated, she had to, of course, keep the estate open for the presentation of claims for one year after issue of letters. Therefore, it seems that the expiration of such year would be the day of which she came into possession of the property.

"The criminal district attorney of this county instituted suit against the executrix and devisee, aforesaid, September 12, 1917. No appraisal of the state has been asked for or made by the county judge as provided by law, and the district attorney proceeded on his own relation on behalf of the State of Texas to collect the flat amount of two per cent on the appraised value of one-half of the estate above the two thousand dollar exemption. The collector of taxes did not institute the suit, nor was it brought in his name or at his direction. No further action on the case has been taken, however.

"Under the terms of Chapter 10, Title 126, R. S., as it existed at the date of the decedent's death, no report was required of the executrix, except to file the inventory, which she did. She was charged, however, with the collection of the tax from those subject to it. In this case she being the only party subject thereto.

"Under the law as it existed until the amendments of 1919 there was no specific time set for the due date of the tax, except that the collector was to sue after six months after the county judge had notified him of the amount thereof; and, further, that the tax if not paid within six months from the date of death was to bear interest from the death.

"Chapter 164, page 318, Regular Session, Acts of the Thirty-sixth Legislature, amending Articles 7490 and 7491, places upon executors and administrators, etc.,

the duty of making report within three months after coming into possession of property, in duplicate to the Comptroller and the county clerk. And within one year after coming into possession of any portion of the estate such person or persons entitled thereto, if no previous report has been made, must file a complete inventory with the Comptroller and county clerk and pay taxes owing on said estate; in case the tax was not paid within the time therein prescribed two per cent per month penalty for the first ten months and two per cent per month thereafter until tax is paid should be added to the tax.

"The district attorney has not reported to me any investigation or report of this estate as being subject to this tax. The executrix comes now and asks the appraisal and calculation to be made so she may pay the taxes due.

"The liability for interest at the rate of six per cent per annum provided all along in the law does not seem to be in question. The question of the effect of the provision for penalty under the 1919 law presents a complexity. There are also other questions with respect to the administration of this law on which I wish to have your opinion.

"I shall greatly appreciate your answer, as early as your duties will permit, to the following questions:

"1. Where the decedent had died long prior to June 19, 1919, the effective date of the 1919 amendment, and executrix and devisee in this case not therefore required to make such report as provided in this amendment and not being in default, except that the tax could have been theretofore levied and collected, did she immediately become liable to make the report upon the amendment becoming effective, or would she be allowed three months from its effective date to file report with the Comptroller and county clerk?

"2. Under the circumstances of this case, could the two per cent per month penalty have any retroactive effect to begin at the time several years ago when the executrix and devisee came into possession of the property, or would the penalty begin one year from the effective date of the law, since such time limit for inventory and paying tax was not theretofore been provided? (If neither, please answer from what date this penalty may be reckoned?)

"3. Is it the intention of this law to have the two per cent penalty date from and relate back to the death or the date of coming into possession of the property where default is made in filing the inventory and paying the tax within the one year provided in the law, or does the penalty begin to run from the expiration of the one year period?

"4. The following does not apply to the instant case, but where a trust estate is created for a period of years, at the end of which time it is distributed to the devisees, will the date of such distribution be considered the date of coming into possession of the property within the meaning of this amendment provided for the inventory and paying of taxes within a year from such event?

"5. Where, as in the instant case, the district attorney filed suit in 1917, when the inheritance tax law did not expressly provide for his instituting such suit, should such suit be dismissed now at the cost of the State?

"6. Could the filing of such suit be considered as a report of the estate to the county judge by the county attorney, as was formerly provided by law, entitling him to a fee to be paid out of such tax, in view of the 1917 amendment providing for the Comptroller to contract with some person to collect these taxes?

"7. Will the ten per cent fee provided for the attorney under the 1919 amendment be figured on the amount of tax, plus penalty and interest, or on the amount of taxes only?

"8. Will the commission of eight per cent for the county attorney for investigation and report of the estate, as well as the fee of two per cent to be taxed for the county judge under the amendment of Art. 7491 be figured upon taxes, plus interest and penalty, or on the amount of taxes only?

"Thanking you in advance for the courtesy of an early reply, I am."

I will attempt to answer your questions in the order in which they have been propounded. We think questions 1 and 2 were answered in an opinion rendered by this Department to Hon. J. C. Bracewell, Assistant Criminal District Attorney, Houston, Texas, under date of

May 6, 1920, and written by the Attorney General. I quote you the pertinent part of that opinion:

"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 penalties 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."

From what has been said in the quotation above we are of the opinion that the penalty does not begin to run until the expiration of the one year period allowed for the payment of the tax provided for in Article 7490, as amended. In the instant case it would begin to run September 18, 1920. This answers your third question.

In order to answer your fourth inquiry it will be necessary to examine the several provisions of the statute, as well as the general principles upon which the law is based. Article 7490, as amended, reads in part as follows:

"Every executor, administrator, or trustee of the estate of a decedent, leaving property subject to taxation under this chapter, or other person coming into possession of any portion of such estate, whether such property passes by will or by the laws of descent and distribution, or otherwise, shall within three months after coming into possession of any of such property, make a report in duplicate, one of which shall be filed with the Comptroller and one with the county clerk of the county court of the county wherein such decedent resided at the time of his death, or wherein the principal part of such estate is located, giving the date of death of such decedent, the approximate value of his estate, if known, and the persons entitled to receive such estate; and within one year after coming into possession of any portion of such estate such person or persons shall, * * * pay the taxes owing on said estate as provided in this chapter. * * *"

There are two fundamental principles which are peculiar to the subject of inheritance taxation. These fundamental principles must be constantly kept in mind in dealing with this law. These principles are, as stated by Gleason & Otis in their well known work on inheritance taxation:

"(a) That the tax is not a property tax; but an excise or impost upon the right to transmit property at death; or upon the right to succeed to it from the dead.

"(b) That the tax accrues because of and at the death of the owner; that the rights and liabilities of the State and the beneficiaries date from that event;

and that the value of the property transmitted or received, which measures the value of the inheritance, is taken at that date."

The first paragraph of the act creating the Inheritance Tax Law in Texas (Art. 7487), in part, reads:

"All property within the jurisdiction of this State * * * which shall pass absolutely or in trust by will or by the laws of descent of this State, or any other State, or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or donor, which upon passing to or for the use of any person, except, * * * be subject to a tax for the benefit of the State as follows."

This provision must be construed in connection with the provisions of Article 7490. It is clear from the provisions of that article that the tax must be paid by the executor, administrator, or trustee of the estate of a decedent, leaving property subject to taxation under this chapter, or other person coming into possession of any portion of such estate, *within one year after coming into possession of any portion of such estate*. This provision does not mean that the State must wait for its taxes until the administration has been closed or the cestui que trust has come into possession of the property. The tax is due at the time of the death of the owner of the property, but one year is allowed from the time possession is obtained of any part of the estate to make a final report and pay the tax without penalty. This proposition is sustained by that portion of Article 7493 which provides:

"Said tax shall be a lien upon such property from the death of the decedent until paid, and shall bear interest from such death until paid, unless payment shall be made within six months after such death, in which case no interest shall be charged."

The expression, "or other person coming into possession of any portion of such estate," contained in Article 7490, as amended, has reference to those who take the property of the decedent "by the laws of descent of this or any other state, or by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor or donor." In those instances there is no administration on the estate of the decedent but the title to the property immediately passes to the heir, grantee, purchaser or donee at the death of the decedent.

It is the opinion of this Department, and you are so advised, that the tax due the State, under facts as stated in this inquiry should be paid by the trustee within one year after he (the trustee of the estate) has come into possession of any portion of the property belonging to the estate.

We think your fifth question should be answered in the affirmative, but your sixth question is answered in the negative because Article 7491 of the original act has been superseded by the amendment of 1917 before suit was filed by the criminal district attorney in September, 1917. The amendment of 1917 did not carry forward the provisions contained in original Article 7491 relating to the county attorney's compensation and his duties pertaining to estates subject to the tax. Therefore, at the time this suit was filed there was no authority for the same.

Your seventh and eighth questions will be considered together.

That portion of Article 7490, as amended, which deals with the compensation allowed county and district attorneys for services rendered in bringing suit for the collection of delinquent inheritance taxes, reads as follows:

"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 \$200, which fee shall be added, and collected from said estate, in addition to the taxes and penalties herein provided for. * * *"

By this provision it is made the duty of the county and district attorneys of the State to institute suit for the collection of delinquent inheritance *taxes and penalties*, but the compensation of such officers is fixed at a percentage of the amount of *taxes* collected. This fee is then added to the amount of taxes and penalties the estate is required to pay. It is in the nature of an additional penalty. Inheritance tax statutes should be strictly construed in favor of the taxpayer. *People vs. Griffith*, 92 N. E., 313; *Eidman vs. Martinez*, 184 U. S., 578; 22 S. Ct. Rep., 515. If the Legislature had intended for this fee to be based upon the amount of taxes, interest and penalties, it would evidently have used language to that effect. It has not done so. We therefore conclude that it did not so intend and that the fee must be calculated on the amount of taxes due, exclusive of interest and penalties.

The pertinent portion of Article 7491, as amended, reads:

"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, 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 \$15, which fee shall be cumulative of all other fees and compensation provided by law."

Here again the statute fixes the basis of compensation on the amount of *taxes* payable. We think the basis fixed excludes the idea that any other was intended, and construing the two provisions together, we conclude that the compensation of the county attorney and county judge provided for under this article is also based on the amount of taxes payable, exclusive of interest and penalties.

Very truly yours,

BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 2662, Bk. 54, P. 530.

EMIGRANT AGENT—LICENSE FEE—REPEALED LAW.

1. H. B. No. 37, passed October 1, 1920, by the Fourth Called Session of the Thirty-sixth Legislature, approved October 19, 1920, repeals Chapter 36 of the General Laws, passed by the Third Called Session of the Thirty-fifth Legislature,

with respect to the issuance of licenses to emigration agents, the fee to be paid therefor and the bond of such agents.

2. Said H. B. No. 37 becomes effective December 31, 1920, and those desiring to engage in business as emigration agents can not lawfully do so from and after that time without taking out the license and paying the license fee, and executing the bond required by that act, and this notwithstanding the fact that such agent may have paid the fee and taken out the license and given the bond required by Chapter 36 of the General Laws passed by the Third Called Session of the Thirty-fifth Legislature.

3. The Commissioner of the Bureau of Labor Statistics, in issuing licenses to emigrant agents under said H. B. No. 37, will not be authorized to credit the applicant with any portion of the license fee that may have been paid by such applicant under said Chapter 36 of the General Laws passed by the Third Called Session of the Thirty-fifth Legislature, nor to deduct any portion of same from the license fee required to be paid by such agent under said H. B. No. 37.

AUSTIN, TEXAS, November 30, 1920.

Hon. T. C. Jennings, Commissioner of Labor Statistics, Austin, Texas.

DEAR SIR: The Attorney General is just in receipt of yours of the 4th instant, which as as follows:

"Under an act of the Fourth Called Session of the Thirty-sixth Legislature, H. B. No. 37, being 'An Act to regulate the business of emigrant agents; providing for licensing any person, firm or private employment agency desiring to be licensed as an emigrant agent, and prescribing the method of obtaining such license, and the requirements thereof, etc.,' which becomes effective on January 1, 1921, I would respectfully ask your Department for a ruling upon the following questions, towit:

"(1) Will the taking effect of the act void the unused portions of licenses now held by emigrant agencies, the date of expiration of which falls after January 1, 1921?

"(2) If so, will the Commissioner of the Bureau of Labor Statistics be authorized, in issuing licenses under the new act, to credit the applicant with the unused portion of his old license and deduct the same from the license fee provided under the new act?"

The act referred to by you was passed October 1, 1920, and becomes effective December 31, 1920. Prior to the passage of that act, the law on this subject was embodied in Chapter 36 (p. 108) of the General Laws passed by the Third Called Session of the Thirty-fifth Legislature (Arts. 5246-101 to 5246-107, and Art. 999½, P. C., Complete Texas Statutes, 1920.) This latter act does not in terms amend or repeal, in fact makes no reference whatever to the former. Two questions are presented:

1. To what extent, if at all, does this latter act repeal the former with respect to the provisions relating to the issuance of licenses, and the payment of license fees, and the bond required?

2. If the latter act repeals the former in these particulars, what is the effect of such repeal as to those to whom licenses have been issued under the former act and who have paid the license fee and executed the bond, as required by the former act?

The rule applicable to repeals in cases of this kind, with the authorities cited to sustain same, is thus stated in *Encyclopedic Digest of Texas Reports (Civil Cases)*, Vol. 15, p. 956:

"When a later act is a complete revision of the subject to which an earlier statute relates, and is manifestly intended as a substitute for the former legislation, the prior act must be considered as repealed. *Rogers vs. Watrous*, 8

Texas, 62; *Stirman vs. State*, 21 Texas, 734; *Bryan vs. Sundberg*, 5 Texas, 418, 423; *Ex parte Valasquez*, 26 Texas, 178, 179; *Fayette County vs. Faires*, 44 Texas, 514, 517; *Tunstall vs. Wormley*, 54 Texas, 476, 480; *State vs. Travis County*, 85 Texas, 435, 21 S. W., 119; *Dallas, etc., St. R. Co. vs. State*, 102 Texas, 570, 575, 120 S. W., 997; *Jessee vs. De Shong (Civ. App.)*, 105 S. W., 1011.

"A statute which as to a certain subject matter of a previous statute creates a new, entire and independent system respecting that subject matter, will repeal without express words to that effect, so much of the prior statute as is inconsistent therewith. *State vs. International & G. N. R. Co.*, 57 Texas, 534; *Bryan vs. Sundberg*, 5 Texas, 418, 424; *Rogers vs. Watrous*, 8 Texas, 62, 64; *Cain vs. State*, 20 Texas, 355, 370; *Tunstall vs. Wormley*, 54 Texas, 476, 480; *Hanrick vs. Hanrick*, 61 Texas, 596, 601; *State vs. Travis County*, 85 Texas, 435, 445, 24 S. W., 1029, reversing 21 S. W., 119; *Schley vs. Hale*, 1 App. Civ. Cases, Sec. 930; *Etter vs. Missouri Pac. R. Co.*, 2 App. Civ. Cases, Sec. 58; *Jessee vs. De Shong (Civ. App.)*, 105 S. W., 1011.

"The rule that, where there is a new enactment on a subject plainly showing that it was intended to and does comprehend the entire subject-matter and to be a substitute for prior statutes on that subject, it repeals such prior laws by implication, is subject to the limitation that particular provisions of a former act embodied in the new one can not be treated as new enactments, but must be construed from the standpoint of an intention to continue the former law, in the absence of a contrary intent to supersede it. *Jessee vs. De Shong (Civ. App.)*, 105 S. W., 1011."

Do the acts here under consideration come within this rule? We think so.

The caption of the later act reads as follows:

"An Act to regulate the business of emigrant agents; defining emigrant agents; providing for licensing any person, firm or private employment agency desiring to be licensed as an emigrant agent, and prescribing the method of obtaining such license, and the requirements thereof, and defining who may be licensed; prescribing certain duties relative to the act and its administration for the Commissioner of Labor Statistics and the Attorney General, and conferring certain authority relative to the administration of this act upon said commissioner; fixing the fees which may be charged by parties licensed hereunder, and fixing the license fees to be paid by those licensed hereunder; creating and defining offenses for violations of this act, and prescribing the punishment therefor; providing that municipal employment bureaus and employment agencies operated purely for charitable purposes shall be exempt from the provisions of this act; prescribing bonds to be filed by emigrant agents, and providing for suits thereon and for service of process in such suits; providing that all fees collected hereunder shall be paid directly into the State Treasury; declaring that all appropriations made for the Department of the Commissioner of Labor Statistics may be used in the enforcement and administration of this act, and declaring an emergency."

The caption of the former act is exactly the same, word for word, as the caption of the latter act, except that the words "prescribing bonds to be filed by emigrant agents, and providing for suits thereon and for service of process in such suits" are not in the caption of the former.

Without encumbering this reply with a detailed analysis and comparison of these two acts, we think it quite evident that the latter repeals at least so much of the former as is inconsistent with the latter.

Are these acts inconsistent with each other with respect to the issuance of a license, the fee to be paid therefor, and the bond required? Clearly they are. The former authorizes the issuance of a license on the payment of a fee of \$50 "for each county in which an office is to

be maintained by said agent," and the execution of a bond in the sum of \$500 "for each county." The latter act requires a license fee of \$100 "for each county in which said solicitation or employment shall be engaged in by said agent," and a bond of \$5000 "for each such county." One of the conditions of the bond under the latter act is that the agent "will not make any false representation or statement to any person solicited or employed." This was not required under the former act. The latter act provides "said bond shall recite that any person injured by any false or fraudulent statement of such emigrant agent or by any violation of the provisions hereof by such agent, shall be entitled to sue thereon, and that service of process on the Commissioner of Labor Statistics as agent for such emigrant agent shall be sufficient to bind the principal of said bond." This provision is not in the former act. The latter act provides that "any person aggrieved by any action or conduct *or any false representation or statement* of any such licensed party, may bring action for damages against such party on said bond *in the county in which same is filed.* The words here italicized are not in the former act.

From the foregoing it is plain that this latter act is inconsistent with the former in these particulars, and at least to that extent will operate as a repeal of the former; that is, that the latter act, on and from December 31, 1920, and not the former, will be the law of this State with respect to the issuance of licenses to emigrant agents, the fee to be paid therefor, and the bond to be executed by such agents.

What effect will this have upon those to whom licenses have been issued and who have paid the license fee and executed bonds as required by the former act?

The case of *Rowland vs. State*, 12 T. Crt. App., 418, while it relates to the license of a liquor dealer, is quite in point here. In that case it is said:

"Art. 4665, Revised Statutes, fixed the State occupation tax upon selling liquors in quantities of one quart and less than five gallons, at \$150. The defendants, in October, 1880, paid this tax, and took out a license to pursue such occupation for the period of one year from that date. On the 11th of March, 1881, the Legislature increased this occupation tax to \$200. (General Laws, Seventeenth Legislature, Chap. 31, p. 21.) After the enactment of this law, defendants continued to sell liquor under their license, refusing to pay the additional tax and take out a license under the new statute. They were prosecuted and convicted under Art. 110, Penal Code, for pursuing the occupation of selling liquor without first obtaining a license therefor.

"The questions presented are: 1. Did their license, obtained under the previous law, protect them from the operation of the new law, during the period of time covered by their license? In other words, having paid for and obtained a license to sell liquor for the period of twelve months, could the Legislature, by imposing an additional tax upon their occupation, destroy the vitality of their license? Could the Legislature revoke or repeal this license? 2. If it has such authority, did it in fact exercise it? While there exists some conflict of authorities upon the question as to the right or power of the Legislature, under a general law, to revoke a license to sell liquors, for which a fee has been received by the State, we think the weight of authority is in support of such right or power. *Breck Presbyterian Church vs. Mayor*, 5 Cow., 538; *Hirn vs. State*, 1 Ohio. N. S., 15; *Calder vs. Kirby*, 5 Gray, 597; *Bummer vs. Boston*, 102 Mass., 19; *State vs. Stirling*, 8 Mo., 697; *Vanderbilt vs. Adams*, 7 Cow., 349; *Board of Excise vs. Barry*, 34 N. Y., 657; *Phelan vs. Virginia*, 3 How., 162; *Freleigh vs.*

State, 8 Mo., 606; State vs. Sterling, 8 Mo., 697; Baltimore vs. Clunet, 23 Md., 449; Fell vs. State, 42 Md., 71; Com. vs. Brennan, 103 Mass., 70.

"In the case before us, did the Legislature exercise this right or power, and revoke the license under which defendants were selling liquor? We think so. The act increasing the tax expressly repeals the law under which the license was issued, and while Section 3 of this repealing act contains a saving clause in favor of a certain class of liquor dealers therein specified, this saving clause does not relate or apply to the liquor dealers having license to sell in quantities of one quart and not more than five gallons. We think, therefore, that the effect of the act of March 11, 1881, was to revoke the license of the defendants, and that such license was no longer a protection to them after that act took effect. We are of the opinion that the judgment of conviction is correct, and it is accordingly affirmed."

Another case directly in point is that of *Ex parte Vaccarezza*, 105 S. W., 1119, decided by our Court of Criminal Appeals. The question in that case was as to the effect of the "Baskin-McGregor" law upon liquor dealers who had complied with the former law and whose license, issued under the former law, had not expired when the "Baskin-McGregor" law went into effect. Relator had taken out license for a year as a liquor dealer under the then existing law. The "Baskin-McGregor" Act increased the license fee and went into effect before the expiration of the year for which relator had taken out license. Relator refused to take out license under the "Baskin-McGregor" Act, claimed the right to continue in business for the year under the license issued to him under the former law, operated upon this theory, and was prosecuted for pursuing the occupation of a retail liquor dealer after the "Baskin-McGregor" Act went into effect without having obtained a license therefor. A writ of habeas corpus was granted by the Court of Criminal Appeals, but upon a hearing relator was remanded. After holding that the "Baskin-McGregor" Act operated as repealing the prior law on that subject, and for the same reasons here advanced for holding that the act referred to by you operates as a repeal of the former law on that subject so far as the same relates to the matters covered by your inquiry, the court in that case says:

"Then the next question arises: Did the Legislature intend that the old licenses should continue in force until their expiration, and that then each one that desired to renew said license would then have to avail himself of the conditions, pains, and penalties and privileges of the Baskin-McGregor law? To this question we say no. This conclusion is arrived at after a very careful scrutiny and investigation into the provisions of the Baskin-McGregor law. It is provided by the terms thereof that the license upon a retail dealer in whiskey should be \$375 per year; for selling malt liquors \$62.50 per year. This is a marked increase in license over the old law; that is to say, the license under the old law for a retail sale is \$300, under the present law \$375. The the Legislature provides bond in the sum of \$5000, which bond may be forfeited for various things not made the basis for forfeiture under the bond as provided for under the old law.

* * * * *

"Is it not necessary to cite authorities on the proposition that a saloon license is a bare permit from the Legislature to sell whiskey which can be revoked at any time in the discretion of the Legislature, even without a provision in the repealing statute authorizing a refund of license. While this would not be perhaps common equity and justice on the part of the Legislature, still the right to do so has never been seriously questioned in this State. It also follows with equal force that they did not intend to place one man in Texas under a \$300 license with certain pains, penalties, and conditions attaching to his bond for the sale of whiskey, and another man in the same town forced to

pay \$375 for a license with many conditions to his bond more onerous than those applying to the first man. If they intended this, then we would have a unique and unparalleled precedent in Texas of one liquor man prosecuted and his bond forfeited for a certain act, and yet the man selling whiskey by his side in the next store could do, with absolute liberty and perfect license, the very thing and the very acts that had wrecked and ruined the man having the license under the Baskin-McGregor law."

These excerpts are from the opinion by Judge Brooks. Presiding Judge Davidson was absent. Inasmuch, however, as under the terms of the "Baskin-McGregor" Act licenses could not be procured in advance of the time when that act became effective, nor within less than about thirty days from the time it became effective, Judge Brooks said:

"Then we are forced, as stated above, to give validity and effect to the clear legislative intent, to some extent at variance with the words of the Baskin-McGregor law. What is that intent? It simply is this: The Legislature merely designed that those having license under the old law should have a reasonable time in which to comply with the provisions and conditions of the Baskin-McGregor law, during which time they would have a right to continue in the sale of whiskey according to conditions of the old law, and would merely be awarded a reasonable time in which to comply with the new law."

In this case Judge Henderson writes an interesting opinion reaching the same conclusion as that reached by Judge Brooks on the disposition of the case but dissenting from the foregoing statement by Judge Brooks to the effect that those having licenses under the old law were entitled to a reasonable time after the new law went into effect within which to comply with its provisions, during which time they were entitled to continue in business under their old licenses. On this point, giving his reasons, Judge Henderson says:

"This brings us to the last proposition in the case: When did the law—that is, the act known as the Baskin-McGregor bill, go into effect. Evidently, like all other laws passed by the Thirtieth Legislature, it went into effect ninety days after adjournment, which was on the 12th of July, 1907. And thereafter it became unlawful for anyone to pursue the occupation of a retail liquor dealer under any former law, because that stood repealed, and no man could be mulcted in damages thereafter for a violation of the provisions of the bill, or could be prosecuted criminally under some provision of the criminal statute relating to his former license, but from the 12th of July onwards was amenable only to the provisions of the new law. Of course, it would be as absurd to hold that the two laws regulating the retail liquor traffic, with diverse and antagonistic provisions, could operate together at the same time, and it would be that two bodies could occupy the same space at the same moment."

This question thus adverted to by these judges was not an issue in that case and their statements can have no weight other than as an expression of their personal views on the question.

From the case of *Brown vs. State*, 7 S. E., 915, it appears that Brown had paid the tax and was granted a license to sell certain intoxicating liquors at Stone Mountain in the State of Georgia for the year ending January 1, 1888. By an act becoming effective October 22, 1887, the Legislature of that State prohibited the sale of such liquors. This act did not in terms revoke licenses such as that held by Brown. Brown sold such liquors after this act went into effect, claiming the right to make such sales during the period of time covered by his license. He was indicted for making sales after the later act became effective, was convicted, and sought to have the judgment set aside. In affirming the

judgment of the trial court denying the motion to set aside the judgment of conviction, the Supreme Court of Georgia said:

"1. The law is now well settled that the Legislature has the power to revoke licenses granted to retail liquors. Such a license is in no sense a contract by the State, county, or city with the person taking out the license. It is simply a permit granted by the authorities to do business under the license; and the license may be revoked by the Legislature at any time. See *Cooley, Const. Lim.*, 343, 474; *Beer Co. vs. Massachusetts*, 97 U. S., 25, 32; *McKinney vs. Town of Salem*, 77 Ind., 213; *Fell vs. State*, 42 Md., 71; *Board vs. Barrie*, 34 N. Y., 657; *Calder vs. Kurby*, 5 Gray, 597.

"2. As to the second point, we think the rule is contrary to the one insisted on before us. Whenever the Legislature fails to except in the act persons who have already obtained license, it is manifest that their intention is to revoke the license. If the Legislature sees proper to except persons who have taken out license, as it did in the general local option law, then the selling under the license is legal until the license expires."

The case of *Newson vs. Galveston*, 76 T., 559, was one wherein Newson had paid to the City of Galveston a license tax and was granted a license to sell meat for one year at a designated place in that city. Before the expiration of the year, the city by ordinance prohibited the sale of meat at such place and required all such sales to be made at the market house. Newson sought by injunction to restrain the city from enforcing such ordinance, claiming the right to continue such business at such place for the year, by virtue of the payment of such tax and issuance to him of such license. In disposing of the question thus raised, the Supreme Court of this State says:

"The police power possessed by such corporations can not be fettered by contracts, but must be left free to be exercised at all times, whether in conferring or withdrawing privileges once conferred. If license tax had been paid for a year this would not deprive the city of the power to withdraw the privilege before its expiration if the public welfare demanded it. Much less would the fact that the city for a time had received the tax and granted the privilege make it incumbent on it to continue to do so.

"If appellant expended money in preparing his private market place for the conduct of his business, he did so with full knowledge that the city might at any time forbid the business to be there conducted."

And see *Moore vs. City of Indianapolis* (Sup. Ct. Ind.), 32 N. E., 424; *Baldacchi vs. Goodlet* (Civ. App. Tex.), 145 S. W., 325; *Hernandez vs. State* (Civ. App. Tex.), 135 S. W., 170; *Cooley's Constitutional Limitations*, 7th Ed., pp. 399-401; *Freund, Police Power*, pp. 602-606; *Kresser vs. Lyman*, 74 Fed. Rep., 765; *Stone vs. Miss.*, 101 U. S., 814.

Adopting part of the reasoning in *Ex parte Vaccarezza*, supra, to the acts here under consideration, we would say that the Legislature could not have intended to place one man in Texas under \$50 license and a bond of \$500, with certain pains, penalties and conditions attaching to his bond, as prerequisites to his engaging in business as an emigrant agent, and at the same time require another man, engaged in exactly the same business to pay a license fee of \$100 and to execute a bond in the sum of \$5,000 with many conditions in his bond more onerous than those in the bond of the first man. If they intended this, then we would have a unique and unparalleled precedent in Texas of one "emigrant agent" prosecuted and his bond forfeited for a certain act, and yet the "emigrant agent" by his side * * * could do, with absolute liberty and perfect license, the very thing and the very act that had wrecked and

ruined the man having the license under the later act. We cannot suppose such a condition was intended by the Legislature.

It is our opinion therefore, and you are so advised:

1. That the taking effect of the act referred to by you will void all licenses heretofore issued to emigrant agents under the provisions of Chapter 36 (p. 108) of the General Laws passed by the Third Called Session of the Thirty-sixth Legislature, and from and after that time no emigrant agent will be authorized to continue his business as such, until he has paid the fee and obtained the license and executed the bond as required by said H. B. No. 37, passed October 1, 1920, and approved October 19, 1920, being the act referred to by you.

2. That the Commissioner of the Bureau of Labor Statistics will not be authorized in issuing licenses under the new act to credit the applicant with any portion of the amount paid by him as a license fee under said Chapter 36 of the General Laws passed by the Third Called Session of the Thirty-sixth Legislature, nor to deduct any portion of same from the license fee required by said H. B. No. 37.

While this construction of these acts may appear inequitable as to those who may have paid the license fee and executed the bond under the former act, owing to the fact that the Legislature has made no provision for a refund or other adjustment with respect to such persons, it is nevertheless sustained by the authorities, and leaves the matter open for adjustment by the Legislature.

Yours very truly,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2319, Bk. 55, P. 326.

GROSS RECEIPTS TAX—NATURAL GAS COMPANIES.

A gas company subject to the payment of a gross receipts tax under the provisions of Chapter 14, General Laws, Third Called Session, Thirty-sixth Legislature, cannot, in calculating the amount of tax due the State, deduct from its gross receipts the amount it pays to some other company for gas purchased from said company.

Chapter 14, Acts Third Called Session, Thirty-sixth Legislature.

AUSTIN, TEXAS, March 28, 1921.

Hon. Clarence B. Gilmore, Railroad Commissioner, Capitol.

DEAR SIR: Your letter of the first instant addressed to the Attorney General has been received. It reads:

"The Dallas Gas Company, the County Gas Company and the Fort Worth Gas Company, three distributing companies selling natural gas to consumers at Dallas, Fort Worth and other points in Dallas County, have rendered reports to this Commission of gross income from all business done by them in this State as basis for assessment of gross receipts tax under Section 11, Chapter 14, General Laws of Texas, passed by the Third Called Session of the Thirty-sixth Legislature, and commonly known as the 'Cox Bill.'

"The reports of all of these companies exclude from their receipts as basis for compilation of taxes, the amount which they pay to the Lone Star Gas Company, a gas producing and transporting company, under contract which provides that the distributing companies named shall pay to the Lone Star Gas Company

for gas delivered at the city gates or at receiving stations for distribution and sale to consumers, two-thirds of the gross revenue from gas sold by the distributing companies. This two-thirds of the revenue is excluded from the returns of the distributing companies on the ground that they collect this amount for the Lone Star Gas Company and they, the distributing companies, are not taxable on the receipts from that source.

"It is our view that under Section 11 of this act the total amount of returns received by distributing companies from consumers constitute their gross receipts within the meaning of this act and we have so advised them.

"Will you kindly advise this Department whether or not, under this act the total collection for gas from consumers by distributing companies constitute their gross receipts, or that sum less the two-thirds contracted to be paid to the Lone Star Gas Company or other furnishing company?"

After the receipt of this letter we requested that you furnish us with a copy of the contract between the Lone Star Gas Company, the Dallas Gas Company, the County Gas Company and the Fort Worth Gas Company. We beg to acknowledge receipt of copies of contract between the Lone Star Gas Company and the Dallas and Fort Worth companies. You have also furnished us with copies of contracts made by the Lone Star Gas Company and various other distributing gas companies.

The Dallas Gas Company and all other gas companies who have contracts with the Lone Star Gas Company for the purchase of gas come clearly within the provisions of Section 1, Chapter 14, General Laws of the State of Texas passed at the Third Called Session of the Thirty-sixth Legislature, according to the copies of said contracts furnished us.

Section 11 of the above mentioned act reads:

"Except as in this section provided, every gas utility subject to the provisions of this act, on or before the first day of January, 1921, and quarterly thereafter, shall file with the Commission a statement, duly verified as true and correct by the president, treasurer or general manager, if a company or corporation or by the owner or one of them, of an individual or co-partnership, showing the gross receipts of such utility for the quarter next preceding or for such portion of said quarterly period as such utility may have been conducting any business, and at such time shall pay into the State Treasury at Austin, Texas, a sum equal to one-fourth of one per cent of the gross income received from all business done by it within this State during said quarter, to be designated as the 'Gas Utilities Fund.' The gross receipts tax charge herein required to be paid, when paid, shall be allowed as an operating expense."

The provisions of this act are to our mind clear, and that it was the intention of the Legislature to levy a gross receipts tax against those companies named in Section 1 of the act in a sum equal to one-fourth of one per cent of the gross receipt, income or revenue received from all business done by said companies within this State.

It appears from your letter that these companies are refusing to pay this tax because under their contracts with the Lone Star Gas Company they must pay it for the gas it furnishes them for the purpose of distribution a sum equal to two-thirds of the gross receipts they receive from the sale of the gas distributed by them. We think this position is wholly untenable.

We copy from the contract between the Lone Star Gas Company and the Dallas Gas Company:

"Whereas, the Dallas Gas Company desires to purchase and secure their supply of gas for use in the said city of Dallas and its suburbs from the Lone Star Gas Company; and

"Whereas, the Lone Star Gas Company is willing to sell and deliver to the

Dallas Gas Company all gas which they shall require for use in the said city of Dallas and its suburbs at the price and upon the terms and conditions hereinafter set forth.

"Subject to the terms and conditions hereof, and to the full extent of the legal capacity, ability and right of these parties to so contract, and to that extent only, said vendor hereby agrees to deliver to said vendee, and the latter hereby agrees to receive of the former, at said junction point, such quantity of natural gas as the distributing system of the latter in said city and its suburbs, may require, when and as the same may be required, for fifteen years from the 8th day of June, 1910, at and for a price equal to two-thirds of the gross receipts of said vendee from the sales of such gas to such consumers, which price said vendee agrees to pay as hereinafter stated."

The contract between the Lone Star Gas Company and the Consumers Light and Heating Company of Fort Worth is identical with that with the Dallas Gas Company in so far as it applies to the price to be paid for the gas used by it.

It is clear from the provision of the contract quoted above that the Dallas Gas Company does not pay to the Lone Star Gas Company a specific and stated amount for the gas it uses, but the price varies with the price charged by the Dallas Gas Company for the gas it distributes. If it increases its price to the consumer, then the price paid to the Lone Star Gas Company increases correspondingly and on the other hand if the price is reduced to the consumer, then the amount the Lone Star Gas Company receives is correspondingly reduced. The most that can be said of this contract is that it is an agreement whereby the Lone Star Gas Company is to receive for the gas it furnishes to the Dallas Gas Company an amount equal to two-thirds of the gross receipts of the latter company. It is a plain contract of sale upon the part of the Lone Star Gas Company and of purchase by the Dallas Gas Company.

In the contract of the Lone Star Gas Company with the Texas Power and Light Company, which furnishes gas to the city of Waco, the latter company pays to the former forty-five cents for each thousand cubic feet of gas sold and delivered by it, while the contract between the same company and the North Texas Gas Company, which is the distributing company to the cities of Cleburne, Hillsboro, Waxahachie, Ennis, Corsicana and other towns, the contract price is twenty-five cents for each thousand cubic feet of gas sold and delivered by the distributing company. Clearly the North Texas Gas Company as to these towns cannot, and evidently does not, claim that it is entitled to deduct one-fourth of its gross receipts when calculating its gross receipts tax due the State under the provisions of this law because it collects said amount for the Lone Star Company. It does not in truth and in fact collect said amount for the Lone Star Gas Company, but pays that company that amount for the gas it furnishes to it. The Dallas Gas Company, the Fort Worth Company and all other companies which have a similar contract with the Lone Star Gas Company for the payment of gas furnished to them by the latter, are in no better position with reference to the payment of their gross receipts tax than the North Texas Gas Company. The amount paid by these companies to the Lone Star Gas Company is for gas furnished to them and are due said company two-thirds of the gross amount said companies receive

in payment of the gas furnished them. They are clearly not the agent of the Lone Star Gas Company for the purpose of distributing this gas and collecting from the consumers for gas sold and delivered to them, but owe said company the above amount because of the amount of gas distributed, whether these companies as distributors ever collect for it or not.

A careful reading of the contract nowhere indicates that it is the purpose of the contracting parties that the distributing companies should be the mere agents of the Lone Star Gas Company for the purpose of distributing its gas and receive for such services a commission of $33\frac{1}{3}$ per cent for making such distribution and collection, but on the other hand it is evident that no such an arrangement or agency exists. It is a plain contract for the sale and purchase of gas.

The words "gross receipt" and "gross income" used in Section 11 of the act are synonymous and mean one and the same thing. *State vs. Illinois Central Railroad Company*, 92 N. E., 814. "Income" means that which comes in or is received from any business or investment of capital without reference to the outgoing expenditures. *In re Murphy*, 80 N. Y. Supp., 530.

It is the opinion of this Department, and you are so advised, that the Dallas Gas Company and the Consumers Light and Heating Company and all other companies having a like contract with the Lone Star Gas Company should be required to pay a gross tax on their gross receipts and that without any deduction for any purpose whatever.

Yours very truly,

BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 2266, Bk. 55, P. 17.

POLL TAX—METHOD OF ASSESSING—LIEN ON PROPERTY.

1. Every person, both men and women resident within this State on the first day of January of each year, between the ages of twenty-one and sixty years, and not exempt therefrom by law, are subject to assessment and payment of State poll tax.

2. Such tax, when properly assessed, becomes and constitutes a lien upon all property, excepting the homestead, owned by the person against whom the tax is levied.

3. An assessment of the community property of husband and wife against them jointly, and the assessment of a poll tax against each of them on the same inventory, and so carried on to the tax roll, if otherwise regular, would constitute a valid assessment as to both the property and the poll tax.

AUSTIN, TEXAS, January 6, 1921.

Honorable M. L. Wiginton, Comptroller, Austin, Texas.

DEAR SIR: The Attorney General is in receipt of yours of the 11th ultimo in which you propound to him the following inquiry:

"The point that I desire your opinion on especially is whether a married woman's poll tax would be a lien on her interest in the community property, and whether it would be legal to assess the husband and wife jointly for their community property and assess each of them with a poll tax on the same inventory."

Section 1 of Article 8 of our State Constitution provides, among other things, that "the Legislature may impose a poll tax." No limitation is here placed upon the Legislature in the imposition of this tax, either as to the amount of the tax or as to the persons upon whom the tax may be imposed.

Section 3 of Article 7 of our Constitution, prior to its amendment at the general election held November 2, 1920, provides, among other things, that "A poll tax of one (\$1.00) dollar on every male inhabitant of this State between the ages of twenty-one and sixty years shall be set apart annually for the benefit of the public free schools." As amended at the general election held November 2, 1920, the word "male" is omitted and this provision of our Constitution now reads "And a poll tax of one (\$1.00) dollar on every inhabitant of this State between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools." S. J. R. No. 17, p. 356, Published Acts, Regular Session, Thirty-sixth Legislature. In discussing this provision of our Constitution our Court of Criminal Appeals, in the case of *Solon vs. State*, 114 S. W., 349 (359), states that "under this provision * * * there is, in express terms, levied in this State a poll tax on every *male* inhabitant thereof between the ages named therein." In view of this ruling it is but reasonable to conclude that under this provision of our Constitution, as amended, there is in express terms levied in this State a poll tax on every inhabitant thereof between the ages named therein, irrespective of sex.

Furthermore, Articles 2942 and 7354, Revised Civil Statutes, 1911, as amended by Chapter 10, page 6, of the Published Acts of the Fourth Called Session of the Thirty-sixth Legislature, approved October 2, 1920, levies and requires that there be annually assessed against and collected from each person, which includes both men and women alike, between the ages of twenty-one and sixty years, resident within this State on the first day of January of each year, a State poll tax of one dollar and fifty cents (\$1.50), except as to those exempt therefrom by law.

This being the law, it is plainly the duty of the tax assessor of each county to assess each person, both men and women alike, resident in his county on the first day of January, who were then twenty-one years of age and not over sixty years of age, and who are not exempt therefrom, with a State poll tax of one dollar and fifty cents (\$1.50), beginning with the year 1921, and to extend such tax on the tax rolls of his county for each year. This is not optional with the tax assessor but a duty placed upon him by law and he has no right or authority to omit from his assessments any person, either man or woman, against whom the law has levied such tax.

Neither is it optional with such person, whether man or woman, whether he or she shall be assessed with such tax. The tax is clearly levied by law against such persons and there is no option or discretion in the matter either on the part of the person against whom the law levies the tax or on the part of any county or State officer charged by law with any duty pertaining to the assessment and collection of such tax.

Furthermore, it is not optional with such person or any officer as to whether or not such tax should be paid. If not paid within the time prescribed by law, collection of it may be enforced by a levy upon and sale of such property, or such interest in such property, as may be owned at the time by the person so liable for such tax, and the law creates a lien against such property in favor of the State for the amount of such tax; except, of course, as to the homestead. (Revised Civil Statutes, 1911, Articles 7624, 7630, 7632, 7633, 7628, 7592; St. Con., Art. 8, Sec. 15; City of Henrietta vs. Eustis, 87 T., 18, 26 S. W., 619; Ring vs. Williams (Civ. App.), 35 S. W., 733.

The same liabilities and duties apply as to the county poll tax of twenty-five cents when levied as authorized by said Article 7354.

The only persons not subject to the tax are:

1. Those not resident within the State on the first day of January.
2. Those under twenty-one or over sixty years of age on the first day of January.
3. Indians not taxed, persons insane, blind, deaf and dumb and those who have lost a hand or foot, or permanently disabled.
4. Officers and enlisted men of the active militia of this State who comply with their military duties as prescribed by Chapter 3 of Title 91 of the Revised Civil Statutes of 1911, are entitled to exemption from the payment of all poll taxes, except the poll tax of one (\$1.00) dollar prescribed by the Constitution for the support of the public schools, on complying with the requirements of Articles 5842, 5844 and 5845 of the Revised Civil Statutes of 1911.

The law prescribes no specific method of assessing the poll tax. It simply levies the tax and requires that it be assessed and collected. Neither does the law prescribe or require that the community property of the husband and wife be rendered and assessed for the rendition and assessment of other property. This being true, your attention is directed to Article 7568 of the Revised Civil Statutes of 1911, which provides, in effect, that tax assessors, in the execution of their duties, shall use the forms and follow the instructions which shall from time to time be prescribed by the Comptroller of Public Accounts.

You are therefore advised that in the opinion of this Department it would be legal, under proper instructions issued by the Comptroller to the tax assessors so directing, to assess the husband and wife jointly for their community property, and to assess each of them, or either of them if subject thereto, with a poll tax on the same inventory on which the community property is rendered or listed for taxation and to so extend such tax on the tax rolls of his county; also that the poll tax so assessed against each or either of them, they being subject thereto, would constitute a lien in favor of the State and county against such property to secure the payment of such tax.

Yours very truly,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2295, Bk. 55, P. 202.

OCCUPATION TAX—EMIGRANT AGENT—DUTY TAX COLLECTOR—LEVY
BY COUNTIES.

County tax collector should collect State occupation tax levied against emigrant agents irrespective of whether or not he has received the notice provided by Chapter 13, page 34, General Laws, Fourth Called Session of the Thirty-sixth Legislature.

Counties are not authorized to levy an occupation tax against emigrant agents, neither under Chapter 14, page 37, General Laws, Fourth Called Session of the Thirty-sixth Legislature, nor Article 7357, Revised Civil Statutes of 1911, nor under any other law.

AUSTIN, TEXAS, February 19, 1921.

Honorable Lon A. Smith, Comptroller, Austin, Texas.

DEAR SIR: The Attorney General is in receipt of yours of the 16th instant which is as follows:

"We are in receipt of a letter from Mr. Dean Bell, tax collector at Fort Worth, Texas, wherein he desires to know if he should wait until receiving notice from the Commissioner of Labor Statistics as required by Section 4, Chapter 13, Acts Fourth Called Session of the Thirty-sixth Legislature, before issuing an occupation tax receipt for an emigrant agent as provided for by Chapter 14 of said act. He also desires to know whether or not an emigrant agent as mentioned by said Chapter 14, is subject to the payment of a county occupation tax equal to one-half that paid to the State."

Chapter 14, page 37, General Laws, Fourth Called Session of the Thirty-sixth Legislature, requires the payment to the State of an annual occupation tax of \$500 by each emigrant agent and specifically states that "The tax hereby levied shall be in addition to any license fees which may be otherwise prescribed by law."

Chapter 13, page 34, General Laws, Fourth Called Session of the Thirty-sixth Legislature, provides for the issuance of licenses to emigrant agents by the Commissioner of Labor Statistics upon compliance by emigrant agents with the provisions of that chapter, including the payment of a license fee of \$100 for each county in which each emigrant agent shall conduct his business" and further provides that "The Commissioner of Labor Statistics shall promptly, upon the issuing of any licenses by him, notify the Comptroller of Public Accounts of the issuance of such license and of the person to whom same is issued, and of the county or counties in which such emigrant agent will engage in business, and shall likewise notify the collector of taxes of each and every county in which such emigrant agent shall have been licensed, of such facts." This requirement that this notice be furnished to the Comptroller of Public Accounts and to the tax collector of the various counties of the State is evidently intended for the information of these officers in order that they may more effectively enforce the payment of the occupation taxes levied against emigrant agents by said Chapter 14 hereinbefore referred to, and not as a basis upon which to determine whether or not emigrant agents should be required to pay such occupation tax.

Section 1 of Article 8 of our State Constitution provides that "the occupation tax levied by any county, city or town for any year * * *

shall not exceed one-half of the tax levied by the State for the same period * * *.”

Article 7357 of the Revised Civil Statutes of 1911, which has not been amended since the adoption of this revision, provides that each county “shall have the right to levy one-half of the occupation tax levied by the State upon all occupations not herein otherwise specially exempted * * *.”

In discussing these provisions of our Constitution and statutes, our Supreme Court, in the case of *State vs. G., H. & S. A. R. R. Co.*, 100 Tex., 163 (174), 97 S. W., 78, after quoting this provision of our Constitution, says:

“No authority to levy a tax is granted to counties, cities or towns by this language. The municipal corporations created by the Legislature would have no power to levy such taxes except by authority derived from the legislative department of the government which is authorized to give power to those corporations to levy occupation taxes, hence the language quoted above is a precautionary limitation upon the power of the Legislature to grant such authority. * * * Article 5050 (7357), Revised Statutes, confers authority upon the commissioners courts of the counties to levy taxes and contains this language: ‘And shall have the right to levy one-half of the occupation tax levied by the State upon all occupations not herein otherwise specially exempted.’ This provision of the statute *applies only to the subjects mentioned in that article which specified a number of occupations that were subject to taxation.* That it was not the intention of the Legislature to confer upon the commissioners courts power to levy taxes upon all occupations which might thereafter be made the subject of taxation by the statute, is made manifest by the terms of the clause ‘*not herein otherwise specially exempted.*’ The exemption therein specified could only apply to occupations named, hence the authority to tax was limited to those named but not exempted.”

We do not understand this holding to be that before the Legislature could authorize a county to levy against any occupation one-half of the occupation tax levied by the State the act levying the State occupation tax would have to be made a part of, or must have been at the time of the adoption of the Revised Civil Statutes a part of, those articles of the Revised Civil Statutes “which specified a number of occupations that were subject to taxation,” but that no county can levy and collect an occupation tax on any occupation unless specifically authorized by the Legislature to do so; that the article here referred to authorizing counties to levy an occupation tax of one-half the amount levied by the State against only those occupations that are required by the preceding article to pay a State occupation tax, except such of said occupations as are exempt from such county occupation tax by those articles. It does not follow that the Legislature may not by a separate act, or by the act levying a State occupation tax on a particular occupation, authorize the counties to levy an occupation tax on any particular occupation taxed by the State in an amount not to exceed one-half of the occupation tax levied by the State, and in our opinion the Legislature may do so. It does follow, however, and is clearly the meaning of this provision of our Constitution, that before a county can levy a tax on any occupation, such occupation (1) must be required to pay a State occupation tax, and (2) the law must authorize the county to levy an occupation tax against such occupation. The bare fact that the State levies a State

occupation tax against those engaged in a given occupation does not authorize a county to levy an occupation tax against such persons.

Does Article 7357, Revised Civil Statutes of 1911, together with Chapter 14, page 37, General Laws, Fourth Called Session of the Thirty-sixth Legislature, authorize a county to levy an occupation tax against emigrant agents? We think not.

In the first place, said Chapter 14, while it levies a State occupation tax against emigrant agents, it does not authorize the counties to do so. Since the levying of a State occupation tax is not sufficient of itself to authorize the county to tax the occupation, and since this act does not specifically authorize the county to do so, and since a county cannot levy such tax unless authorized by law to do so, it follows that the act levying an occupation tax on emigrant agents does not authorize a county to levy a county occupation tax against such agency.

In the second place, since, as held in *State vs. G., H. & S. A. R. R. Co., supra*, the authorities given by Article 7357, Revised Civil Statutes of 1911, to levy county occupation taxes "applies only to the subjects (occupations?) mentioned in that article which specified a number of occupations that were subject to taxation," and "was not the intention of the Legislature to confer upon the commissioners courts power to levy taxes upon all occupations which might thereafter be made the subject of taxation by the statutes," and since the occupation of emigrant agent is not "one of the subjects mentioned in that article" of the Revised Civil Statutes "which specified a number of occupations that were subject to taxation," but is an occupation "thereafter * * * made the subject of taxation by the statute," it follows that "There is no authority in the law under consideration (Article 7357) * * * for a county * * * to levy upon" emigrant agents "any occupation tax * * * to operate and carry on" their business.

Furthermore, there is no other law of this State on this subject that authorizes or that could be construed as authorizing a county to levy an occupation tax against emigrant agents.

You are advised, therefore, (a) that county tax collectors should collect annually the State occupation tax of \$500 "from each and every person, firm or private employment agency who shall engage in or pursue the business of emigrant agent," that is, "who engages in hiring employees or soliciting emigrants or employees in this State to be employed beyond the limits of this State," beginning on December 31, 1920, the date on which said Chapter 14 became effective, irrespective of whether or not such tax collector has received from the Commissioner of Labor Statistics the notice provided for by said Chapter 13; and (b) that counties are not authorized to levy, nor are the county tax collectors authorized to collect, a county occupation tax from emigrant agents.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2333, Bk. 55, P. 424.

ELECTRIC LIGHT PLANT—OCCUPATION TAX.

An electric light company engaged in the manufacture of electricity for lighting purposes, having its machinery and apparatus for generating or manufacturing electricity in one city, and supplying electricity so generated for lighting purposes in another city by means of wires or other apparatus connecting with its manufacturing or generating establishment in the former city, is subject to the payment of an occupation tax in the latter city, under the provisions of Section 26 of Article 7355 of the Revised Civil Statutes of 1911.

AUSTIN, TEXAS, April 19, 1921.

Honorable Lon A. Smith, Comptroller of Public Accounts, Capitol.

DEAR SIR: The Attorney General is in receipt of yours of the 1st instant enclosing a letter addressed to you by Messrs. Baker, Botts, Parker & Garwood, under date of March 25, 1921, presenting to the Attorney General for his ruling the question as to whether or not an electric light plant is subject to the payment of an occupation tax under Section 26 of Article 7355 of the Revised Civil Statutes of 1911, under the circumstances stated in said letter of Messrs. Baker, Botts, Parker & Garwood to you. Said letter reads as follows:

"Our client, Houston Lighting & Power Company (1905), has for several years past been operating an electric light plant in the city of Houston and supplying electricity throughout this city. The State and county occupation tax prescribed by Section 26 of Article 7355 of our Revised Statutes has been paid regularly.

"However, our client has also been supplying electricity in Magnolia Park, Harrisburg, and other cities of less than ten thousand inhabitants adjacent to or near Houston. In none of these adjoining towns does our client have any powerhouse, but it simply runs lines of poles and wires into such towns.

"We have been advised that a special revenue agent from your office has recently called on our client for the payment of an additional occupation tax because of the fact that it has supplied electricity in these various towns adjacent to Houston. The statute, as recently amended, which fixes this tax, reads as follows:

"From each electric light company operating an electric light plant in a town or city of ten thousand inhabitants or more, \$35; in a city or town of less than ten thousand and more than six hundred inhabitants, \$20."

"The Houston Lighting & Power Company (1905) of course has no desire to evade the payment of this tax, if it is legally due, but we fail to see how it could be said that the company 'was operating an electric light plant' in Magnolia Park, or any of the other towns, and, therefore, we do not consider that there is any tax due merely because the company has supplied electricity in these places. Will you not submit this question to the Attorney General and defer any action in the matter until we both have the benefit of his views?"

The section of the statute referred to is correctly copied in the foregoing letter and will not be again set out here. (Ch. 16, p. 37, Gen. Laws, 3rd C. S., 36th Leg.)

The purpose of this corporation is declared in its charter to be "For the manufacturing and supply of gas and the supply of light, heat, and electric motor power, or either of them, to the public by any means." Its charter further provides that "the business office and place of business of this corporation shall be and remain in the City of Houston, Harris County, Texas, and the place or places where its business is to be transacted is in said City of Houston and sub-

urbs thereof, and such other place or places within Harris and adjoining counties to which its gas mains and electric lines can be extended.”

The answer to the question here presented will depend largely upon the effect given to or construction placed upon the words “operate” and “electric light plant” as used in this law.

The word “plant” is defined in Rawle’s Revision, Bouvier’s Law Dictionary, as follows:

“The fixtures and tools necessary to carry on any trade or mechanical business, 77 Ga., 752. The term does not cover property forming a part of a separate business, 77 Fed. Rep., 938. As used in the business of a wharfinger, a horse was held part of the plant, 19 Q. S. D., 647; and a legacy of plant and good will was held to pass the house of business held by lease, 8 W. R., 410.”

In *Maxwell vs. Wilmington Dental Manufacturing Company*, 77 Fed. Rep., 938, it is said:

“Webster defines the word ‘plant’ to be ‘the fixtures and tools necessary to carry on any trade or mechanical business (local). * * *’ ‘Plant’ is defined by Worcester to be ‘the manufacturing apparatus or fixtures by which a business is carried on.’”

In *Words and Phrases, Second Series, Volume 3, page 1050*, we find the following:

“A corporation was empowered to manufacture, sell, and distribute electricity for lighting, heating, and manufacturing purposes in two towns, and to maintain a dam on a river, and take as for public use any water rights or land, and to flow any lands to construct its dam and the establishment of its plant, but not to flow any mill privilege. It was empowered to transmit electric power in said town in such manner as might be expedient, and to erect poles and wires. The town and the corporation were authorized to contract for public lighting. Held, that the word ‘plant’ in defendant’s charter included its poles and wires. *Brown vs. Gerald*, 61 Atl., 785, 786, 100 Me., 351, 70 L. R. A., 472, 109 Am. St. Rep., 526.”

We have examined this case and find that it well sustains the construction here placed upon its holding on this point.

In *Fisher Electric Company vs. Bath Iron Works* (Supreme Court of Michigan), 74 N. W., 493, we find the following:

“Houston’s Electric Dictionary defines the term ‘plant’ as follows: ‘Plant—a word sometimes used for installation or for the apparatus required to carry on any manufacturing operation. An electric plant includes the steam engines or other prime motors, the generating dynamo or dynamos, the lamps and other electro-receptive devices, and the circuit connected therewith.’”

For other definitions and illustrations of the meaning of the word “plant” reference is made to *Words and Phrases, Second Series, Volume 3, pages 1047 to 1050*.

It would not be contended, we are sure, that this electric light plant consists only of the engines, boilers, dynamos, belts, pulleys, measuring devices, and the like necessary in manufacturing or generating electricity. True, in a proper sense, such machinery and appliances properly constructed and arranged, might be held to be an electric light plant, but we do not think it would be so held under this provision of our law. Our understanding of this provision is that it contemplates and is intended to apply to an electric light company engaged in the occupation of supplying electric light, or in gen-

erating electricity for that purpose, to and in cities of a certain population by use of the means necessary and usually employed for that purpose, and that the physical properties so used, and by means of which that result is accomplished, constitute what is here meant by the word "plant."

Without pursuing this inquiry further, we think that the wires, lamps, poles, and other appliances, or means used or employed by the electric light company referred to, in transmitting electricity to Magnolia Park, Harrisburg, and other cities other than the City of Houston, for lighting purposes, and by means of which that purpose is effected, constitute and are within the meaning of this law, a part of the electric light plant operated by the electric light company so supplying such electricity for such purpose in such other cities.

Having reached this conclusion, the next question is as to whether or not this electric light company, within the meaning of this provision of our law, is operating an electric light plant in these respective cities.

The word "operate" is defined by the Standard Dictionary as follows:

"To put in action and supervise the working of; as, to operate a machine. To conduct or manage the affairs of; superintend, as to operate a mining business or a railroad. To effect by some course of action or procedure; accomplish. To effect any result; have agency; to bring about or effect a (specified) result; to work or act noticeably and effectively; produce the proper or intended effect."

For other definitions and illustrations of the meaning of the word "operate" in its application to various business enterprises, reference is made to Words and Phrases, Volume 6, pages 4989-4995, and to Words and Phrases, Second Series, Volume 3, pages 743-751.

We think it would not be reasonable to say that an electric light company that had outside of the corporate limits of a city that part of its plant used in generating the electricity with which it lights such city would not be engaged in operating an electric light plant in such city within the meaning of this law; that it would not be operating an electric light plant in such city merely because that part of its physical properties used in generating the electricity so used happens to be or had been placed outside the corporate limits of such city. Likewise, we think it would not be reasonable to hold that an electric light company having in one city that part of its physical properties by which it generates the electricity with which it lights another city by means of some other part of its physical properties would not be operating an electric light plant in the latter city within the meaning of this law.

Note that the charter of this corporation declares its purpose to be "for the manufacture and supply of gas and the supply of light, heat and motor power, or either of them, to the public by any means," and provides that "the place or places where its business is to be transacted in said City of Houston and suburbs thereof, and such other place or places within Harris and adjoining counties to which its gas mains and electric lines can be extended."

To hold that this company is only operating an electric light plant in the particular city in which its generating machinery is located,

when by means of the same machinery and other physical properties connected therewith, laid to and installed and operated in another city, and constituting part of its lighting system, its lighting the latter city is not operating an electric light plant in the latter city within the meaning of this law would, to our mind, be too narrow a construction of this provision. It is quite evident to us from the language and purpose of this law that the Legislature in passing it did not have in mind the particular location of the machinery used in generating or manufacturing electricity for lighting purposes when it used the words "operating an electric light plant in a town or city."

It is our opinion, therefore, and you are so advised, that the electric light company in question is not only subject to the payment of an occupation tax in the City of Houston, but is likewise subject to the payment of an occupation tax with respect to each of the other cities or towns in which it supplies electricity for lighting purposes by means of wires, poles, lamps, and the like, connected with and constituting any part of its lighting system, said tax being payable as to each such city under and in accordance with the provisions of said Section 26 of Article 7355 of the Revised Civil Statutes of 1911.

Yours very truly,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2266, Bk. 55, P. 17.

POLL TAX—METHOD OF ASSESSING—LIEN ON PROPERTY.

1. Every person, both men and women, resident within this State on the first day of January of each year, between the ages of twenty-one and sixty years, and not exempt therefrom by law, are subject to assessment and payment of State poll tax.

2. Such tax, when properly assessed, becomes and constitutes a lien upon all property, excepting the homestead, whether separate or community property, owned by the person against whom the tax is levied.

3. An assessment of the community property of husband and wife against them jointly, and the assessment of a poll tax against each of them on the same inventory, and so carried on to the tax roll, if otherwise regular, would constitute a valid assessment as to both the property and the poll tax.

AUSTIN, TEXAS, January 6, 1921.

Honorable M. L. Wiginton, Comptroller, Austin, Texas.

DEAR SIR: The Attorney General is in receipt of yours of the 11th ultimo in which you propound to him the following inquiry:

"The point that I desire your opinion on especially is whether a married woman's poll tax would be a lien on her interest in the community property, and whether it would be legal to assess the husband and wife jointly for their community property and assess each of them with a poll tax on the same inventory."

Section 1 of Article 8 of our State Constitution provides, among other things, that "The Legislature may impose a poll tax." No limitation is here placed upon the Legislature in the imposition of this tax, either as to the amount of the tax or as to the persons upon whom the tax may be imposed.

Section 3 of Article 7 of our State Constitution, prior to its amendment at the general election held November 2, 1920, provides, among other things, that "A poll tax of one (\$1.00) dollar on every *male* inhabitant of this State between the ages of twenty-one and sixty years shall be set apart annually for the benefit of the public free schools." As amended at the general election held November 2, 1920, the word "male" is omitted and this provision of our Constitution now reads, "And a poll tax of one (\$1.00) dollar on every inhabitant of this State between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the public free schools." S. J. R. No. 17, p. 356, Published Acts, Regular Session, Thirty-sixth Legislature. In discussing this provision of our Constitution, our Court of Criminal Appeals, in the case of *Solon vs. State*, 114 S. W., 349 (359), states that, "Under this provision * * * there is, in express terms, levied in this State a poll tax on every *male* inhabitant thereof between the ages named therein." In view of this ruling it is but reasonable to conclude that under this provision of our Constitution as amended, there is in express terms levied in this State a poll tax on every inhabitant thereof between the ages named therein, irrespective of sex.

Furthermore, Articles 2942 and 7354, Revised Civil Statutes, 1911, as amended by Chapter 10, page 6, of the Published Acts of the Fourth Called Session of the Thirty-sixth Legislature, approved October 2, 1920, levies and requires that there be annually assessed against and collected from each person, which includes both men and women alike, between the ages of twenty-one and sixty years, resident within this State on the 1st day of January of each year, a State poll tax of one dollar and fifty cents (\$1.50), except as to those exempt therefrom by law.

This being the law, it is plainly the duty of the tax assessor of each county to assess each person, both men and women alike, resident in his county on the 1st day of January, who were then twenty-one years of age and not over sixty years of age, and who are not exempt therefrom, with a State poll tax of one dollar and fifty cents (\$1.50), beginning with the year 1921, and to extend such tax on the tax rolls of his county for each year. This is not optional with the tax assessor but a duty placed upon him by law and he has no right or authority to omit from his assessments any person, either man or woman, against whom the law has levied such tax.

Neither is it optional with such person, whether man or woman, whether he or she shall be assessed with such tax. The tax is clearly levied by law against such persons and there is no option or discretion in the matter either on the part of the person against whom the law levies the tax or on the part of any county or State officer charged by law with any duty pertaining to the assessment and collection of such tax.

Furthermore, it is not optional with such person or any officer as to whether or not such tax should be paid. If not paid within the time prescribed by law, collection of it may be enforced by a levy upon and sale of such property, or such interest in such property, as may be owned at the time by the person so liable for such tax, and

the law creates a lien against such property in favor of the State for the amount of such tax; except, of course, as to the homestead. (Revised Civil Statutes, 1911, Articles 7624, 7630, 7632, 7633, 7628, 7692; St. Con., Art. 8, Sec. 15; City of Henrietta vs. Eustis, 87 Tex., 18, 26 S. W., 619; Ring vs. Williams (Civ. App.), 35 S. W., 733.)

The same liabilities and duties apply as to the county poll tax of twenty-five cents when levied as authorized by said Article 7354.

The only persons not subject to the tax are:

1. Those not resident within the State on the first day of January.
2. Those under twenty-one or over sixty years of age on the first day of January.

3. Indians not taxed, persons insane, blind, deaf and dumb and those who have lost a hand or foot, or permanently disabled.

4. Officers and enlisted men of the active militia of this State who comply with their military duties as prescribed by Chapter 3 of Title 91 of the Revised Civil Statutes of 1911, are entitled to exemption from the payment of all poll taxes, except the poll tax of one (\$1.00) dollar prescribed by the Constitution for the support of the public free schools, on complying with the requirements of Articles 5842, 5844 and 5845 of the Revised Civil Statutes of 1911.

The law prescribes no specific method of assessing the poll tax. It simply levies the tax and requires that it be assessed and collected. Neither does the law prescribe or require that the community property of the husband and wife be rendered and assessed for taxation in any way different from that prescribed for the rendition and assessment of other property. This being true, your attention is directed to Article 7568 of the Revised Civil Statutes of 1911 which provides in effect that tax assessors in the execution of their duties, shall use the forms and follow the instructions which shall from time to time be prescribed by the Comptroller of Public Accounts.

You are therefore advised that in the opinion of this Department it would be legal, under proper instructions issued by the Comptroller to the tax assessors so directing, to assess the husband and wife jointly for their community property, and to assess each of them, or either of them, if subject thereto, with a poll tax on the same inventory on which the community property is rendered or listed for taxation and to so extend such tax on the tax rolls of his county; also that the poll tax so assessed against each or either of them, they being subject thereto, would constitute a lien in favor of the State and county against such property to secure the payment of such tax.

Yours very truly,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2271, Bk. 55, P. 46.

POLL TAXES—PLACE OF PAYMENT—CITIES OF 10,000 INHABITANTS.

(1) It is the duty of the county tax collector to designate times and places for the payment of poll taxes, as well as other taxes, in cities of 10,000 inhabitants or more, as well as elsewhere in his county, and to attend, either in per-

son or by deputy at such times and places for such purpose, as provided by Article 7615 of the Revised Civil Statutes of 1911.

(2) In addition to such times and places, it is the duty of the county tax collector to maintain an office in each city in his county of 10,000 inhabitants, or more, not the county seat, and to keep a deputy at such office during the entire month of January of each year, for the purpose of receiving and receipting for poll taxes payable by those residing in such city.

(3) Except as provided by said Article 7615, the county tax collector is not required or authorized to receive and receipt for poll taxes at more than one place in a city of 10,000 inhabitants or more.

AUSTIN, TEXAS, January 13, 1921.

Mrs. Jessie Daniel Ames, President, Texas League of Women Voters, Georgetown, Texas.

DEAR MRS. AMES: The Attorney General is in receipt of yours of the 7th instant making certain inquiries with reference to the payment of poll taxes. Your first question is as follows:

"The question of city poll taxes arose in the meeting of the executive board of the League of Women Voters yesterday and I was requested officially by that board to ask you whether the law permitting the levying of this poll tax applies to women? The wording, as you know, says that the city council shall have the power to levy and collect an annual poll tax * * * 'of every male inhabitant of said city over the age of 21. * * *"

"We are in doubt as to whether this law until it is amended by the Legislature striking out the word 'male' and inserting the word 'person' is applicable to women. Will you please let me know as soon as it is possible, your opinion on this?"

This question is answered in paragraph 16 of opinion No. 2254, rendered by this Department to Hon. M. L. Wiginton, Comptroller of Public Accounts, on October 8, 1920, a copy of which opinion we are enclosing herewith.

Your second question is stated by you as follows:

"At the same meeting I was requested to ask you whether it is legal for a deputy tax collector to be placed in various parts of cities in different voting precincts to collect poll taxes during the present month. Some of us have been told by our tax collectors that this is illegal. However, there are cities where this is a custom and is now being followed. We feel that if it is legal in some places of the State it is legal in other cities. We understand, of course, that there may be reasons why it is inconvenient to place deputies in various precincts in a large city, but we wish to know the legality of it."

Replying to this question, you are advised that the county tax collector is required to keep his office at the county seat (Arts. 1399 and 7616, R. C. S., 1911), and that except as provided by Articles 7615 and 2957 of the Revised Civil Statutes of 1911, all taxes are payable at such office.

Said Article 7615 requires the tax collector to post up notices in at least three public places in each voting or magistrate's precinct of his county as soon after the 1st day of October in each year as he is prepared to begin the collection of taxes, designating certain times and places when and where the taxpayers of his county may meet him for the purpose of paying their taxes for the current year, and makes it the duty of the tax collector, either in person or by a deputy, to attend and remain at each of such times and places for at least two days for the purpose of receiving and receipting for such taxes. This law applies to all counties, whether containing a city of 10,000 inhab-

itants or more or not, and applies as well within as outside of a city of 10,000 inhabitants. It applies to all counties. Of course, poll taxes as well as other taxes for the current year may be paid and receipted for at such times and places so designated. Thus each taxpayer, whether residing within or outside of a city of 10,000 inhabitants or more, is afforded the opportunity of paying his or her taxes, including poll taxes, at some time between the 1st day of October and the 1st day of February of each year, at some convenient place thus designated by the tax collector, without having to go to the tax collector's office at the county seat for that purpose. Having complied with this law, the tax collector is not required nor authorized to receive and receipt for taxes elsewhere than at his office at the county seat, and taxes not paid at the times and places so designated by the tax collector are payable only at his office, except as provided by said Article 2957.

Said Article 2957 requires the tax collector of each county wherein is situated a city of 10,000 inhabitants or more, other than the county seat, to have a duly authorized and sworn deputy in each such city to represent him for the purpose of receiving poll tax payments from residents of such city who are liable for such tax, and giving receipts therefor, and requires such deputy to keep his office for such purposes at some convenient place in such city during the entire month of January of each year; and also requires the tax collector to publish four weeks notice of the authority of such deputy and the location of such office. Since only those residing in a city of 10,000 inhabitants or more are required to pay their poll taxes in person (Arts. 2944-2945, R. C. S., 1911), and since those residing at the county seat have a convenient place, viz., the tax collector's office, at which to appear in person and pay their poll taxes, we presume this law was passed for the purpose of affording those residing in a city of 10,000 inhabitants or more, other than the county seat, the same facility, that is, a local office in their city, for paying their poll taxes and receiving receipts therefor as is afforded under the general law to those residing at a county seat that has 10,000 inhabitants or more. This presumption is strengthened by the fact that neither this nor any other law, except as provided by said Article 7615, authorizes the tax collector to designate any place other than his office for receiving and receipting for taxes at the county seat, although such county seat may be a city of 10,000 inhabitants or more. This purpose is fully met by the designation by the tax collector of only one place in such city of 10,000 inhabitants or more in his county, other than the county seat, for the purpose of receiving and receipting for poll taxes payable by inhabitants of such city, and we are of the opinion that the tax collector is not required nor authorized under this article, nor otherwise than as provided by Article 7615, to have more than one place in any one such city for such purpose. This conclusion is strengthened by the wording of this article. The wording is that the tax collector shall

"have a duly authorized and sworn *deputy* * * * who shall keep his *office* * * * at some convenient *place* and shall publish notice of the authority of such *deputy* and the location of such *office*."

In this connection reference is made to the opinion of our Austin Court of Civil Appeals, rendered February 19, 1913, in the case of Davis vs. Riley, 154 S. W., 314, wherein the court says:

"The payment by a citizen of his poll tax at any other place than the office of the tax collector does not constitute in law a payment of said tax, so as to entitle the taxpayer to a receipt, unless such payment be made to the collector while on his rounds through the county or to a duly authorized deputy in a town of 10,000 inhabitants, other than the county seat * * * that no tax collector or his deputy can receive poll taxes at any other place than his office at the county seat, except in the two instances heretofore mentioned. * * **"

It is the opinion of the Attorney General, therefore, that after complying with the requirements of said Article 7615, the county tax collector is not required nor authorized to receive and receipt for poll tax payments elsewhere than at his office at the county seat, except as to cities of 10,000 inhabitants or more in his county, other than the county seat, and that he is not required nor authorized to designate or have more than one place or office in any one such city for such purpose.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2440, Bk. 57, P. 238.

PENITENTIARY LANDS—TAXATION—INTEREST—PENALTIES AND COSTS.

1. Only such lands as have heretofore been or may hereafter be acquired by the State for the purpose of establishing thereon State farms and employing thereon convict labor on State account, and no other property belonging to the penitentiary system, are subject to taxation.

2. It is the duty of the Board of Prison Commissioners to render or cause to be rendered said land for taxation to the tax assessors of the respective counties in which such lands may be situated, the lands constituting each respective farm to be listed or rendered separately from all other lands.

3. Taxes on these lands can be assessed and collected for county purposes only and should be assessed and collected in the manner required by law for the assessment and collection of taxes on privately owned lands.

4. Such county taxes so assessed against each separate farm, respectively, must be paid annually out of the revenue derived from that particular farm and charged to the expense account of operating such farm, and not from revenue derived from any other farm, or from the operation of the prison system generally, or from funds that may come into the hands of the Board of Prison Commissioners from any other source, and no debt shall be created against the general revenue of the State in case of the failure to pay such taxes so assessed against any particular farm out of the revenue derived from such farms.

5. In arriving at the value of these lands and the amount of county taxes to be paid thereon the value of the land only shall be considered and not the value of the buildings and other improvements owned by the State and situated on such lands.

6. Should such taxes not be paid on said lands within the time prescribed by law such lands should be returned delinquent just as other lands on which the taxes are not paid and in such case the Board of Prison Commissioners should pay certain tax collector's and county clerk's fees thereon in like manner as upon lands belonging to private individuals, but no penalties nor interest should be paid, and no fees or costs should be paid on account of any purported suits that may be brought to enforce the payment of such taxes.

7. Such school district maintenance taxes as may have been levied and

assessed against these lands, if any, are illegal and void and the Board of Prison Commissioners has the right to pay such county taxes as may have been properly assessed against these lands, and to receive proper receipts therefor, without the payment of such school district maintenance taxes.

8. The validity of such taxes as may have been or may hereafter be levied and assessed against these lands on account of district bonds, such as school district bonds, road district bonds, and the like, that may have been issued prior to the time the State acquired same for convict farm purposes, is in question, and the Board of Prison Commissioners has the right to pay such county taxes as may have been properly assessed against these lands, and upon so doing will be entitled to receive proper receipts therefor, without the payment of such district bond taxes.

AUSTIN, TEXAS, June 17, 1922.

Board of Prison Commissioners, Huntsville, Texas.

GENTLEMEN: The Attorney General is in receipt of your several inquiries of recent date pertaining to the assessment and payment of taxes on property belonging to the penitentiary system of this State and this is in reply thereto.

Notwithstanding general expressions and the use of general terms in this opinion which might indicate to the contrary, it will be understood that we do not mean to express herein any opinion one way or the other with respect to such taxes as may be or as may have been assessed against prison property, particularly lands, on account of any district or local bonds, road district bonds, and the like. With respect to such taxes, however, we advise that they should not be paid by you until your authority to pay them has been in some way determined.

The general rule with respect to the taxing of property owned by a State is thus set out in Ruling Law Case, Volume 26, page 331, Sections 289 and 290:

"Sec. 289. It is a generally accepted principle that the property of a particular body politic, such as the State or a municipal corporation, whether used for public purposes or held for the income to be derived therefrom, is not taxable by the same body politic. This exemption exists without any express statutory sanction and in the face of a specific requirement of the statutes or of the Constitution itself that all property be taxed. * * *

"Sec. 290. The property of a State is exempt from taxation, because as the sovereign power it receives the taxes through its officers, or through municipalities it creates, that it may, from the means thus furnished, discharge the duties and pay the expenses of government. Its property constitutes one of the instrumentalities by which it performs its functions. * * * The exemption of State property extends to the property of all public departments of the State even though the title is in a board of trustees or in a separate corporation as is often the case with State University or other State institutions. * * *"

This is the universally accepted rule with respect to taxation of property belonging to a State, and since the property here in question not only belongs to the State of Texas but is used by the State exclusively in the discharge by it of an admittedly and clearly governmental function, such property may not be taxed unless subject thereto under our Constitution and statutes.

The only provision of our State Constitution that might be regarded as bearing on this question is that part of Section 2 of Article 8 which reads as follows:

"The Legislature may, by general laws, exempt from taxation public property used for public purposes."

Since the universally accepted rule is and has always been that property belonging to a State is not subject to taxation we doubt if this provision of our Constitution has any reference to property belonging to the State. It will be noted that neither this nor any other provision of our State Constitution exempts from taxation property belonging to the State, and we could hardly say that State property, including the Capitol building and grounds, eleemosynary institutions, educational institutions, orphan asylums and the like, would or could be subject to taxation merely because the Legislature, through oversight or otherwise, had failed to pass statutes exempting such property from taxation. However this may be, we find that Article 7507 of the Revised Civil Statutes of 1911 exempts from taxation "all property, whether real or personal, that belongs exclusively to this State," except certain lands constituting parts of our prison system. In so far as it relates to the questions here presented this article reads as follows:

"The following property shall be exempt from taxation, towit: * * *

"All property, whether real or personal belonging exclusively to this State or any political subdivision thereof, or the United States, where the State of Texas has heretofore or may hereafter acquire and own land for the purpose of establishing thereon State farms and employing thereon convict labor on State account, it shall be the duty of the penitentiary board or board of penitentiary commissioners, or other officers of the penitentiary having the managing of same, to render said land for taxes to the tax assessor of said county; and the taxes on same shall be assessed and collected in the manner required by law for the assessment and collection of other taxes; provided, that said taxes shall be assessed and collected for county purposes only; and said county taxes shall be paid annually out of the revenues derived from such State farms, respectively, by the officer or officers having the management thereof, and same shall be charged to the expense account of operating such farm; and no debt shall be created against the general revenues of the State in case of the failure to pay said taxes out of the revenues of any such farm; and provided further, that in arriving at the amount to be paid in taxes to the counties the value of the land only shall be considered and not the value of the buildings and other improvements owned by the State and situated on said land."

We think it evident that property owned by the State and used by it for prison purposes, and as constituting parts of what is commonly referred to as the prison system of this State, is "property * * * belonging exclusively to this State," and that this property, under this statute as well as under the general rule stated in Ruling Case Law, is exempt from taxation of every kind and character, whether for strictly State purposes, or county or other municipal purposes, except as authorized and provided for by this article.

From this it follows that all property of every character belonging to the prison system of this State, except certain lands to the extent provided for by this article is exempt from taxation.

It will be noted, however, that this article does not attempt to provide the details for levying, assessing and collecting taxes on these lands. These details are numerous and necessary and in the absence of them this statute could not be made effective. This omission is supplied, we think, by the provision in this article that these taxes "shall be assessed and collected in the manner required by law for the assessment and collection of other taxes." The significance and importance of this provision becomes apparent when we consider the many details necessary to a proper levy, assessment and collection of taxes and note the entire

absence of them from this article. It is provided that these lands shall be rendered for taxes but no form or manner of rendition is prescribed. There is no provision for extending upon the tax rolls the taxes assessed against these lands. No provision is made for the issuance of receipts or the form of same on payment of taxes assessed. Only the value of the land and not the improvements is to be considered in arriving at a valuation for assessment but no provision is made for equalizing such values with the value of other like property in the county. Taxes shall be paid "annually" but it is not stated at what time they shall become due and payable. There are no provisions with respect to such of these taxes as may not be paid "annually." In short, if we close our eyes to all statutory provisions with respect to the levy, assessment and collection of taxes except those contained in this article we find ourselves in a hopeless situation. It is our opinion, therefore, that this language means that reference is to be had to the statutes governing the levy, assessment and collection of taxes on privately owned lands for all necessary details in the method of levying, assessing and collecting taxes on these lands.

We also note that this article provides that such taxes shall be paid "annually," and that "no debt shall be created against the general revenue of the State in case of the failure to pay said tax out of the revenues of any such farm," but we do not understand this to mean that such of these taxes as may not have been paid within the time prescribed by law for the payment of taxes assessed against privately owned lands should thereupon and thereby become invalid and void or that same should not be thereafter paid. On the contrary we think it was the intention of the Legislature that the counties in which these lands are situated should have the revenues that they would derive from county taxes on these lands if they had not been acquired by the State. This is particularly indicated by the emergency clause of this act which says:

"The fact that the State of Texas has acquired valuable lands in various counties of the State of Texas to be used in connection with the State penitentiary system, thereby depriving the counties where said lands are located of any revenue from taxes thereon, and the further fact that the counties where said farms are located need said revenue, creates an emergency," etc.

This purpose would be defeated if the assessments against those lands should be held void simply because not paid within the time provided by general law for the payment of taxes. It is our opinion, therefore, that such of these taxes as may not have been paid on or before the 31st day of January of the year following the year for which levied and assessed remain valid assessments and should thereafter be paid when there are sufficient revenues on hand to do so, derived from the farm of which the land against which the same are assessed is a part.

Since this article, however, contains no detailed provisions on that subject it is our opinion that the general statutes pertaining to the manner of collecting delinquent taxes are also applicable to the collection of these taxes after they become delinquent, to the extent hereinafter indicated. We do not attempt to set out here these several statutory provisions, but such of them as bear upon the question presented by you will be taken up and discussed at their appropriate places in the course of this opinion.

With these general observations in mind we will now undertake to answer the several questions propounded by you on this subject.

1. Only such land as has heretofore been or may hereafter be acquired by the State "for the purpose of establishing thereon State farms and employing thereon convict labor on State account," and no other, is subject to taxation. Neither this article nor any other statute authorizes the taxation, whether for county or other purposes, of any land belonging to the State, even though constituting some part of the prison system, except such lands as may have been or may hereafter be acquired by the State for the purpose of establishing State farms for the employment thereon of convict labor. No other lands belonging to the prison system are subject to any sort of taxation. We do not understand, however, that this statute includes only such area as may be in actual cultivation. On the contrary, we think this article includes all lands acquired and owned by the State for convict farm purposes whether such land is in actual cultivation or not.

2. It is the "duty of the Penitentiary Board or Board of Penitentiary Commissioners or other officers of the penitentiary having the management of same, to render said land for taxes to the tax assessor" of the respective counties in which such land may be situated, such renditions to be made within the time and in the same manner as privately owned lands are rendered for taxation, except that the value of such lands is to be determined and fixed as hereinafter stated. The lands constituting each separate farm, respectively, should be listed or rendered separate from all other lands, that is, each farm should constitute within itself a separate and distinct rendition.

3. Taxes on these lands "shall be assessed and collected for county purposes only" and "shall be assessed and collected in the manner required by law for the assessment and collection of other taxes." The lists or inventories upon which these respective farms are rendered for taxes should be submitted by the tax assessor to the board of equalization of his county in like manner and for the same purpose as lists or inventories of privately owned property. After the valuation of same has been equalized by the board of equalization these lands, those constituting each farm separately, together with the tax calculated on the value of same, should be extended upon the county tax roll in like manner as privately owned property. Taxes on these lands, however, are to be assessed and collected for *county purposes only*. This tax should be assessed only at such rates as have been levied upon the property of the whole county for the county purposes, that is to say:

(a) Not to exceed 25 cents for general county purposes, 15 cents for road and bridge purposes, 15c to pay jurors, and 25 cents for court house and jail purposes. We do not mean to say that these full rates should be levied and assessed against these lands, but only so much of said rates, respectively, as has been levied upon the property of the whole county by the commissioners court for the current year.

(b) An additional tax of not to exceed 15 cents on the valuation of said land may be assessed and collected upon these lands for county road and bridge purposes if such tax has been voted upon the whole county at an election held for that purpose, but only so much of this rate as has been levied upon the property of the whole county by the

commissioners court for such purposes for the current year may be so levied and collected.

(c) Such tax, if any, as may have been voted by the whole county under the provisions of Articles 637a, 637b and 637c of the Revised Civil Statutes, as enacted by Chapter 203, page 461, General Laws, Regular Session Thirty-fifth Legislature, for the purpose of issuing bonds to provide for the construction of public roads for the whole county, may also be assessed and collected against these lands.

(d) No other taxes are authorized to be levied and collected for county purposes and hence no tax other than those here enumerated should be levied and assessed against these lands. On this question your attention is called to a former opinion (No. 1090) of the Attorney General on this question addressed to Hon. Louis W. Tittle, Prison Commissioner, under date of January 20, 1914.

4. Such "county taxes shall be paid annually out of the revenue derived from such State farms, respectively, by the officer or officers having the management thereof, and same shall be charged to the expense account of operating such farm; and no debt shall be created against the general revenue of the State in case of the failure to pay said taxes out of the revenues of any such farms." With respect to such taxes each separate farm stands singly and alone and wholly separate and distinct from every other farm and the county taxes assessed against any particular farm are to be paid annually from the revenues derived from that particular farm and not from proceeds or funds arising from any other farm or from the operation of any other part of the prison system or coming into the hands of the Board of Prison Commissioners from any other source. This also applies to such costs or fees as should be paid by you as hereinafter explained. This answers in the negative your specific inquiry as to whether you would be authorized to pay taxes on these lands and have such expenditures taken care of under the provisions of the Brown-Crummer Company contract.

We have already held that such of these taxes as may not have been paid within the time prescribed by law remain valid assessments and should thereafter be paid when there are sufficient revenues on hand to do so derived from the farm of which the land against which the same are assessed is a part. This brings us back to the question as to what extent the general laws pertaining to the collection of delinquent taxes on other lands are applicable to the collection of delinquent taxes on these lands. We do not consider all these numerous provisions but only those that pertain to the payment of interest, penalties and costs and that therefore might be regarded as requiring the payment of other sums than the actual taxes.

(a) When the tax rolls are completed and turned over to the tax collector he is charged by the county with the amount of taxes due the county as shown by the rolls, including, of course, such taxes as may have been assessed against these lands. (R. S., Art. 1408.) He can only be relieved of this charge in so far as the taxes assessed against these lands are concerned either by collecting the tax and paying it into the county treasury or by reporting same delinquent. (R. S., Arts. 1409-1410.) Furthermore, it is made the duty of the tax collector to make up lands on which the taxes for the preceding year have not been

paid. (R. S., Art. 7592.) For this service the tax collector is entitled to a fee of one dollar for each correct assessment so returned delinquent, same to be taxed against the delinquent taxpayer. These provisions have to do with the making and preservation of a proper and necessary record of these assessments and with the "manner required by law for the * * * collection of other taxes" and are applicable, we think, to such of these lands and taxes as may become delinquent. You are advised, therefore, that the tax collector is entitled to a fee of one dollar for each correct assessment of these lands properly returned by him as delinquent for unpaid taxes, same to be paid by you out of revenues derived from the farm of which the land on which the fees are taxed is a part.

(b) Upon these lands being returned delinquent as hereinbefore stated the county clerk is required to record or note such delinquency upon the delinquent tax record of his county, and to perform certain other duties with respect to same. (R. S., Art. 7691.) We think the performance of these duties by the county clerk also has to do with the making and preservation of a proper and necessary record of such delinquencies and pertain to the "manner required by law for the * * * collection of other taxes." For these services the county clerk is entitled to a fee of one dollar for each such delinquent assessment. (R. S., Art. 7691.) We advise that this fee should be paid by you out of revenues derived from the farm of which the delinquent lands so recorded is a part, when such delinquent taxes are paid, if the clerk has performed the services required of him with respect to such delinquency.

(c) It is provided that the lists of delinquent lands returned each year by the tax collector shall be published at a cost to the county of not to exceed twenty-five cents for each parcel or tract of land so returned delinquent, same to be taxed as costs against each such tract so published. (R. S., Arts. 7687-7692.) This requirement is intended as a notice to and is for the special benefit of the one who owes the taxes. We can conceive of no reason why the State should be so notified with respect to a tax levied and assessed by its own officers under its own laws against its own property and for its own benefit, that is, for the benefit of one of its political subdivisions. That suits authorized by general law to enforce payment of delinquent taxes might not be maintained to enforce the payment of delinquent taxes on these lands if they should be omitted from the published list of delinquent lands affords no reason for such publication for the reason that such suits could not be maintained anyway since they would of necessity be suits against the State and could not be brought without the State's consent. It is our opinion that the delinquency of these lands should not be published and that no fee or charge should be paid by you therefor.

(d) The general statutes also provide certain fees for district and county attorneys, district clerks and sheriffs where suits are brought under the statutes to enforce the payment of delinquent taxes. Such suits would of necessity be suits against the State and since the State has not consented to the bringing of such suits they are unauthorized and cannot become a basis for such fees. We do not understand that the provision of this article that these taxes "shall be * * * col-

lected in the manner prescribed by law for the * * * collection of other taxes" was intended as authorizing such suits. You should not therefore pay any fees or costs that may be claimed on account of the filing of any suits provided for by general statute for the collection of delinquent taxes.

(e) We are of the opinion that those provisions of the general statutes that provide for the accrual and payment of interest and penalties on delinquent taxes do not apply to such of these taxes as may become delinquent. As we have already seen, these lands are wholly exempt from taxation except to the extent provided for by this article, and this article plainly provides that taxes on these lands "shall be assessed and collected for county purposes only." Only a tax is authorized, and a tax for *county purposes only*. Interest and penalties may be imposed for non-payment of taxes, and when properly imposed and accrued payment of same may be enforced against private persons and property (*Marlin vs. Green* (Civ. App.) 78 S. W., 704; *Bean vs. Brownwood* (Civ. App.), 43 S. W., 1056; *San Antonio vs. Berry*, 92 T., 319, 48 S. W., 496), but interest and penalties do not accrue unless expressly provided for. (R. C. L. Vol. 26, pp. 385-386, Secs. 342-345.) A statute authorizing and providing for the levy of a tax does not carry with it interest and penalties. We have here a statute providing for the assessment of a tax against property not otherwise subject to such tax and no provision made for the accrual of interest or penalties thereon. This, we think, brings this tax within the rules above stated. Furthermore, interest does not run against the State in the absence of a statute providing for interest. (*Auditorial Board vs. Arle*, 15 Texas 72; *Op. Atty. Gen.*, Book 35, p. 107.) It is our opinion, therefore, that the general statutes providing for the accrual of interest and penalties against delinquent taxes are not applicable to taxes assessed under this article and that you should not pay same.

(f) It has been held that where interest, penalties and costs, and even an excessive or invalid tax, have been improperly charged against property the taxpayer has the right to pay what is rightfully due and to obtain proper receipt therefor without payment of such improper charges. (*Nalle vs. City of Austin*, 91 T., 424, 44 S. W., 66; *City of San Antonio vs. Berry*, 92 T., 319, 48 S. W., 496; *State vs. Hoffman*, 109 T., 133, 201 S. W. 653.) You are advised, therefore, that upon payment by you of the county taxes properly assessed against any of these lands, and the tax collector's and county clerk's fees hereinbefore mentioned, if any, it will be the duty of the tax collector to issue to you a proper receipt therefor.

5. In arriving at the amount to be paid in taxes to the counties, the value of the land only shall be considered and not the value of any of the buildings and other improvements owned by the State and situated on said lands." In arriving at the value of these respective lands for taxation the tax assessor and board of equalization should eliminate from consideration the value of all buildings, fences, and such like improvements situated on such lands, and should take into consideration the value of the land only. It is our opinion, however, that such of these lands as are in actual cultivation may be valued as cultivated lands, that is, that in valuing these lands it would be proper to take

into consideration the fact that such lands are in an actual state of cultivation. Such of these lands as are not in cultivation, of course, should be valued only as raw land, or land in its natural state. These lands, of course, should not be valued higher than other similar lands in the county similarly situated but should be equalized in value with other lands.

6. We understand from your letters and certain enclosures by you that certain district taxes other than district bond taxes, such as school district maintenance taxes, have been levied and assessed against certain of these lands and that a question has been raised as to your right to pay the county taxes properly levied and assessed against these lands without the payment by you of such district taxes. Such assessments are not valid and you would not be authorized to pay same. The tax collector, therefore, would be authorized and it would be his duty to accept payment from you of such county taxes as have been properly levied and assessed against these lands, including certain tax collector's and county clerk's fees, if any, as hereinbefore explained, and to issue to you receipt for same without the payment by you of such district tax. (*Nalle vs. City of Austin*, 91 Texas, 424, 44 S. W., 66; *City of San Antonio vs. Berry*, 92 Texas, 319, 48 S. W., 496; *State vs. Hoffman*, 109 Texas, 133, 201 S. W., 653.)

7. We also understand that certain district taxes have been levied and assessed against certain of these lands on account of district bonds, such as school district, road district, levee district and drainage district bonds, issued by such district or districts at a time prior to the acquisition of such lands by the State for convict farm purposes, and that a question has been raised as to your right to pay the county taxes levied and assessed against these lands without the payment by you of such district bond taxes. The validity of the district taxes levied and assessed for these purposes is also in question and on the authority of the cases cited in the next preceding paragraph hereof, you are advised that you have the right to pay such county taxes as may have been properly levied and assessed against these lands, including certain tax collector's and county clerk's fees, if any, as hereinbefore explained, and that upon doing so it would be the duty of the tax collector to issue to you proper receipts therefor, without the payment by you of such district bond taxes. This will not, of course, in any way prejudice the collection of such district bond taxes if at any time it should be determined that you should pay them.

Yours very truly,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2429, Bk. 57, P. 352.

COLLECTION OF DELINQUENT TAXES—INTEREST AND PENALTIES,
WHERE THE ESTATE OF SUCH DELINQUENT TAXPAYER IS
PENDING IN THE BANKRUPT COURT.

1. The statutes governing bankrupt courts control the allowance and payment of taxes, interest and penalties. Held, taxes and interest are to be allowed, pen-

alties accruing subsequent to the institution of bankrupt proceedings not allowed and payment properly refused.

2. Property in the hands of bankrupt court is vested in the trustee. It becomes his duty to render such property in his name as trustee of the bankrupt estate, and if for any reason this is not done the tax assessor should place such property upon the tax rolls in the name of the bankrupt as unrendered property.

3. The bankrupt statutes make it the duty of the trustee in bankruptcy to pay all taxes and interest due by such bankrupt, but in the event such trustee fails or refuses to pay such taxes, the purchaser of such property takes it subject to the statutory and constitutional lien existing against such property for all unpaid taxes, interest, penalties and costs, just as though such property had been sold by the delinquent taxpayer prior to the institution of proceedings in the bankrupt court.

AUSTIN, TEXAS, May 6, 1922.

Hon. Lon A. Smith, Comptroller, Austin, Texas.

DEAR SIR: This Department is in receipt of your letters of April 11 and March 7, to which are attached letters from Mr. F. D. Coleman, Tax Collector of Morris County, and A. C. Calloway, Tax Assessor of Cass County. The above letters pertain to the collection of delinquent taxes where such delinquent taxpayer had been adjudged a bankrupt, and the following questions are submitted:

"First: Where penalties accrued subsequent to the institution of bankruptcy proceedings, should such penalties be allowed and ordered paid by the referee in bankruptcy?

"Second: Whose duty is it to render bankrupt stocks held in trust by the referee in bankruptcy on January 1st of each year?

"Third: Where bankrupt stocks are held in trust by the referee in bankruptcy on January 1st of each year and such bankruptcy is disposed of before the property is rendered for taxation for the current year, in this case who would be required to make rendition of such stocks?

"Fourth: In case there was no rendition made by the party having such stocks in charge on January 1st and it became necessary for the tax assessor to assess such property as being unrendered, in whose name should the property be assessed?

"Fifth: Where property has been sold through bankruptcy proceedings, would the taxes for this year follow such property?"

The questions submitted above will be discussed in the order in which they are submitted.

A penalty imposed for a failure to pay a tax prior to a time designated by the statutes has been held not to be a part of the original tax, but the courts are not in accord as to this proposition.

Under the Bankrupt Act, United States Compiled Statutes, 1918, Section 9648, providing that the court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality, in advance of the payment of dividends to creditors, taxes are placed in a class by themselves and are not preferred claims but stand ahead of preferred claims.

A State has a right to charge upon taxes not paid when due such interest as will make the payment when received equivalent to payment at the designated time for payment and thus interest is a part of the tax and entitled to priority of payment under Bankruptcy Act (Section 63, United States Compiled Statutes, 1918, Section 9648.)

The courts have properly made a distinction between "interest" and "penalties" accruing on delinquent taxes. Interest is ordinarily under-

stood as a charge for the use of money or damages for its detention or delay in payment, while a penalty as applied to the non-payment of taxes when due is the punishment imposed for failure to make a payment on time, and while interest on taxes not paid when due is a part of the taxes and entitled to priority of payment under Bankrupt Act, Section 63, United States Compiled Statutes, 1918, Section 9648, penalties are not a part of the taxes and are not entitled to be paid where the property was in the hands of the bankrupt court during the entire period when they accrued. It cannot be claimed that a penalty imposed for failure to pay a tax is a part of the original tax in the sense that interest is, and Section 64, *supra*, contains no provision for the payment of penalties; therefore, we do not think that it can fairly be construed to include them, especially when as here, the property was in the hands of the bankrupt court during the period when such penalties accrued.

It does not seem just nor to have been the intention of Congress that out of a delay in paying the tax caused by the bankruptcy proceedings the State should make a profit or exact a penalty at the expense of other creditors. For instance, the labor employed by the bankrupt. (Ashland, Emery and Corundum Company, 229 Fed., 829; Corpus Juris 7, page 307, footnote 37.)

The United States Constitution provides that Congress shall have power to establish "uniform laws on the subject of bankruptcies throughout the United States." The provision confers comprehensive power on Congress to legislate on the subject and constitutes a relinquishment of all control thereof on the part of the States. The Act applies alike in all the States and effectively nullifies all State laws which are in conflict with its terms.

Federal Reporter, 224, 525, in re Mater of Sage, the court held "that since the Bankruptcy Act confers upon courts of bankruptcy jurisdiction to adjudge private bankers bankrupt and to administer their property, this jurisdiction is not only paramount but is exclusive and State laws assuming to confer upon State officers or courts authority to administer the property of such bank are superseded and must give way when the bankruptcy act is properly invoked.

You are, therefore, advised that for the reason the statutes controlling proceedings of bankruptcy do not authorize the payment of penalties and the courts have held that same cannot be allowed that the referee in bankruptcy in the instant case correctly and with legal authority refused the payment of penalties accruing for the non-payment of taxes, where such penalties accrued after the property had passed from the hands of the delinquent taxpayer into the hands and control of the bankrupt court.

In discussing your second inquiry under the bankrupt statutes, the trustee of the estate of a bankrupt shall upon his appointment and qualification, be vested with the title of the bankrupt as of the date he was adjudged bankrupt, except in so far as it is to property which is exempt, and all the real and personal property belonging to such bankrupt, except that which is exempt which passed into the hands of a trustee who takes the same subject to all the rights that formerly existed against such property while in the hands of the bankrupt and where such property

is in the hands of the trustee in bankruptcy at the time it becomes the duty of the assessor of taxes to assess such property for taxes it would be the duty of the trustee to render same for taxes in the name of the trustee as trustee for the bankrupt, and if such trustee in bankruptcy failed or refused to render such property for taxation, it would then become the duty of the tax assessor to place such property upon the tax rolls in the name of the bankrupt as unrendered property.

We will not discuss inquiries numbers three and four, for the reason that the same are answered in number two.

In discussing inquiry number five, apparently you have in mind a case where the statement of facts are as follows:

That the property owner had assessed against his property certain taxes and prior to such taxes becoming due, he became a bankrupt and subject to the provisions of the statutes governing bankruptcy proceedings and prior to the taxes becoming due under the statutes of the State, such bankrupt and his affairs in bankruptcy had been adjudicated by the bankrupt court and he had received his discharge therefrom.

If we are correct in the above conclusion, you are advised that in our opinion, the purchasers of such property would take the same subject to the State's constitutional and statutory lien for taxes. The trustee should pay "all taxes owing by the bankrupt," and this would include the original tax and all other sums accrued thereon under the tax or revenue laws of the State up to the time the payment is actually made. 147 Fed., 276.

The bankruptcy of a debtor does not dissolve a pre-existing constitutional or statutory lien upon its property. Therefore, under the statutes of this State, as well as under the constitutional provisions, the State, county and other political subdivisions retain a lien against the property of the delinquent taxpayer for taxes, delinquent interest, penalties and the cost of collecting the same.

It is settled law that the bankrupt estate is taxable while it is in the hands of the bankrupt trustee. Taxes upon property in the hands of a trustee accrued since the proceedings were instituted do not fall within the strict letter of the law, but the Bankruptcy Act does not withdraw the estates of bankrupts from the reach of the taxing power and they are subject in consequence to the payment of taxes imposed while in the hands of the trustee.

148 Fed., 907.

241 U. S., 588.

220 Fed., 441.

109 Fed., 131.

Since it is true that property of the estate is not withdrawn for taxation by the bankruptcy but remains subject to taxation while in the trustee's hands; also that taxes assessed upon it after the bankruptcy, though never due, are owing by the bankrupt, are to be treated by the court as preferred claims.

Swarts vs. Hammer, 120 Fed., 256.

Re: Prince and Walter, 131 Fed., 546.

The manifest intent of the law is that while the estate is in the hands of the trustee his custody shall not constitute a barrier to prevent the

collection of taxes which would be collectible under the law, if the property had remained in the possession and control of the bankrupt himself.

100 Fed., 268.
242 Fed., 1005.

Under our present Bankruptcy Act, a discharge is defined as "the release of a bankrupt from all of his debts which are provable in bankruptcy except such as are excepted by this act."

The above exceptions are made in the United States Compiled Statutes, 1918, Chapter 4, Section 9601, page 1552, in the following language: "A discharge in bankruptcy shall release a bankrupt from all of his probable debts except such as are due as a tax levied by the United States, the State, county and district or municipality in which he resides."

From this statutory provision, we are of the opinion that where property has been sold through bankruptcy proceedings and the taxes for that allowed remain unpaid, that the right of the State, county, district or municipality to whom such taxes were due would have the right to look to such property for the satisfaction of the taxes due.

Very truly yours,

C. L. STONE,
Assistant Attorney General.

Op. No. 2425, Bk. 57, P. 366.

COLLECTION OF DELINQUENT TAXES BY TAX COLLECTOR OF
INDEPENDENT SCHOOL DISTRICT—LIABILITY OF PERSONAL
PROPERTY FOR SUCH TAXES—LEGAL LEVY—PERSONAL
PROPERTY NOT REDEEMABLE AFTER BEING
SOLD FOR TAXES.

1. Failure of member of board of equalization to take oath does not invalidate the action of the board.
2. Tax collector of independent school district should not levy upon personal property that has been disposed of since same was assessed for taxes if such delinquent taxpayer had other property subject to the payment of such taxes. However, such disposal does not defeat the tax lien which was attached at the time such property was assessed.
3. Any property belonging to a delinquent taxpayer is subject to the enforcement of the constitutional lien for taxes regardless of when acquired except the homestead is only liable for the taxes due on such homestead.
4. A party who formerly had personal property assessed for taxation in an independent school district, but thereafter removed such property from such independent school district is still liable for such tax and the same can be collected as is authorized in Article 7628.
5. Personal property cannot be redeemed after the same has been sold for taxes.
6. The tax collector would have to take property in his possession thereby having power and control of such property to constitute a legal levy.
7. The tax collector of an independent school district is not required to have an order from the board of trustees authorizing him to collect delinquent taxes due such school district.

AUSTIN, TEXAS, April 8, 1922.

Hon. A. S. McKee, County Attorney, Jasper, Texas.

DEAR SIR: Your letter of January 31st addressed to the Attorney General has just recently been referred to me for attention. In your letter of above date you submit the following inquiries:

"1. Will the fact that one member of the board of equalization fails to take oath invalidate action of the board?

"2. Can collector of independent school district levy upon personal property that has been transferred since taxes were assessed, if original owner has other property?

"3. If 'A' sells personal property after same has been assessed for taxes, and later trades same to 'B' for other personal property, can collector levy upon 'A's' new acquired property and sell same for his taxes?

"4. 'A' while living within school district renders personal property for school taxes, afterwards moves out of school district, or out of county and carries property with him. How may collector proceed to get taxes?

"5. Has property owner the right to redeem personal property after same has been sold for taxes?

"6. If collector levies upon personal property, is it necessary for him to take same in his possession, or may same be left in hands of owner until sales day?

"7. Is an order of school board necessary for tax collector to make levies upon personal property?"

The questions above propounded will be discussed in their order of submission.

A board of trustees for independent school districts is provided for in Article 2853, Complete Texas Statutes, 1920, such board to be vested with the full management and control of the free schools of such independent school district, including power and manner of taxation for free schools that are conferred by the laws of this State upon the council or board of aldermen of incorporated cities or towns. That we might better understand just what powers are vested in the board of trustees it is necessary to determine what authority and powers are vested in the council or board of aldermen of incorporated cities and towns.

The provisions made in Article 945, Complete Texas Statutes, 1920, authorizes the board of aldermen or the city council of the various cities and towns of this State, incorporated under the general laws, annually at their first meeting, or as soon thereafter as practicable, to appoint three commissioners, each being a qualified voter and a resident and property owner of such city or town for which he is appointed, such board to be styled "The Board of Equalization."

Article 951 provides for the meetings of the board of equalization to hear all persons with reference to the value of their property as indicated by the assessment rolls of such independent school district. This equalization board has power to raise or lower the assessed valuation of the taxpayers' property.

Article 953 makes the acts of said board provided for in Article 951 final and shall not be subject to revision by said board or by any other tribunal thereafter.

Article 955 requires the members of said board, before entering upon their duties, to be sworn by any officer authorized by law to administer oaths, to faithfully and impartially discharge all such duties incumbent upon them by law. "Cyc," Volume 37, page 1086, lays down this ruling:

"If the officer, or a majority of those acting as a board of equalization, do not possess the statutory qualifications or have no legal title to their office, the actions of the officer or board will be void; but it is otherwise where this objection applies only to one member or to a minority, in which case no objection can be raised to the action of the board in any collateral proceeding. Although the members of the board are required to be sworn, their official actions are not invalidated by the fact that the records fail to show that they took the oath of office."

The above rule is supported by the following authorities:

Texas Pacific Ry. Co. vs. Harrison County, 54 Texas, 119.
 State National Bank vs. Memphis, 94 S. W., 606.
 Bratton vs. Johnson, 45 N. W., 412.
 State vs. Buchanan County Board of Equalization, 18 S. W., 782.
 Mena Real Estate Co. vs. Cooner, 58 Atlantic, 918.

You are therefore advised that we are of the opinion that the failure of one member of the board of equalization to take the oath would not invalidate the action of such board.

Second. In view of Articles 957, 958, 961, 7626 to 7628, and Article 2853 conferring power of taxation on trustees of independent school districts, and such independent school district acquired a lien on personal property within the district, and the fact that such owner and delinquent taxpayer had disposed of such property since the same was assessed, at which time the lien attached, would not prevent the tax collector of such independent school district from levying upon and selling same to satisfy the taxes due by such delinquent taxpayer, as a subsequent purchaser or owner acquired such property subject to the lien in favor of the independent school district. However, if the delinquent taxpayer owned other property other than his homestead it would be a better practice to levy and sell such other property. The provisions made in Article 3738 may not be deemed applicable to the collection of delinquent taxes. However, such article does provide that "property which the judgment debtor has sold, mortgaged or conveyed in trust shall not be seized in execution, if the purchaser, mortgagee or trustee shall point out other property of the debtor in the county sufficient to satisfy the execution." Notwithstanding the fact that the Supreme Court in the case of Mission Independent School District vs. Armstrong, 222 S. W., 201, held that where a purchaser under deed of trust took the property subject to the right of the district to its collector to enforce collection by levying on and advertising the property for sale to satisfy the lien.

We are of the opinion that in keeping with the common rules of right and justice, as well as the rule of law and equity, that the tax collector of such independent school district should levy on other property, if such delinquent taxpayer owns same, and provision is made in Articles 7627 and 7630 making all real and personal property held or owned by any person in this State liable for State and county taxes, except those specifically exempted in Article 7627, and Article 7693 makes the provisions of Articles 7627 and 7630 available to incorporated cities, towns and school districts for the enforcement and collection of delinquent taxes due such city or independent school district.

You are therefore advised that we are of the opinion that the tax collector for an independent school district should levy upon and sell

all other property held or owned by such delinquent taxpayer before proceeding to levy upon and sell the personal property theretofore disposed of by such taxpayer.

Mission Independent School District vs. Armstrong, 222 S. W., 201.

Crawford vs. Koch, 125 N. W., 339.

Carswell & Co. vs. Habberzettle, 37 Texas Civ. App., 494; 87 S. W., 911.

37 Cyc., 1142.

Third. We do not understand just how "A" could sell personal property thereby parting title with and possession of said property and thereafter trading the same property to "B" for other property unless "A" again acquired title to such property. However, in this discussion that is immaterial but since Article 7630 makes all property, real and personal, held or owned by any person in this State liable for all taxes due by the owner thereof, except the homestead which is only liable for the taxes due on such homestead, and Article 7630 further authorizes the collector of taxes to levy on all personal or real property to be found in his county to satisfy all delinquent taxes, any law to the contrary notwithstanding.

The above liability for the payment of taxes created by the provisions of Article 7630 deals with State and county taxes, but Article 7693 makes the provisions of Article 7630 available to incorporated cities and towns, also to independent school districts for the enforcement and collection of delinquent taxes due such city, town or independent school district.

You are therefore advised that it is our opinion that any property subject to the payment of such delinquent taxes, regardless of when acquired, would be subject to levy and sale by the tax collector of such independent school district in satisfaction of the delinquent taxes due such district.

Fourth. As heretofore indicated, an incorporated city or town or independent school district enjoys the same legal rights and authorities to enforce the collection of delinquent taxes as are conferred by our statutes upon the county and State. Then if this be true, it necessarily follows that under the provisions of Article 7628 the collector of taxes for an independent school district would be authorized to make out from the assessment list a true and complete list or schedule of the taxes due by such person, the same to be certified under the official seal and signature of such collector, and then forward the same to the collector of taxes of any county or counties where he has reason to believe that such delinquent taxpayer has property of any description, and it would be the duty of such tax collector on receipt of such list or schedule to at once proceed to the collection of such taxes by seizure and sale of such property liable therefor in the same manner as if said tax were originally assessed and due in his county, and to thereafter report to the collector from whom said list was received the taxes so collected by him.

Fifth. You are advised that we know of no statutory provision authorizing the redemption of personal property after same has been sold for payment of delinquent taxes.

Sixth. It is rather difficult to determine from this question as to what it would take to constitute a levy as we are not advised as to

whether the levy is to be made on real or personal property. If such levy was to be made on real property it would not be necessary for the officer to go upon the ground but would be sufficient for him to endorse such levy on the writ in a way sufficient to identify the real estate levied upon. (Art. 3739.)

The word "levy" when employed in relation to a public tax has reference rather to the collection than to the assessment of such tax. One of the legal definitions of the word "levy" given by Webster is: "The taking or seizure of property; the execution to satisfy judgment or on warrant for the collection of taxes." Words and Phrases, Volume 5, page 4103.

The legal definition of the word "levy" is to have the property within the power and control of the officer.

Cary vs. German American Insurance Co., 54 N. W., 18; 20 L. R. A., 267; 36 Am. St. Rep., 907. (Quote, Boviers Law Dictionary).
Words and Phrases, Vol. 5, page 4103.

The term "levy" in its legal significance means taking possession of. Burchell vs. Green, 27 N. Y. Supp., 82. To constitute a levy on personal property the officer must assume dominion over it. He must not only have a view of the property but he must assert his title to it so as to render himself chargeable as a trespasser. Craft vs. Memphis, 96 Atl., 447.

Our statutes by Article 3740 provide that "a levy upon personal property is made by taking possession thereof, when the defendant in execution is entitled to the possession; where the defendant in execution has an interest in personal property, but is not entitled to the possession thereof, a levy is made thereon by giving notice thereof to the person who is entitled to the possession, or one of them when there are several."

Sayles' Practice, pp. 795-7, 1204.
Summer vs. Crawford, 41 S. W., 994.
Sutton vs. Gregory, 45 S. W., 932.
Kressler vs. Half, 51 S. W., 48.
Davis vs. Jones, 75 S. W., 63.
Hubert vs. Hubert, 102 S. W., 948.
Jones & Nixon vs. First State Bank of Hamlin, 140 S. W., 116.
Needham vs. Conney, 173 S. W., 797.
Kimbrough vs. Bevering, 182 S. W., 403.
Burch vs. Mounts, 185 S. W., 889.

Article 3741 to Article 3744, inclusive, further defines the manner in which levies are authorized to be made. However, if such property levied upon belonged exclusively to the person against whom the enforced collection of the delinquent taxes is attempted to be made, we are of the opinion that it would be necessary to take such personal property into actual possession of the party making such levy before it would legally constitute a levy and we are of the further opinion that this would also be true of community property, and you are so advised.

Seventh. We are of the opinion that it would not be necessary for the school board to pass an order authorizing the tax collector to levy upon property in the enforcement of the collection of delinquent taxes as this is not required by the board of aldermen or council of incorporated cities and towns in this State and we have heretofore seen that inde-

pendent school districts under the provisions of Article 2853 vests in the trustees of an independent school district all the rights, powers and authority as are conferred by the laws of this State upon the council or board of aldermen of incorporated cities or towns and you are therefore advised that it would not be necessary for the board of trustees to pass an order instructing or authorizing the tax collector to make levy upon property in independent school districts for the purpose of collecting delinquent taxes due such independent school district.

Yours very truly,

C. L. STONE,
Assistant Attorney General.

Op. No. 2300, Bk. 55, P. 243.

TAXATION—EXEMPTION OF FARM PRODUCTS—WORDS AND PHRASES—
“IN THE HANDS OF PRODUCER.”

Farm products in the hands of the producer are subject to a tax levied by operation of a statute which has been adopted by two-thirds vote of all the members-elect of both houses of the Legislature.

A farmer or producer of farm products holding a legal title to such products is not required to pay taxes under existing law.

“In the hands of producer” defined.

AUSTIN, TEXAS, March 1, 1921.

Hon. Geo. B. Terrell, Commissioner of Agriculture, State Office Building.

DEAR SIR: The Attorney General's Department received your inquiry of February 19, which reads as follows:

“The question at point is: when do farm products cease to be exempt from taxation, if at all, and when do farm products become subject to taxation, if at all?”

In reply to this inquiry, the writer calls your attention to Section 19, Article 8 of the Constitution, which section was adopted October 14, 1879, and which reads as follows:

“Farm products in the hands of the producer, and family supplies for home and farm use, are exempt from all taxation until otherwise directed by two-thirds vote of all the members-elect of both houses of the Legislature.”

The adoption of the foregoing amendment to the Constitution of 1876 simply carries out the policy which has always found a place in the various constitutions of Texas of relieving farmers and those engaged in agricultural pursuits from the burden of taxation. Section 27, Article 7 of the Constitution of 1845 permits the Legislature to exempt by two-thirds vote whatever property it may deem necessary. The proviso that no occupation tax shall be levied against those engaged in agricultural pursuits is contained in the same section and also finds a place in the Constitution of 1866 in Section 19, Article 11. As the Constitution of 1876 was originally written, there was no provision whereby a vote of two-thirds of the members-elect of both houses could exempt farm products or any other property. It was therefore quite natural for Section 19 to be added to Article 8 by an amendment which was declared adopted in 1879.

There are two reasons why farm products in the hands of the producer are exempt, and that is by virtue of Section 19 above quoted, and for the second reason that there has been no statutory enactment levying taxes upon farm products in the hands of the producer which has passed both houses by two-thirds vote. Article 7503 of the Revised Statutes of 1911 declares that:

"All property, real, personal or mixed, except such as may be hereafter expressly exempt, is subject to taxation."

This statute has not been passed in accordance with the provisions of Section 19 of the Constitution, that is by two-thirds vote, and consequently does not apply to the taxation of farm products in the hands of the producer. 69 Tex., 404.

The status, therefore, of farm products in the hands of the producer is that they are exempt from taxation so long as they remain in the hands of the producer and so long as the Legislature does not see fit to levy a tax thereon by a vote of two-thirds of the legislative body.

Farm products, however, become taxable when they are no longer in the hands of the producer, and they likewise would become taxable when the Legislature sees fit by two-thirds vote to so tax. We presume, however, that you are interested in the question only as to when farm products are said to be "in the hands of the producer" and at what time do they cease to be so held as to come under the general taxing statute. We have been unable to find any case cited by the Texas courts defining either farm products or the term "in the hands of the producer," but in arriving at the proper definition of this phrase, we must follow the constitutional construction which gives the words used their ordinary meaning, free from forced or unnatural construction, and use them as was contemplated by the framers of the Constitution. 52 Tex., 59; 90 Tex., 340; 95 Tex., 507. The framers of the Constitution must be understood to have employed these terms in their natural sense and to have intended what they said, and the plain language must be looked to in order to arrive at the constitutional exemption of farm products from taxation. Dallam, 473, 396; 96 Tex., 586; 87 S. W., 669.

In order to arrive at the proper definition of the phrase, "in the hands of the producer," it is well to ascertain a general definition of the term "farm products." In an academic sense it might be said that farm products, directly or indirectly, include all products of the soil, but in the first place the term "farm products" must be construed in contradistinction with manufactured or industrial production. The term must be used and construed as it was known to the customs and usages of the people at the time it was written into the Constitution. In this connection it has no exact or technical meaning. In determining, therefore, as to what is included in the term "farm products" as such term was commonly used at the time it was written in the Constitution, we conclude that the term "farm products" includes those farming or agricultural products which were produced upon the farm and which were prepared for use in society by the labor of those engaged in agricultural or farming pursuits. The test is that the product must have had its situs of production on a farm and prepared for use by one engaged in agricultural or farming pursuit. When this is applied, it will not be difficult

to arrive at what is included within the term and what should be properly excluded. 54 Am. Rep., 275; 28 So., 775; 40 S. E., 60.

The framers of the Constitution provided that such farm products, so long as they were in the hands of the producer, would be exempt from taxation unless a two-thirds majority of the Legislature otherwise declared. In other words, the Legislature in removing the exemption would have to act with a larger majority than is ordinarily provided. The exemption, of course, is not absolute, but there is a substantial deterrent to setting aside the exemption from taxation mentioned in the section.

But this exemption does not apply when the farm products are not in the hands of the producer. When can a farm product be said not to be within the hands of the producer? The phrase, "in the hands of the producer," is a metonymyous figure. It is the use of a characteristic to express an idea. It is colloquial and familiar to the average man. Therefore it cannot be said that there must be physical contact with the hands and the farm product; nor do we think that the farm products must be in the actual physical possession of the farmer or agricultural producer, and it might occur that a farmer may have physical possession and custody of farm products, yet it cannot be said that such are farm products in the hands of the producer within the meaning of the constitutional provision. 138 Mass., 14, 30 Atl., 140. In short, the framers of the Constitution in using the words "in the hands of the producer" did not intend to require actual physical possession. We would think that farm products which have been left with another for safe-keeping, or which are in the hands of an institution whose purpose is to store and protect such products, are still in the hands of the producer. The term "in the hands of the producer" was used by the framers of the Constitution in the sense that the legal title to such products was in the producer. The term was not used, however, in our opinion, as has been said by some courts, to describe a relationship of debtor and creditor, for such rule of construction is not applicable to farm products.

In considering farm products which have been placed in a public warehouse and against which negotiable or non-negotiable receipts may be issued, we call your attention to the provisions of Article 782 $\frac{1}{2}$ tt and u in order to ascertain when the legal title passes when a negotiable or non-negotiable receipt has been issued by a warehouseman. In the first instance, when a negotiable receipt has been duly negotiated as the term negotiation is described in the Uniform Warehouse Receipts Act passed at the Regular Session of the Thirty-sixth Legislature, the title to such products is vested by this statute in the person to whom the negotiable receipt has been negotiated and in the case where there has been transferred a non-negotiable receipt, the person to whom such receipt has been transferred acquires thereby the title to the goods subject to the terms of any agreement with the transferrer. Even prior to the enactment of the foregoing mentioned Uniform Warehouse Receipts Act, it has been held that even in case of assignment under Article 308, Revised Statutes of 1911, the receipt vested title to the property in the warehouse in the transferee or assignee. 143 S. W., 1142.

However, in ascertaining in whom the legal title to such products rests where there has been issued a negotiable or non-negotiable receipt by a warehouse, there must be an actual negotiation of such receipt as is described in the Warehouse Receipts Act, and the fact that there has been a pledge of such receipt as collateral and in the other manners which such receipt may be pledged is not a negotiation which effects the divesting of title to the property out of one and the vesting in another.

It is therefore the opinion of this Department, and you are so advised, that farm products, the legal title to which is in the producer, are exempt from taxation so long as the Legislature fails to directly tax such property by a vote of two-thirds of both houses of the Legislature. When the legal title to farm products vests in another than the producer, then such products are taxable as is now required by law.

The purpose of this opinion is not to pass upon every question that might arise as to the taxation of different articles, for it is patent that there are many circumstances and facts which would require the application of different principles, but it is sought here only to arrive at a general rule to apply in ascertaining when farm products are taxable and when they are not.

Respectfully,

WALACE HAWKINS,
Assistant Attorney General.

Op. No. 2351, Bk. 56, P. 520.

TAXATION—EXEMPTIONS—PROPERTY OF AN IRRIGATION DISTRICT.

1. Property owned by an irrigation district within the proper scope of its purposes and creation is not subject to taxation.
2. Water furnished to irrigate land in an irrigation district is not taxable as against the owner of the land separate and apart from the land itself.

AUSTIN, TEXAS, June 6, 1921.

Hon. W. A. Hadden, County Attorney, Fort Stockton, Texas.

DEAR SIR: I have yours of May 21, 1921, addressed to the Attorney General, reading as follows:

"The commissioners court sitting as a board of equalization has asked me to write you as county attorney for an opinion on following question that has come up before them:

"Certain farmers living near here have voted their lands into an irrigation district as provided for under the statutes, taxing the land and their property to purchase the water system carrying the water to their land from Comanche Springs rising near here. The court has attempted to tax the water, and have also taxed their lands valued with the water right, and wish to know if they can do this. They are satisfied as to taxing the land, but wish to know can they tax the water system, canals, etc., carrying the water to the lands. The land irrigated and the water system is owned by them.

"Last year the water system was owned by individuals and made a charge to the farmers for their water, since then they have voted themselves into this district, and the question now arises can they levy a tax separate on the water from the land?"

I assume the irrigation district about which you inquire is organized under what is now Chapter 2 of Title 73 of Vernon's Complete Texas Statutes of 1920.

The Constitution of Texas, Article 8, Section 2, provides that the Legislature may, by general laws, exempt from taxation public property used for public purposes. Pursuant to this authority, the Legislature has enacted Article 7505 of the Revised Civil Statutes of 1911, subdivision 5 of which, in so far as is material, provides that "all property, whether real or personal, belonging exclusively to this State, or any political subdivision thereof, shall be exempt from taxation."

Thus, it appears that if an irrigation district of the kind under consideration is a "political subdivision" of the State within the meaning of this exemption statute, then the property properly belonging to such district is exempt from taxation.

An examination of the statute authorizing the creation of these districts, above cited, discloses that they are created upon a petition signed by fifty holders of title or evidence of title to land situated within the proposed district, or by a majority of such persons and upon an election called for the purpose of determining whether such district shall be created. Among other things, the question is to be determined by the commissioners court whether the district would be a public benefit or a public utility. The district established may sue and be sued, and the courts shall take judicial knowledge and notice of the establishment of such district, and the boundaries thereof, and such district shall contract and be contracted with in the name of such district. The district is empowered to own and construct reservoirs, dams, wells, canals, etc. and to acquire the necessary rights-of-way, laterals, sites for pumping plants and all other improvements required for the irrigation of the lands in such district. The district has the right of eminent domain and the power of taxation.

We have examined into the meaning of the expression "political subdivision of the State" as judicially defined, and have arrived at the conclusion that within the meaning of the tax exemption clause of our Constitution and statutes, an irrigation district organized under the law above discussed is a political subdivision of the State, and that property owned by such district within the legitimate scope of its purposes and creation is exempt from taxation. In exercising the power of eminent domain and taxation, such a district performs a governmental function and exercises sovereign power. It is an instrumentality of the State government and performs a public service. We believe it to be within the spirit and letter of our exemption laws to exempt property of this kind from taxation.

You further request an opinion as to whether the water is taxable separate and apart from the land.

Article 7504 provides 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 whatever kind thereon, and all the rights and privileges belonging or in anywise appertaining thereto, and all mines, minerals, quarries and fossils in and under the same."

It is the opinion of this Department that the water furnished to the owner of the land is not taxable separate and apart from the land itself. The right to such water for irrigation purposes is contemplated by the words of the statute "rights and privileges belonging or in any wise appertaining thereto." This water right, of course, could be and doubtless is taken into consideration in arriving at the value of the land, but when the land is valued and taxed, the water right is also valued and taxed.

Very truly yours,
L. C. SUTTON,
Assistant Attorney General.

Op. No. 2368, Bk. 56, P. 516.

TAXATION—BOOKS AND RECORDS OF AN ABSTRACT OFFICE.

The books and records of an abstract office are subject to taxation in this State.

AUSTIN, TEXAS, July 2, 1921.

Hon. Brady P. Gentry, County Attorney, Tyler, Texas.

DEAR SIR: I have yours of the 27th ultimo, reading as follows:

"Please advise me whether the records of an abstract office are subject to taxation."

Our State Constitution declares that:

"All property in this State, whether owned by natural persons or corporations other than municipal shall be taxed in proportion to its value, which shall be ascertained as may be provided by law." (Art. 8, Sec. 1.)

The Revised Civil Statutes, Article 7503, declares that:

"All property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed."

The Constitution contains certain exceptions and exemptions from taxation and authorizes the Legislature to provide for others, but neither the Constitution nor the statutes have exempted from taxation abstract books and records.

The writer finds no decisions of the courts of this State passing upon this question.

In an early case in the State of Michigan it was held that abstract books were not subject to taxation in that State. *Perry vs. Big Rapids*, 67 Mich., 146; 34 N. W., 530; 11 A. S. R., 570. The court in this case followed the doctrine laid down in a former case in the State of Michigan, holding that abstract books are of no inherent value, and for that reason are not subject to execution as property. *Dart vs. Woodhouse*, 4 Mich., 399; 29 Am. Rep., 544.

The text in 1 R. C. L., page 90, under which these two cases are cited is as follows:

"In one of the earlier cases the court adopted the view that abstract books have no inherent value, and therefore are not subject to execution as property,

and this decision was adhered to in a later case in the same jurisdiction, holding that such books are not taxable."

Following this language, the compilers of Ruling Case Law state that:

"The weight of authority, however, as well as sound reasoning, supports the view that abstract books are property with all the usual incidents of other property, and as such may be seized under execution against the owner, and are subject to taxation."

Under this proposition the following cases are cited:

Washington Bank vs. Fidelity Abstract, Etc., Co., 15 Wash., 487, 46 Pac., 1036, 55 A. S. R., 902, 37 L. R. A., 115.

Leon Loan & Etc. Co., vs. Equalization Board, 86 Ia., 127, 63 N. W., 94, 41 A. S. R., 486, 17 L. R. A., 199.

Booth, Etc., Abstract Co. vs. Phelps, 8 Wash., 549, 36 Pac., 489, 40 A. S. R., 921, 23 L. R. A., 864.

The decisions above cited of the Michigan court are based upon the theory that a set of abstract books are nothing more than the unpublished manuscript of an author, valuable only on account of its literary contents, and that it belongs to the unleviable class of property such as a patent right or copyright. Commenting upon the case of Dart vs. Woodhouse, supra, the compilers of Ruling Case Law, at page 90, say:

"The reasoning of the court in this case is ingenious but unsatisfying."

And Mr. Freeman, in his work on Executions, Section 110, referring to the Dart case, says:

"The reasoning of this decision does not seem irresistible. In a set of abstract books, or in any other manuscript, we see nothing intangible—nothing which makes it difficult to subject them to execution."

In Leon Loan & Abstract Company vs. Equalization Board, supra, the Supreme Court of Iowa said:

"The revenue law of the State makes certain exemptions of property from taxation, but there is no claim that they embrace books of this character. By Section 801 of the Code it is provided that 'all property, real and personal, is subject to taxation in the manner directed.' These books are personal property. They embody the qualities of such property in a marked degree. Then why are they not taxable?"

In the Booth vs. Phelps case, cited above, the Supreme Court of the State of Washington directed attention to the fact that the Constitution of that State provided that the Legislature should provide by law a uniform and annual rate of assessment for taxation on all property in the State according to its value in money, and that the statutes of that State declared that all real and personal property in the State, and all personal property of persons residing therein, and the property of existing corporations, or thereafter to be created, except such as was expressly excepted, was subject to taxation. The court then used this language:

"We are of the opinion that the property was subject to taxation. The fact that it requires the services of an expert to obtain the necessary information from the books may detract from their value in a general sense but would not deprive them of all taxable value."

The Washington Bank vs. Fidelity Abstract & Surety Company case, supra, held that books and maps containing a record of the late titles in

a certain county in the State of Washington, which had been mortgaged to secure a loan, might be sold in case of default in payment, although the abstract and indices were prepared by the mortgager and have no value unconnected with the right to use them. In deciding the case, the court refused to follow the *Dart vs. Woodhouse* case, decided by the Michigan Supreme Court and cited above in this opinion.

In line with the weight of authority, this Department is of the opinion that abstract books and records are property and are subject to taxation in this State.

Yours very truly,
L. C. SUTTON,
Assistant Attorney General.

Op. No. 2430, Bk. 57, P. 359.

TAXATION—CORPORATIONS, FOREIGN—TANK CARS—
GROSS RECEIPTS TAX.

1. A foreign corporation owning oil tank cars which have acquired a situs in this State for ad valorem tax purposes, cannot claim exemption from ad valorem taxes thereon by reason of the fact that such corporation has paid the gross receipts tax provided for in Article 7373, Revised Civil Statutes, the latter being an occupation tax and not an ad valorem tax.

AUSTIN, TEXAS, May 5, 1922.

Hon. E. L. Fulton, County Attorney, Wichita County, Wichita Falls, Texas.

DEAR SIR: Yours of the 12th instant, addressed to Attorney General Keeling, has been referred to me for reply. Your communication reads as follows:

"As county attorney of Wichita County, I am reliably informed that certain foreign corporations having refineries and casinghead gas plants in this county, and owning tank cars, will institute suit at an early day to restrain the levy and collection of what is claimed by them to be unjust, burdensome and double taxes.

"One of the large companies own several hundred tank cars which, it is claimed, are used exclusively in interstate commerce, that is, the cars will be sent to Burkburnett, loaded there with casinghead gas and billed out to points in New Jersey, or to Los Angeles, California, where the principal output from this plant is sold. Now this company claims that under Article 7373 it has paid the gross receipt tax of 3 per cent there provided for upon that portion of the mileage in Texas consumed in the entire journey to destination; that is, the railroad company allows this refining company a deduction of three-fourths of one per cent per mile for the use of its tank cars, this being deducted from the freight charge and the mileage actually traveled on Texas railroad, or 3 per cent thereof is paid to the Comptroller in the way of gross receipts. Now, this company claims that this tax should be, and in law must be exclusive of all other taxes except, of course, its franchise tax for a permit to do business in the State, etc.

"I notice that Article 7373 referring to sleeping and dining car companies expressly provides 'The tax herein provided for shall be in lieu of other taxes, etc.' The commissioners court of this county insists upon its right to have these tank cars rendered for the county and State ad valorem taxes, irrespective of the fact that the gross receipt tax above referred to is paid.

"Now, I observe that Article 7373 only applies to persons and companies residing without the State of Texas or incorporated under the laws of any other

State, etc., very clearly exempting Texas corporations. It is claimed that the Texas corporations render their cars for taxes just as any other property is rendered and escape the payment of this gross receipt tax, and if the cars of this foreign corporation are rendered locally for ad valorem taxes, then (and everyone must agree to this) the payment of the gross receipt tax provided for by Article 7373 is greatly in excess, and this much in excess of what the domestic corporations are required to pay.

"Since important litigation will result unless some agreement can be reached between these companies and the local authorities, I desire an opinion fully covering this situation.

"The corporation referred to intimates that it is willing to pay either the ad valorem tax or the gross receipt tax, but not both, and this naturally brings about a conflict between the interests of the State and the county, because, if only the ad valorem tax is paid, the county will share in this with the State; whereas, if the gross receipt tax only is paid, the county will receive nothing.

"I will appreciate a prompt reply to this letter, together with the citation of authorities bearing upon the point, and remain, etc."

The question presented is whether a foreign corporation paying the gross receipts tax levied by Article 7373, Revised Civil Statutes, can also be called upon to pay ordinary ad valorem taxes on its tank cars in this State.

The Constitution of the State of Texas requires "all property in this State, whether owned by natural persons or corporations," to be taxed "in proportion to its value, which shall be ascertained as may be provided by law." Art. 8, Sec. 1. The same section authorizes the Legislature to impose occupation taxes and income taxes upon natural persons and private corporations.

The Constitution, it is true, authorizes the Legislature to exempt certain kinds of property from taxation (see Sec. 2, Art. 8), but the enumeration of authorized exemptions does not include tank cars of a foreign corporation. Nor do the statutes purport to expressly exempt such property from ad valorem taxes.

Of course, if the gross receipts tax hereinbefore mentioned is in reality an ad valorem tax, it would probably be reasonable to conclude that double ad valorem taxation was not intended and that the gross receipts tax is exclusive. But the statutes do not seem to justify the assertion that the gross receipts tax is a method of taxing tank cars according to their value. The statute calls it an "occupation tax." The Constitution, as before indicated, expressly authorizes the Legislature to impose occupation taxes as well as ad valorem taxes. Article 7373 reads as follows:

"Each and every individual, company, corporation, or association, residing without the State of Texas, or incorporated under the laws of any other State or territory, or nation, and owning stock cars, refrigerator and fruit cars of any kind, tank cars of any kind, coal cars of any kind, furniture cars or common box cars and flat cars, and leasing, renting or charging mileage for the use of such cars within the State of Texas, shall make quarterly; on the first days of January, April, July and October of each year, and report to the Comptroller of Public Accounts under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the amount of gross receipts from such rentals, or mileage, or from other sources of revenue received from business done within this State, during the quarter next preceding. Said individuals, companies and corporations, and associations, at the time of making said report, shall pay to the Treasurer of the State of Texas an occupation tax for the quarter beginning

on said date equal to three per cent of said gross receipts as shown by said report."

Even if there were no other statutory laws on the subject, we believe it would be doubtful whether it could be plausibly contended that there is disclosed a legislative intent that the tax imposed is an ad valorem tax as distinguished from an occupation tax. The Constitution distinguishes between the two, and authorizes both, and hence if the legislature had intended it to be an ad valorem tax it is reasonable to suppose it would not have used the expression "occupation tax."

However this may be, the statute itself, in another article, makes clear the legislative intent and dispels all doubt. Article 7390, which is a part of the same chapter and title of the Revised Civil Statutes as Article 7373 imposing the occupation tax, is as follows:

"Except as herein stated, all taxes levied by this chapter shall be in addition to all other taxes now levied by law; provided, that nothing herein shall be construed as authorizing any county or city to levy an occupation tax on the occupations and business taxed by this chapter."

This provision makes clear that the occupation tax imposed by Article 7373 is in addition to all other taxes now levied by law; and even a casual examination of the statutes shows that other taxes, to wit, ad valorem taxes, have been levied against such property as tank cars. See Chapter 11, Title 126, Revised Civil Statutes.

So much for the legislative intent. Granting that it was the intention of the Legislature to impose both occupation and ad valorem taxes against the same foreign corporation, does it follow that the attempt is unconstitutional? We think not. Neither Federal nor the State Constitution inhibits this kind of double taxation (if it can be called double taxation); the latter expressly authorizes it.

It has been repeatedly held that a State may impose an excise upon a certain act and at the same time impose a property tax upon the property used in the performance of the act. 26 R. C. L., pages 265, 266.

Even if it should be held that the gross receipts act is unconstitutional, it is difficult to perceive how this fact would affect the validity of the ad valorem tax law, and for this reason we consider it unnecessary to pass upon the constitutionality of the former. We are of the opinion that the Legislature, in passing the gross receipts occupation tax law under consideration, did not intend to supersede the ad valorem tax statutes as applied to such tank cars as are mentioned in Article 7373. This being the case the ad valorem tax law stands irrespective of the fate of the gross receipts statute. This, of course, means that we are of the opinion that the tax levied by Article 7373 is not an ad valorem tax on tank cars.

We advise you, therefore, that in our opinion such of these tank cars as have acquired a situs in this State are taxable according to their value, and this in addition to any taxes the foreign corporation owning them may have paid, or will be required to pay under Article 7373, Revised Civil Statutes.

Very truly yours,
L. C. SUTTON,
Assistant Attorney General.

Op. No. 2343, Bk. 56, P. 524.

TAXATION—DELINQUENT TAXES—FEES OF COUNTY ATTORNEY—
JUDGMENT—CONCLUSIVENESS OF.

1. The county attorney is not entitled to commissions upon amount of delinquent taxes collected for the State and county, the fees provided in the delinquent tax statutes being exclusive.

2. That portion of a judgment in an ordinary suit for delinquent taxes, penalties, interest and costs, reciting that the county attorney shall receive commissions on the amount recovered, is void and is not binding on the county tax collector or the State Comptroller of Public Accounts. R. C. S., Arts. 363, 7688a.

AUSTIN, TEXAS, May 11, 1921.

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

DEAR SIR: I have yours of April 13, 1921, addressed to the Attorney General, reading as follows:

"At recent terms of the district court of this county, certain judgments were rendered in favor of the State and county for delinquent taxes, and in each instance the decree of the court provided that the county attorney should have and retain a commission of ten per cent on the amount of judgment. Upon the payment of the proceeds of the judgments into the registry of the court settlement was made with the county attorney and the tax collector of the county according to the terms of the decree.

"The State Comptroller has refused to recognize the binding effect of these decrees. In each case the judgment has become final, and no appeal nor writ of error has been prosecuted. The Comptroller has charged to the account of the tax collector of this county the full amount of the commissions so paid to the county attorney, and has deducted said sum from the commissions due to the tax collector.

"An opinion is requested as to whether or not, under the circumstances stated, the decrees of the district court of this county are binding upon the tax collector of the county, and the Comptroller of the State."

At my request you have furnished me a copy of the pleadings and judgment in one of these suits, and it appears that the causes are ordinary suits for delinquent taxes, penalties, interest and costs. The judgment, copy of which you furnished, in addition to the usual provisions as to amount of taxes, penalties, interest and costs, contains the following:

"It is further ordered by the court that E. P. Adams, county attorney of Houston County, have ten per cent of said \$12.04, to be retained by him out of the recovery herein as his lawful compensation for bringing this suit and prosecuting same to effect."

The question whether the county attorney as a matter of law is entitled to commissions was not in issue in the case, the issue, if any, being whether the defendant was liable for taxes, penalties, etc., to the State and county. A judgment could not be binding on anyone as to a matter not in issue.

In *Rochelle vs. Lane*, State Comptroller, 148 S. W., 568, the Supreme Court of this State held that the State Comptroller had no power to refuse to issue a warrant upon an account of a sheriff for fees in felony cases approved by the district judge under Articles 1132 and 1133 of the Code of Criminal Procedure of 1911, the act of the judge being a judicial one. However, in that case it appeared that the objection of

the Comptroller to the payment of the claim of the sheriff was based upon supposed facts which by statute it was the province of the district judge to pass upon in approving or disapproving the claim. The court held that the action of the district judge was a judgment and that it had the effect of settling finally the facts, and that the Comptroller could not go behind it.

It is likewise true that the acts of the commissioners court in ordering and settling accounts against the county are judicial in their nature. *Padgett vs. Young County*, 204 S. W., 1046; *Edmondson vs. Cummings*, 203 S. W., 426; *Anderson vs. Ashe*, 90 S. W., 872.

But in *Jeff Davis County vs. Davis*, 192 S. W., 291, the Court of Civil Appeals at El Paso properly held that where the items of account allowed to a sheriff by the commissioners court could not under any circumstances have been properly charged against the county, the want of authority on the part of the commissioners court to allow them was jurisdictional so that its action in so doing has no conclusive effect. The items in question were for compensation and expenses of the sheriff. In its written opinion the court quoted approvingly the following language of Judge Dillon in the case of *Shirk vs. Pulaski County*, 4 Dill., 209, Fed. Case No. 12,794.

"Within the limits of their power as conferred by statute, the action of the county court in determining the amount due a creditor of the county, in the absence of fraud, or perhaps mistake, binds the county; but the county court cannot bind the county by ordering a claim to be paid, which is not made a county charge by statute, or by allowing more than the statute distinctly limits, or by an allowance in the face of a statutory prohibition."

It will be conceded that the judgment of a court as to matters under its jurisdiction and properly in issue in the case decided, cannot be attacked collaterally. Mr. Black in his work on *Judgments*, Second Edition, Section 245, says:

"Where the court has jurisdiction of the parties and the subject matter in the particular case, its judgment, unless reversed or annulled in some proper proceeding, is not open to attack or impeachment, by parties or privies, in any collateral action or proceeding whatever."

In determining, however, whether a particular matter is within the jurisdiction of the court in a particular case, it must be remembered that the term "jurisdiction" contemplates "jurisdiction of the persons, of the subject matter, and of the particular question which it assumes to decide." It not only cannot act upon persons who are not legally before it or upon a subject which does not fall within its province as defined or limited by law, but it is also powerless to go beyond the issues and pass upon a matter which the parties neither submitted nor intended to submit for its determination. Black on *Judgments*, Second Edition, Section 215.

In order for a judgment to be valid, a court must have actual jurisdiction, that is, it must not only be a matter which the court might under proper pleadings exercise jurisdiction, but the matter included in the judgment must have been actually and properly placed in issue by the pleadings in the case in which the judgment was rendered. Upon this point we quote the following from Section 342 of Black on *Judgments*:

"In these cases the court lacked jurisdiction which it assumed to pass upon because such matter was not submitted to it by the parties. But the same result will follow if, being invested with jurisdiction for a single purpose in a special statutory proceeding, it transcends the limit and attempts to exercise its powers for other purposes also. Thus where a statute provides for an action to foreclose a mortgage against a non-resident defendant, upon publication of summons, and authorizes a decree to be made for the sale of the mortgaged premises to satisfy the debt secured thereby, the court exhausts its jurisdiction in making the decree contemplated, and if, in addition thereto, it proceeds to award a personal judgment for a sum of money against the defendant, such judgment, being beyond its power, is void."

When the record itself discloses the fact that the court had no jurisdiction of the controversy, or that jurisdiction of the person of the defendant did not attach in the particular case, the judgment is a mere nullity and may be collaterally impeached by any person interested whenever and wherever it is brought in question. Black, Second Edition, Section 278.

Says Mr. Black:

"When we speak of jurisdiction of the subject matter, we do not mean merely cognizance of the general class of actions to which the action in question belongs, but we also mean legal power to pass upon and decide the particular question which the judgment assumes to settle. And how can a court acquire jurisdiction of the particular contention except it be clearly marked out and precisely defined by the pleadings of the parties? And how can that be done in any mode known to the law save by the formation of a regular issue? There is, therefore, plausible ground for holding that if the record fails to show an issue to be determined the judgment will be void on its face."

Even if the county attorney is entitled to the ten per cent commissions under the law, it could not be contended that such commissions are costs. Ordinarily, costs are the expenses of a suit of action which may be recovered by law from the losing party. *State vs. Dyches*, 28 Texas, 535, 542. It cannot be said that either party to one of those delinquent tax suits pays this ten per cent commission even if the statute is to be construed as allowing it. The suit is brought to recover the amount of taxes, penalties, etc., due. When recovered, if the law allows the commission at all, it allows it out of the sum recovered.

But even if it is to be regarded as costs and is properly included in the judgment, still the judgment cannot be considered as final as to such costs so as to make it conclusive or free from collateral attack. A judgment for costs when the question of costs is not an issue in the case is not to be regarded as a final judgment. Upon this point our State Supreme Court in *Scott vs. Burton*, 66 Texas, 322, 323, said:

"The form of the judgment is immaterial, but in substance it must show intrinsically and distinctly, and not inferentially, that the matters in the record had been determined in favor of one of the litigants, or that the rights of the parties in litigation has been adjudicated. The costs are regulated by statute, and are an incident or appendage of the judgment, and generally are recoverable by the victor in the contest. But, as an incident, they can be substituted for the principal and a judgment for their recovery is not a decision of the matters at issue; and it is therefore no such final judgment as can by law come within the revisory power of the Supreme Court."

See also *Banks vs. Thompson*, 5 Texas, 6, 10; *Ball vs. Chase*, 49 S. W., 934; *Gulf City, etc., Co. vs. Becker*, 23 S. W., 1015.

Mr. Black says that a judgment which merely awards costs is not a final judgment. Black, Second Edition, Section 31.

A judgment may be good in part and bad in part, good to the extent it is authorized by law and bad for the residue. 15 R. C. L., Sec. 316; *Sommes vs. United States*, 91 U. S., 21, 23 U. S. (L. Ed.), 193; *In re Cica*, 18 N. M., 452, 137 Pac., 598, 51 L. R. A. (N. S.), 373, and note.

It is a general principle of law that a court cannot set itself in motion nor has it power to decide questions except as presented by the parties in their pleadings. Anything that is decided beyond them is *coram non iudice* and void. Therefore, where a court enters a judgment or awards relief beyond the prayer of the complaint or the scope of its allegations, the excessive relief is not merely irregular but is void for want of jurisdiction, and is open to collateral attack. 15 R. C. L., p. 854, Sec. 328.

It is true that if, as a matter of law or fact, the question of whether the ten per cent commission is payable had been in issue in the cases involved, and the court had proper and actual jurisdiction, the judgment of the court determining the issue or issues would be conclusive and binding as far as the tax collector and Comptroller are concerned. To hold otherwise would be to grant revisory power to those officials over the district court. However, we do not understand how it could reasonably be contended that in a suit for delinquent taxes and penalties in which the question of the right of the county attorney to commissions was not at issue, the judgment could be conclusive as to such commissions. The purpose of a suit of this kind is to recover the taxes and penalties due, and when so recovered the county attorney is entitled, if entitled at all, to his commissions by operation of law; and it is the opinion of this Department that the mere inclusion of a recital as to commissions in the judgment of the court is not a determination of that question so as to be binding upon the State Comptroller or the tax collector.

If our opinion to the effect that the law does not allow a commission to the county attorney, based upon the amount of taxes recovered, is correct, then it necessarily follows, under the doctrine laid down in this opinion, that the judgments of the courts in these delinquent tax cases is void and of no effect so far as such commissions are concerned, and that to that extent said judgments are not binding upon the tax collector or the State Comptroller.

You are advised that in the opinion of this Department the judgments of the district court in these delinquent tax cases, in so far as commissions of the county attorney are concerned, are void and not binding on the county tax collector or the State Comptroller of Public Accounts.

Yours very truly,
L. C. SUTTON,
Assistant Attorney General.

OPINIONS ON RAILROADS

Op. No. 2448, Bk. 57, P. 270.

RAILROADS—FULL CREW LAW.

1. Chapter 100 of the Acts of the Thirty-first Legislature, 1909, being known as the "Full Crew Law," is clearly within the police power of the State and is valid.

2. The Act of the Thirtieth Legislature, approved March 25, 1907, laws of the Thirtieth Legislature, pages 92 and 93, Chapter 41, being the original "Full Crew Law," was declared invalid by the Supreme Court of the State of Texas.

Chapter 41, Acts of the Thirtieth Legislature, 1907; Chapter 100, Acts of the Thirty-first Legislature, 1909; Articles 6572-6573, of the Revised Statutes of the State of Texas.

AUSTIN, TEXAS, August 11, 1922.

Mr. Clarence E. Gilmore, Railroad Commission, Capitol.

DEAR SIR: In your letter of June 15, 1922, you say:

"The Commission will thank you to advise us whether or not under Articles 6572 and 6573 and the interpretation of these articles by the Supreme Court of the State in the case of M., K. & T. R. R. Co. vs. State, 113 S. W., 917, this road is required to maintain a full crew of five people in the operation of its trains as described."

In reply to your inquiry we beg to advise that the original "Full Crew Law" of Texas was passed by the Thirtieth Legislature and approved March 25, 1907, being Chapter 41 of the Laws of the Thirtieth Legislature. In the case of M., K. & T. R. R. Co. against State, 113 S. W., 917, the validity of this law was attacked because of the insufficiency of title. The title of the act being "An Act to protect the lives and property of the traveling public and the employes of the railroad in the State of Texas." In this case the Supreme Court through Judge Williams holds that the title to the said bill was not in compliance with Article 3, Section 35, of the Constitution, the title being so indefinite as to express no subject and particularly that the title did not express the particular subject of the act.

Evidently for the purpose of meeting the objection raised to this bill by the Supreme Court, the Thirty-first Legislature, Chapter 100, approved March 20, 1909, passed a "Full Crew Law" which substantially reenacted the attempted law of 1907 with the exception that the title thereto is very comprehensive and definite and expresses each particular subject of the bill, which, in our opinion, meets fully all requirements of Article 3, Section 35, of the Constitution with reference to the title of bills. Since the passage of that act there have been no cases decided by the appellate courts of this State. But various other State Legislatures have construed similar laws known as "Full Crew Laws" and have upheld them as being within the police power of said States. In the case of Chicago Rock Island Pacific Railway Company against State, 111 S. W., 456; 86 Ark., 412, the court held that a similar law was within the legislative discretion and that the court

could not declare the act void as arbitrary and unreasonable. This judgment was affirmed in the 203 U. S., 453. A similar law was held valid in the case of Railway against State, 87 N. E., 1034; 172 Ind., 147; 223 U. S., 713. In the case of Pennsylvania Railway Company against Ewing, 88 Atl., 775; 241 Penn., 581; 49 L. R. A. (N. S.), 977, it is said that the declared purpose of the Full Crew Act as found in its title is clearly within the police power of the State.

You are therefore advised that it is our opinion that the Eastland, Wichita Falls & Gulf Railroad is required to maintain a full crew of five persons in the operation of its trains as described.

From an examination of the files accompanying your letter it appears that the E., W. F. & G. R. R. is operating a mixed train and it seems they contend that in the operation of this particular kind of a train they would only be required to have a crew of four.

Under authority of State against International and Great Northern Railway Company, 68 S. W., 534, we are of the opinion that any mixed train or train carrying freight is a freight train and would therefore be required to operate with a full crew of five persons.

Yours very truly,

FRANK M. KEMP,
Assistant Attorney General.

Op. No. 2281, Bk. 55, P. 119.

GAS UTILITIES ACT—EXPENDITURES.

The total expenditure in the administration of the gas utilities act cannot exceed twenty thousand (\$20,000) dollars.

Should there be a deficit in the fund created by the operation of the act for any one quarter, then such deficit may be paid from the general revenue, but in no event shall the amount expended from the utilities fund plus the amount expended from the general revenue exceed twenty thousand (\$20,000) dollars per annum.

The language of the act is sufficient to appropriate twenty thousand (\$20,000) dollars per annum, or so much thereof as may be necessary, to make up any deficit between the amount of the utilities fund accruing during the year and the sum of twenty thousand (\$20,000) dollars.

Chapter 14, General Laws, Third Called Session, Thirty-sixth Legislature.

AUSTIN, TEXAS, February 1, 1921.

Railroad Commission of Texas, Capitol.

GENTLEMEN: The Attorney General is just in receipt of your communication addressed to him under date of January 27th, wherein you refer to Section 12, Chapter 14, General Laws passed by the Third Called Session of the Thirty-sixth Legislature, such act being an act defining gas utility and giving the Railroad Commission of Texas jurisdiction over the same. The question propounded by you is as follows:

“Will you kindly advise if, under this provision, regardless of whether the gas utility fund collected from taxes upon gross income exceeds twenty thousand dollars or not, we are limited to that amount in support of the administration of this law? Expressed differently, does this limitation to twenty thousand dollars per annum apply to the amount that may be drawn from the general revenue.

or does it extend to the amount that may be expended from the gas utilities fund, regardless of the source from which the money is obtained?"

The act referred to in Section 11 thereof provides in substance that every gas utility, subject to the act, shall pay into the State Treasury a sum equal to one-fourth of one per cent of the gross income received from all business done by it within this State during the quarter for which the report is filed, to be designated as the "Gas Utilities Fund." It is further provided in this section that when the gross receipts taxes are paid that the same shall be allowed as an operating expense. The next succeeding section of this act, and being the section expressly referred to by you, provides that all salaries, wages, fees, expenses of every person employed or appointed, and all other expenses, costs and charges, including witness fees and mileage incurred by or under authority of the Commission or a Commissioner in administering or enforcing the act, or in exercising any power or authority thereunder, shall be paid from and out of the gas utilities fund. It is also provided in Section 8 of this act that salaries, wages and fees shall be paid out of the moneys and funds as in this act directed.

These are clear-cut limitations upon the expenditures made from the Treasury on account of the enforcement of this act, and were these the only expressions in the act, surely such expenditures would be limited to the fund thereby created. There is some latitude given, however, in expenditures for the purposes of the act, because in Section 12 it is provided that if the total of the gross receipts collected shall not be sufficient during any quarterly period to pay such salaries, costs, charges, fees and expenses, then the deficit shall be paid by the State Treasurer out of the general revenue not otherwise appropriated, and it is further provided in this section that until sufficient funds have accrued to said fund that the expenses shall be paid by the State Treasurer out of the general revenue not otherwise appropriated. This is a wise provision inserted in the act to insure immediate and continued operations thereunder. These provisions were inserted with a knowledge that of course there would be no moneys in the fund upon the taking effect of the act, and that in order that the department might be organized and begin its activities some appropriation was necessary, and it would also be necessary to provide against a possible deficit in the receipts during any quarterly period, which was done by the language above quoted. There is a limitation, however, upon this appropriation from the general fund for it is expressly provided that the expenses authorized in this section shall never exceed in any one calendar year the sum of twenty thousand (\$20,000) dollars. This is a limitation both upon the amount of money that may be drawn from the general revenue and that may be drawn from the gas utilities fund. The Legislature did not intend that in any event the operation of this department or bureau should cost to exceed twenty thousand (\$20,000) dollars, all told, whether it be drawn from the utilities fund or from the general revenue or from both.

A correct interpretation of the act is that no more than twenty thousand (\$20,000.00) dollars may be expended, and that in event the revenue derived from the operation of the act does not reach that amount, then the difference between the amount of the revenue and

twenty thousand (\$20,000.00) dollars may be paid from the general revenue, and that in event the proceeds of its operation are sufficient to create a surplus at the end of each quarter, such excess shall be converted into the general revenue.

Taking the section as a whole, it means simply that the State guarantees to the Railroad Commission that the sum of twenty thousand (\$20,000.00) dollars will be forthcoming for the support of its operations under the act, and such sum is appropriated to meet any deficiency in the utilities fund for each of the two years beginning with the taking effect of the act.

Answering your question categorically, you are advised that the total amount that may be expended in the support of the administration of this law is the sum of twenty thousand (\$20,000.00) dollars, that such expenses must be paid from the gas utilities fund, if sufficient during any one quarter, and if not sufficient, then the deficit may be paid from the general revenue, provided that the total amount expended within a year, both from the utility fund and the general revenue together, shall not exceed the total of twenty thousand (\$20,000.00) dollars.

Yours very truly,

C. W. TAYLOR,

Assistant Attorney General.

Op. No. 2447, Bk. 57, P. 274.

RAILROAD CHARTERS—I. & G. N. RAILROAD COMPANY'S CHARTER—
ARTICLES 6408, 6409, 6410, 6423, 6425 AND 6435,
REVISED STATUTES, CONSTRUED.

1. Duties of Attorney General in passing upon railroad charters are not merely ministerial. Under provisions of Article 6409 he is required to pass both upon the facts and the law and may go beyond the face of a charter and consider any facts known to him or ascertained by him and must take cognizance of the statutes and the decisions of the highest courts of this State and of the United States.

2. The Secretary of State as regards railroad charters is imposed by law with purely ministerial duties.

3. The I. & G. N. Ry. Company took the property of the H. G. N. R. R. Company subject to the public duty of maintaining its principal business office at Palestine, and applicants, its successor, took said property burdened with the same duty.

4. Being cognizant of the decision of the Supreme Court of the United States in the case of I. & G. N. Ry. Company vs. Anderson County, 246 U. S., 424, and of the fact that applicants for the proposed charter are the successors of said railway company and also of the fact that no effort has been made by applicants to change the location of its principal business office in the manner prescribed by Article 6435 and Article 6423, the Attorney General cannot approve the charter tendered naming Houston as the location for the principal business office of the proposed corporation.

5. A railroad company cannot, without legislative authority, sell, lease, mortgage, or in any manner dispose of its property, so as to render it unable to discharge its public duties.

6. Articles 6423 and 6435, R. S., were passed by the Legislature in the exercise of the police powers of the State and the I. & G. N. Ry. Company could not free itself from these police regulations by executing a mortgage on its property.

7. The police power of the State is inalienable and cannot be contracted away.

AUSTIN, TEXAS, August 7, 1922.

Messrs. Dabney and King, General Attorneys, International & Great Northern Ry. Co., Houston, Texas.

GENTLEMEN: You have presented for the approval of the Attorney General a proposed charter drawn under the provisions of Article 6625, Chapter 2, Title 115, Revised Statutes of the State of Texas, for the purchasers at a foreclosure sale of the properties of the International and Great Northern Railway Company, said purchasers desiring to incorporate under the name of the "International-Great Northern Railroad Company."

The third paragraph of said proposed charter is as follows:

"Third: The place at which shall be established and maintained the principal business office, the public office, and the general office of the corporation is the city of Houston, in Harris County, State of Texas."

Article 6408 of the Revised Statutes, among other things, requires that the articles of incorporation shall state "the place at which shall be established and maintained the principal business office of the proposed corporation." The above designation of Houston as the place of the "principal business office" meets literally this requirement and, assuming the charter in other respects to be regular, the Attorney General would have to approve the same, provided his duties in such matters were purely ministerial. But are his duties merely ministerial and is he limited in the performance of them to the recitals appearing on the face of the proffered articles of incorporation?

His duties in respect to railroad charters are thus stated in Article 6409 of the Revised Statutes:

"The articles of incorporation, when so prepared, adopted and signed, shall be submitted to the Attorney General of the State, whose duty it shall be to carefully examine the same; and, if he finds them to be in accordance with the provisions of this chapter and not in conflict with the laws of the United States or of this State, he shall attach thereto a certificate to that effect."

In construing the foregoing provisions it must be borne in mind that the law does not require, that the proposed charters of any private corporations, except those of railroads, shall, before being offered for filing, be submitted to the Attorney General. In respect to almost every other class of corporations the Secretary of State alone is designated by the statutes as the officer who shall ascertain whether the law has been complied with, and file and record the charters. See Art. 1126, R. S. The Legislature, therefore, must have had a particular reason for requiring railroad charters to be first submitted to the Attorney General, who is regarded by the Supreme Court of Texas as the "superior law officer of the State." *State vs. Moore*, 57 Texas, 307, 312.

The Secretary of State is not a law officer of the State and many, if not most, of his duties are purely ministerial. Yet the Legislature, when it came to prescribing his duties in respect to those classes of corporations whose charters must be submitted to him, saw fit not to confine him to the mere recitals in the charter and in the affidavits of those who executed the same, but expressly stipulated:

"Art. 1128. If the Secretary of State is not satisfied he may, at the expense of the incorporators, require other and more satisfactory evidence before he shall be required to receive, file and record said charter."

And, construing this article, in a mandamus proceeding, the Supreme Court of Texas, in the case of Beach vs. McKay, 191 S. W., 557-558, held that before they were permitted to grant the writ of mandamus requiring the Secretary of State to file and record the charter involved, "it must appear that the act sought to have him perform is imperatively required of him by law, and not a matter within his discretion," and further said:

"The question whether the stock had been subscribed in good faith, and whether fifty per cent thereof had been paid in cash, or its equivalent, are questions of fact to be determined by the Secretary of State by the exercise of a discretion lodged with him by law. We have not the power to require him to exercise his discretion in a particular way on such questions of fact. If the act sought to require the Secretary of State to perform were purely ministerial, we could compel its performance by mandamus. * * *"

It is true that there is no such statute expressly authorizing the Attorney General to go beyond the face of a railroad charter and of the affidavits accompanying the same, but does this indicate that the Legislature expected less care to be used by the Attorney General in passing upon the sufficiency of railroad charters than by the Secretary of State in passing upon the charters of all other private corporations? Rather do we think it indicates the legislative conception of the difference between duties naturally inhering in the two offices. The duties of the office of the Secretary of State being largely ministerial, a statute of this kind, authorizing him to go beyond the face of the charter and the accompanying affidavits, was necessary to remove any doubt on that subject; whereas, in requiring railroad charters to be passed upon by the chief law officer of the State it was thought sufficient merely to say that he shall "*carefully* examine the same; and, if he finds them to be in accordance with the provisions of this chapter and not in conflict with the laws of the United States and of this State, he shall attach thereto a certificate to that effect."

The very fact that the Legislature has enacted a separate and distinct system of laws for the incorporation of railroad companies, among other things, relieving the Secretary of State from the duty of passing upon the charters of such companies and imposing that duty on the Attorney General, indicates that a very high degree of care is to be used both in finding the facts necessary to the creation of such corporations under the terms of the particular statutes on the subject and also in determining as a matter of law that nothing in the proffered charters conflicts with the laws of the United States or of the State of Texas.

None of the above duties in respect to railroad charters rests upon the Secretary of State. In fact, he has no duty of any kind to perform in relation to such charters, except the purely ministerial duty of causing the charters, together with the affidavit accompanying the same, to be recorded in his office and of attaching a certificate of the fact of said record to said articles and returning the same to such corporation. See Article 6410, R. S.

The purely ministerial character of his duties is indicated by the

language used in Article 6410 to the effect that when said articles have been examined and certified by the Attorney General "the same *shall be filed* in the office of the Secretary of State, accompanied by affidavit in writing * * * that the amount of one thousand dollars for every mile of such proposed road has been in good faith subscribed and that five per cent of the amount subscribed has been actually paid to the directors named in such articles; and the Secretary of State shall *cause* such articles, together with said affidavit, *to be recorded* in his office, and shall attach a certificate of the fact of such record to said articles and return the same to such corporation."

Article 6411 is as follows:

"The existence of such corporation shall date from the filing of the articles of incorporation in the office of the Secretary of State and the *certificate of the Secretary of State shall be evidence of such filing.*"

Indeed, the Secretary of State could not legally refuse to have the articles, if accompanied by the certificate of the Attorney General and the affidavit described in Article 6410, R. S., recorded in his office, nor could he legally refuse to attach his certificate of the fact of such record to such articles and return the same to the corporation.

Aside from these views it has frequently been determined, in States where the Legislature has delegated to a court, a board or an officer, the duty of passing upon the proposed charters of private corporations, that such court, board or officer is charged with discretion and is bound to investigate beyond the face of the proposed charter, if the circumstances connected with, or surrounding the application, or, if objection made, make it proper to enter into such investigation to determine whether approval should be given. 14 Corpus Juris, page 146, under the title "Corporations," and authorities there cited.

Returning now to a consideration of the designation of Houston as the location of the principal business office of the proposed corporation, the Attorney General knows and is charged with knowledge, among other things, of the following facts:

1. That the persons who are presenting this charter for approval are the purchasers of the property and franchises of the International & Great Northern Railway Company—in other words, the successors of the International & Great Northern Railway Company.

2. That the International & Great Northern Railway Company, in its turn, was the purchaser of the properties and franchises of the Houston & Great Northern Railroad Company—the successor of said last named company.

3. That the Houston & Great Northern Railroad Company, the original owners of the property and franchises involved, by virtue of a contract with Anderson County, Texas, established its principal business office at Palestine and was maintaining the same there at the time its properties and franchises were acquired by its successor, the International & Great Northern Railway Company.

4. That thereafterwards the International & Great Northern Railway Company attempted to remove its principal business office from the City of Palestine and was enjoined from doing so by the courts of this State and that, as a result of the litigation involving this

question of removal, the highest courts of the State of Texas and the Supreme Court of the United States decreed that the International & Great Northern Railway Company, as the successors of the Houston & Great Northern Railway Company, the original owners, acquired with the property and franchises of said last named company burdened with the duty of maintaining the principal business office at Palestine. See *International & Great Northern Railway Company vs. Anderson County*, 174 S. W., 305; writ of error denied by Supreme Court of Texas, 106 Tex., 60; opinion Court of Civil Appeals affirmed by the Supreme Court of the United States, 246 U. S., 424.

5. The Attorney General is also charged with knowledge of the fact that the Office-Shops Act of 1889, of which Article 6423 of our Revised Statutes is a part, and that Article 6435 of the Revised Statutes, as amended by the Act of 1915, together with the decision of the highest courts of this State and of the United States construing the same, constitute the law of Texas governing the designation and maintenance of the principal business offices of a railroad company and providing the manner in which changes of the principal offices of such companies can be made.

6. The Attorney General also knows as a matter of fact that the principal business office of the International & Great Northern Railway Company is now located at Palestine, Texas, and that the proponents of the charter under investigation, who are the successors of said company, have not applied for nor received the consent of the Railroad Commission of Texas to remove said principal office to the city of Houston; that, in fact, no effort has been made by them to comply with the provisions of Articles 6423 and 6435, R. S.

The matter of the location of the principal offices of a railroad company is important. It is essential that the location be definitely and certainly fixed because, among other things, it effects the jurisdiction of the courts, the service of process, and the place of taxation. *Lord vs. Lynchburg*, 113 Va., 627, 75 S. W., 233; *Kruse vs. Dusenbergl*, 19 N. Y. Wkly. Digest, 201.

The importance of definitely fixing the residence and domicile of a railroad company has long been recognized by the courts of the land. By far the greater weight of authority is that where the residence and domicile of such a company is fixed within a State, the same cannot be changed by the company at will but only as authorized by the State.

Fairbanks & Co. vs. Wills, 240 U. S., 642; 60 L. E. D., 841.

Federal Contracting Co. vs. ———, 212 Fed., 688; 129 C. C. A., 224.

Home Fire & Co. vs. Benton (Ark.), 153 S. W., 830.

Jossey vs. Georgia, 28 S. W., 273.

Collector Taxes vs. Mt. Auburn & Co. (Mass.), 104 N. E., 750.

Stinspi vs. Cedar Grove (N. J.), 40 A., 116.

Everett & Co. Bk. vs. Wilcox, 130 P., 756; 131 P., 203, 86 Fed., 725; 32 C. C. A., 31.

The Legislature of Texas has recognized the importance of this both by enacting the "Office-Shops Act" of 1889 and also the Act of 1915, amending Article 6435 of the Revised Statutes of 1911. This last article, as amended in 1915, is as follows:

"No railroad corporation shall have the right in the future to change the location of its general offices, machine shops or roundhouses, save with the con-

sent and approval of the Railroad Commission of Texas, and this shall apply also to receivers and to purchasers of the franchises and properties of railroad companies and to new corporations formed by such purchasers of their assigns, provided, however, that the Railroad Commission of Texas shall not consent to, or approve of, any removal or change of location, in conflict with the restrictions of Article 6423 of the Revised Civil Statutes of Texas of 1911; and, provided further, that no consent or approval of the Railroad Commission of Texas shall be required before the return of general offices, machine shops or round-houses to previous locations when ordered or required under judgments in suits now pending in trial or appellate courts. (Act February 7, 1854; P. D., 4888; Act February 20, 1915, Ch. 20, par. 1.)”

It will be noted that the foregoing article of the statute not only applies to railroad corporations, but “to purchasers of the franchises and properties of railroad companies and to new corporations formed by such purchasers or their assigns.” It also provides not only that the location of the general offices, machine shops and round houses of a railroad company shall not be changed “save with the consent and approval of the Railroad Commission of Texas,” but also that “the Railroad Commission of Texas shall not consent to, or approve of any removal or change of location in conflict with the restrictions of Article 6423 of the Revised Civil Statutes of Texas, 1911,” which is a part of the Office-Shops Act of 1889.

The importance of seeing that the designation of the place of the principal business office made in a proposed charter is accurate and is in accordance with the law is emphatically brought home to the Attorney General when he comes to consider the meaning of the following provision of Article 6423:

“Every railroad company chartered by this State, or owning or operating any line of railway within this State, shall keep and maintain permanently its general offices within the State of Texas at the place named in its charter for the location of its general offices.”

In face of the above provision, and knowing the facts and believing the law to be as hereinbefore stated, to approve this charter designating Houston as the location of the principal business offices of the successors to the International & Great Northern Railway Company would be entirely wrong. It would be equivalent to permitting a railroad corporation, bound by a decision of the highest courts of the land, to completely circumvent such decision by a sale, or even a pretended sale, of its properties and franchises and by an incorporation of the purchasers under a charter containing the necessary recitals to accomplish such a purpose.

The Attorney General would thus be permitting something to be done that the courts of the land expressly say cannot be done. For a careful consideration of the opinion of the Supreme Court of the United States in the case of *I. & G. N. Ry. Co. v. Anderson County*, supra, will disclose that they have there decided that the successors to the Houston & Great Northern Railroad Company acquired the property of the last named company, burdened with the public duty of maintaining the principal business office at Palestine, and it takes no reasoning to see that the present applicants, who are in every sense the successors to said successors, must take the same property burdened with the same duty.

But it is insisted that the purchasers of the properties and franchises of the International & Great Northern Railway Company, who are

seeking to incorporate under the charter offered for our approval, were the mortgagees of said company; that they have purchased the property of said company at the foreclosure sale; and that said mortgagees were not made parties to the suit of the International & Great Northern Railway Company vs. Anderson County, *supra*, and are, in no manner, bound by the decision in that case. We think there is no force to this argument.

A railroad company cannot, without legislative authority, sell, lease, mortgage, or in any other manner dispose of its road so as to render it unable to discharge its public duties. *Railway Company vs. Newell*, 73 Texas, 334; 11 S. W., 342; 15 A. S. R., 788. *Naglee vs. Railway (Va.)*, 3 S. E., 369; 5 A. L. R., 308.

A railroad company, just as individuals and as other corporations, is liable to control under the police powers of the State. By reason of the dangerous character of its agencies and of its close relation to the public, it is a peculiarly fit subject for police regulation. In its essence, it is a public highway; and one of the important duties of the State is to supervise and maintain highways. Based upon this last fact a State may regulate railroads in many ways that amount to direct interference with private rights.

22 R. C. L., p. 778.

Wisconsin, etc., Ry. vs. Jacobson, 179 U. S., 287, 45 U. S., L. Ed., 194.

N. Y., etc., Ry. vs. Bristol, 151 U. S., 556, 38 U. S., L. Ed., 269, 40 L. R. A., 389.

Thus a Legislature may delegate to a commission the power to determine as to which of two modes of construction and which of two termini shall be adopted for a subway. *Codman vs. Crocker (Mass.)*, 25 L. R. A. (N. S.), 980.

Thus railroad corporations may be required to make changes in the construction of their roads where the object of such changes is for the greater protection of human life, or the accomplishment of any other object which a State may rightfully seek in the exercise of its police power. *Ill., etc., Ry. vs. Willenborg (Ill.)*, 7 N. E., 698; *Portland, etc., Ry. Co. vs. Gerring (Me.)*, 2 Atl., 67.

Thus, although crossings have been constructed at a height and in a manner approved at the time of their construction, railroads may, by subsequent statutes, be required to change the same at their own expense, if the change is reasonably designed to further some police purpose. 22 R. C. L., Sec. 42, p. 787. Also 51 L. R. A. (N. S.), 236. Also 41 L. R. A., 481. Also *Ann. Cases*, 1912 D., 1029.

Thus, they may be required to change the grade of their tracks to conform with street grades. *Cleveland vs. Augusta (Ga.)*, 43 L. R. A., 638. And they may be required to construct suitable crossings over streets that have been opened subsequent to the building of the railroad. *Ry. vs. Dallas*, 98 Texas, 396; 70 L. R. A., 850.

It was in the exercise of the police power of the State that the Legislature passed the acts which now constitute Articles 6423 and 6435 of our Revised Statutes. The International & Great Northern Railway Company could not free itself, or make itself immune, from these police regulations of the State by executing a mortgage on its property. Nor can it be successfully asserted that a mortgagee of a railroad company

is a necessary or a proper party to a suit brought against the railroad to compel its performance of a duty toward the public required by a statute passed in pursuance of the police power of the State.

The police power of the State is inalienable and could not be surrendered or bargained away by the International & Great Northern Railway Company. *Railway vs. Minn.*, 208 U. S., 583; 52 U. S., L. Ed., 630.

A railroad could not, by mortgage or sale, or by contract with individuals, corporations, cities or counties, free itself from proper regulation under the police powers of the State. 22 R. C. L., par. 57, p. 803; 208 U. S., 583; 167 U. S., 88; 28 L. R. A. (N. S.), 298.

Aside from these considerations we think this question is completely settled, as to applicants for the charter under consideration, by the decision of the Court of Civil Appeals for Texas and that of the Supreme Court of the United States in the case of the International & Great Northern Railway Company vs. Anderson County, *supra*. The International & Great Northern Railway Company, plaintiff in error in the Supreme Court of the United States, was the successor to the Houston & Great Northern Railroad Company, and the applicants for the charter here being considered are the successors of the International & Great Northern Railway Company.

Certainly the law there applied by the court to the International & Great Northern Railway Company is applicable in every respect to its successors.

There are two other decisions, which we think are directly in point and conclusively settle this question, and also settle the additional contention made by applicants, that they are not bound by Article 6435 (the Act of 1915), which was passed after the execution to them of the mortgage on the properties of the International & Great Northern Railway Company. We cite and refer these cases without comment:

State vs. Central Railway Co. (Ia.), 32 N. W., 409; 60 Am. Rep., 306.

Union Pacific Ry. Co. vs. Mason City, 199 U. S., 160; 50 U. S. (L. Ed.), 134.

Our conclusion is that the purchasers of the property and franchises of the International and Great Northern Railway Company, at the foreclosure sale, take the property subject to the burden or duty of maintaining the general offices at Palestine. That since Article 6423 provides that a railway company shall keep and maintain its offices permanently at the place named in its charter, it would be improper to approve the charter tendered for our examination, designating Houston as the location for its general office, when we have knowledge of the facts recited herein and must be governed by the statutes of the State and by the laws of the United States and the State of Texas as announced by the courts of last resort. For the reasons stated, we cannot certify that we find the charter offered for our examination "to be in accordance with the provision" of the statutes of the State of Texas and "not in conflict with the laws of the United States or of this State."

Yours very truly,

JOHN C. WALL,

First Assistant Attorney General.

Op. No. 2379, Bk. 56, P. 491.

TEXAS STATE RAILROAD—CONTRACT TO OPERATE THEREON—
TEXAS AND NEW ORLEANS RAILWAY COMPANY.

The contract entered into by the board of managers of the Texas State Railroad and the Texas & New Orleans Railway Company, with respect to the Texas State Railroad, dated August 23, 1921, as embodied in Senate bill No. 13, passed by the Second Called Session of the Thirty-seventh Legislature, approved August 25, 1921, is legal and binding upon the parties thereto, subject to the approval of same by the Governor of Texas and the Interstate Commerce Commission as provided by its terms.

AUSTIN, TEXAS, September 17, 1921.

Honorable Lynch Davidson, Lieutenant Governor and Chairman, Board of Managers, Texas State Railroad, Houston, Texas.

DEAR SIR: The Attorney General is in receipt of your telegram and letter of the 15th inst. and your letter of the 10th inst. requesting an opinion from him as to the legality of the contract entered into by the Board of Managers of the Texas State Railroad and the Texas and New Orleans Railway Company with respect to the Texas State Railroad, dated August 23, 1921, as same is embodied in Senate Bill No. 13 passed by the Second Called Session of the Thirty-seventh Legislature and approved August 25, 1921.

We have carefully examined this contract as embodied in Senate Bill No. 13, as well as the Constitution and statutes of this State with respect thereto and it is our opinion that this contract in no way contravenes any constitutional or statutory provision of this State, and that the same, when approved by the Governor of Texas and by the Interstate Commerce Commission as provided by its terms, will become and be a valid and legal contract, binding upon and enforceable against the parties thereto.

Sometime prior to the year 1905 a line of railroad track about a mile and a half in length, extending from the State penitentiary industries near the town of Rusk, Texas, to a connection with the line of the St. Louis and Southwestern Railroad Company's line of railroad at the town of Rusk, was constructed by and for the use of the penitentiary system of this State, particularly for the use of the State in handling the products of certain industries situated near the town of Rusk and constituting and operated as a part of the penitentiary system of this State. Prior to 1907 this line of road was not operated as a railroad as such.

This status obtained until by the Act of April 5, 1907 (Ch. 74, p. 151, Gen. Laws, Reg. Ses., 30th Leg.), and the amendment of same of May 12, 1909 (Ch. 24, p. 45, Gen. Laws, 2nd C. S., 31st Leg.), the Penitentiary Board, or Board of Prison Commissioners, were required to "extend, build and construct the railroad now owned by the State of Texas at the Rusk penitentiary to a connection with the Texas and New Orleans Railway, and to a connection with the International and Great Northern Railroad, or to a connection with either of said railroads, as said board and the Governor may deem to be to the best interests of the State and also to maintain, equip and operate said State Railroad and any and all other such extensions thereof, to purchase

therefor such equipment, rolling stock, engines and cars, as said board may deem necessary and expedient."

Under this act the Board of Prison Commissioners constructed a line of railroad from the town of Rusk, Texas, to the town of Palestine, Texas, and operated the same as such up to March 12, 1921. This railroad thus constructed was and is the property of the State of Texas, and is the line of railroad designated in the contract under consideration, and in the various acts of our Legislature, and generally known as the "Texas State Railroad." It has never been chartered, or incorporated as a railroad corporation, either by general or special law, but has been operated generally in the transportation of commodities and passengers for hire in the ordinary and usual manner as other railroads are operated, being subject to the rules and regulations of the Railroad Commission of Texas as other railroads.

By Chapter 25, page 65, General Laws, Regular Session, Thirty-seventh Legislature, effective March 12, 1921, the "full and plenary control and management of this road was vested in a Board of Managers composed of the Lieutenant Governor of Texas and two other men to be appointed by him, and the Board of Prison Commissioners were required to deliver possession of said railroad, together with all equipment, supplies, choses, books, records and documents of every character, and all property of whatever kind belonging to the said railroad, to the Board of Managers, created by this act."

Shortly after March 12, 1921, when this act became effective, the Lieutenant Governor of Texas, Honorable Lynch Davidson of Houston, Texas, appointed the two other members necessary to complete this Board of Managers, namely, E. C. Durham and J. A. Glen, and the railroad and all of its properties were turned over to this Board of Managers by the Board of Prison Commissioners thereupon, or shortly thereafter.

The railroad was in need of certain improvements and by said Act of March 12, 1921, the sum of \$25,000 was appropriated, which, with certain revenues to be derived from the road, was to be used by the Board of Managers in rehabilitating and operating the road. The larger part, if not all of this appropriation, excepting a balance of about \$16,000 derived from the road, has been expended for these purposes. The Board of Prison Commissioners was also required to furnish to the Board of Managers for the period of one year from March 12, 1921, fifty able-bodied State convicts to be employed in repairing and improving the road, and this has been and is being done.

This act authorizes the Board of Managers to *sell* or *lease* the road; also to operate it until an advantageous sale or lease might be made. It was under this act that the contract here in question was negotiated and consummated subject to its approval by certain authorities as in the contract provided.

Following the consummation of this agreement by the Texas and New Orleans Railway Company and the Board of Managers, the question arose as to whether or not this act authorized this character of contract. The act seems to authorize only three things, namely, the *sale*, *lease*, or *operation* of this road by the Board of Commissioners.

This transaction is clearly not a *sale*, and there was a difference of opinion as to whether or not it was a *lease*, or as to whether or not the carrying out of the terms of this contract would constitute the *operation* of the road within the meaning of this act. The further question was raised as to the right and power of the Texas and New Orleans Railway Company to make this character of contract.

The answer to all these questions was the passage by the Legislature of said Senate Bill No. 13, setting out this contract in full and authorizing, ratifying and confirming it in all respects. In view of this act there can be now no question, as far as the laws of Texas are concerned, about the validity of this contract, unless this act is contravened by some provisions of our State statutes.

Is this act for any reason unconstitutional? We think not.

That the construction of this railroad originally by the State for the advantage and benefit of its prison or penitentiary system was a proper exercise of a governmental function will not be questioned. But whether this be conceded or not, the State owns, in its own right, this railroad and its properties, and clearly has the right at least to care for and handle it in such a way as the State deems to its best interests until it can be advantageously disposed of. There is nothing in our State Constitution that precludes this. We conclude, therefore, that this act is not unconstitutional on this point.

The only provision of our State Constitution that might be regarded as bearing upon this question is Section 58 of Article 16, and this only upon the theory that this railroad is, and was on March 12, 1921, a constituent part of our "State prisons," and that for this reason this provision of our Constitution vested in the Board of Prison Commissioners the "control and management" of same, thus precluding the Legislature from placing it in the hands of a Board of Managers, other than the Board of Prison Commissioners, as is sought to be done by Act of March 12th, 1921. This provision of our State Constitution in so far as it relates to this point, 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."

It will be noted that this provision does not attempt to define or declare what constitutes or shall constitute prison property, or to say what the "State prisons" are or shall consist of. This is an amendment to our State Constitution and was adopted November 5, 1912. At that time the State owned various properties used for the purpose of confining and employing State convicts, including what was then known and operated as the State Iron Industry at or near Rusk, Texas. Can it be said with any degree of reason that by the adoption of this amendment the character and status of prison properties were so fixed and determined that the Legislature was and is precluded from changing or altering them? Must the "State prisons" forever remain, as far as the power of the Legislature to change it is concerned, just as it existed at the time of the adoption of this amendment? Is the Legislature, by this amendment, precluded from selling or otherwise dispos-

ing of any property that was at that time used, or that may hereafter be acquired and used, for prison purposes, or from providing other State agencies for caring for, selling, or handling, or operating any State property that was then or may hereafter be employed for prison purposes when, or whether or not, such property becomes and is, in the judgment of the Legislature, no longer serviceable as or adopted to prison purposes? It seems quite clear to us that these questions must be answered in the negative. Does this "control and management" named in this amendment to our State Constitution vest in the Board of Prison Commissioners the right and power to sell or otherwise handle or dispose of prison properties, and to handle State convicts, independent of the Legislature? Surely not. Whatever this amendment may mean otherwise it is our opinion that it does not deprive the Legislature of the right to vest in some agency other than the Board of Prison Commissioners the control and management, and the power to sell, or otherwise dispose of or handle or operate such property as has ceased to be prison property, or such properties as in the judgment of the Legislature are no longer needed for, or as are no longer useful or adapted to prison purposes.

Had this railroad, on March 12, 1921, ceased to be a part of the prison system, or was it in the judgment of the Legislature, no longer needed for, or no longer useful as or adapted to, prison purposes?

We think this question was answered in the affirmative by the Legislature in its passage of said Act of March 12, 1921. That act expressly takes the control and management of this railroad out of the hands of the Board of Prison Commissioners and vests same in a Board of Managers created by that act. It authorizes the Board of Managers to sell the road and to execute title to same to the purchaser. It requires the Board of Prison Commissioners to turn over to the Board of Managers the whole of this railroad and its properties. It authorizes the Board of Managers to sell, lease, or operate the road. It even goes so far as to require the Board of Prison Commissioners to furnish certain State convicts to work upon the road, an evident superfluity if the road was to remain, and did remain a part of the prison system. A separate and considerable appropriation is made to be expended by the Board of Managers in rehabilitating the road. Furthermore, the Legislature by the passage of said Senate Bill No. 13, has ratified and confirmed the contract made by the Board of Managers with the Texas and New Orleans Railway Company providing for the operation of trains upon said road. It seems to us that it would be difficult for the Legislature more plainly and effectively to have expressed its solemn judgment and opinion that this railroad did not then and should not thereafter constitute any part of the prison system of this State, and that it is not and shall no longer be used as such, and is not needed for nor adapted to such use.

This is further evidenced by our legislative records, and other public acts by which the State has sold and no longer uses for prison purposes the iron and other industries situated at or near the town of Rusk and primarily in the interest of which this road originated and for a time was operated, and by certain legislative actions under which the

penitentiary buildings and structures at Rusk formerly used by the State for prison purposes have been by the State converted to other public uses and are no longer occupied or operated as any part of the prison system; in fact, it is well known that there is not now and has not been since some time prior to March 12, 1921, any part of our prison system connected with or adjacent to this road. The Legislature, of course, was cognizant of these things.

Wherefore it is our opinion that neither said Act of March 12, 1921, nor said Senate Bill No. 13, transgresses or contravenes in any way this provision of our State Constitution.

Without discussing the matter further we are of the opinion that neither the Act of March 12, 1921, nor said Senate Bill No. 13, contravenes any constitutional or statutory provision of this State, and that said contract, when approved by the Governor of Texas and by the Interstate Commerce Commission, as required by its terms, will become and be a valid and legal contract.

As bearing upon this question reference is made to the following:

Section 58, Article 16, State Constitution.

Chapter 19, p. 175, Special Laws, Regular and First Called Session, Twenty-ninth Legislature, approved March 27, 1905.

Chapter 74, p. 157, General Laws, Regular Session, Thirtieth Legislature, approved April 30, 1907.

Chapter 24, p. 445, General Laws, Second Called Session, Thirty-first Legislature, approved May 12, 1909.

Chapter 139, p. 279, General Laws, Regular Session, Thirty-third Legislature, approved April 5, 1913.

Chapter 180, p. 392, General Laws, Regular Session, Thirty-fifth Legislature, approved April 2, 1917.

House Concurrent Resolution No. 22, p. 499, General Laws, Regular Session, Thirty-fifth Legislature, approved April 2, 1917.

Chapter 198, p. 444, General Laws, Regular Session, Thirty-fifth Legislature, approved April 4, 1919.

Chapter 57, p. 110, General Laws, Regular Session, Thirty-third Legislature, approved March 29, 1913.

House Concurrent Resolution No. 11, p. 460, General Laws, Second Called Session, Thirty-fifth Legislature, filed July 16, 1919.

Chapter 30, p. 49, General Laws, Third Called Session, Thirty-sixth Legislature, approved June 18, 1920.

Chapter 37, p. 62, General Laws, Third Called Session, Thirty-sixth Legislature, approved June 18, 1920.

Chapter 26, p. 65, General Laws, Regular Session, Thirty-seventh Legislature, approved March 12, 1921.

Senate bill No. 13, Second Called Session, Thirty-seventh Legislature, approved August 25, 1921.

Senate Concurrent Resolution No. 2, First Called Session, Thirty-seventh Legislature, filed August 22, 1921.

Opinion, Attorney General, No. 930, August 16, 1913.

Report and Opinion, Attorney General, 1916-18, p. 831, No. 1816, book 50, p. 100, September 12, 1917.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2322, Bk. 55, P. 410.

TEXAS STATE RAILROAD—CONVICT LABOR.

Construction of that part of Section 4, Senate Bill No. 267, passed by Regular Session Thirty-seventh Legislature, which provides "and said board of managers shall have at their disposal for the purpose of improving and repairing said Texas Railroad, fifty able-bodied convicts to be furnished by the Prison Commission of Texas, and to be used at any time during the first year of said management of said Texas Railroad by the board of managers created by this bill."

AUSTIN, TEXAS, April 9, 1921.

Board of Prison Commissioners, Huntsville, Texas.

GENTLEMEN: The Attorney General is in receipt of yours of the 25th ultimo, which is as follows:

"We desire to call your attention to Senate Bill No. 267 which places the control and management of the Texas State Railroad under a board comprised of the Lieutenant Governor and two others appointed by him. We particularly want to call your attention to Section 4 of said bill, or a part thereof, which is as follows:

"And said board of managers shall have at their disposal for the purpose of improving and repairing said Texas Railroad, fifty (50) able-bodied convicts to be furnished by the Prison Commission of Texas, and to be used at any time during the first year of said management of said Texas Railroad by the board of managers created by this bill."

"This section seems to be vague and indefinite and does not, in our opinion, provide as to how said fifty (50) convicts shall be handled. What the Prison Commission would like to know from your Department is, shall the management and control of said fifty (50) convicts pass from the Prison Commission to the new board of managers of the Texas Railroad or shall they be furnished by the Prison Commission and shall the Prison Commission retain the control and supervision of said convicts?

"It is the contention of the Prison Commission that they will furnish the convicts to the new board of managers of the Texas Railroad, when said board of managers have ready a sufficient train to accommodate the convicts and necessary guards, and other equipment necessary to care for and house said convicts, and that while the Prison Commission will furnish the necessary guards and other officers, the new board of managers of the Texas Railroad shall be required to furnish sufficient funds to take care of the pay roll of said guards and officers and to furnish the necessary medical attention for the convicts.

"Please advise the Commission whether our interpretation of the act is correct or not?

"Inasmuch as the Prison Commission has arranged a meeting with the board of managers of the Texas Railroad in the next few days to discuss this matter, we would be glad to have an immediate reply to this letter."

This provision seems to be plain, simple and unambiguous, and yet it is so incomplete, uncertain and indefinite when an attempt is made to make a practical application of it, that it might well be argued that it is invalid because impossible of execution, but, taking it in connection with other laws concerning our State convicts and our Prison System, we have arrived at the conclusion that the purpose evidently intended to be accomplished by it is susceptible of being reached.

The difficulties that must arise upon any attempt to make a practical application of this provision readily appear when an effort is made to determine to what extent, if at all, the general law pertaining to our convicts and prison system and the responsibility and duty of enforcing such law are or can be made applicable to such convicts when brought

under the operation of this provision. These difficulties and our solution of them are indicated in the following discussion.

We have no statutory definition of the word "penitentiary," nor any law declaring what it is or shall consist of. The nearest we have to such a definition is Section 2 of Chapter 10, page 143, General Laws, Fourth Called Session, Thirty-first Legislature, declaring what shall be included in or is meant by the term "prison system" as used in that act. This section reads:

"The Prison System of this State as referred to in this act, shall include the State Penitentiary at Huntsville, the State Penitentiary at Rusk, and such other penitentiaries as may be hereafter established, and all farms or camps where State prisoners are or may be kept or worked, together with all property of every character belonging to or connected therewith."

The Texas State Railroad has never been declared to be, and we conclude does not constitute any part of the prison system of this State, but in as much as the State has the right, through the Legislature, to direct and control the time, character and place of confinement and work or labor to be performed by its convicts, within humane and reasonable bounds, we are of the opinion that the placing of convicts on the Texas State Railroad as and for the purposes provided for by this act, did not operate, and was not intended to operate, as a release of such convicts from the prison system, or the "penitentiary," nor as a repealing or rendering ineffective as to such convicts those provisions of our laws governing our prison system that relate to the treatment, control, care and management of our State convicts.

That is, we do not understand that by this provision the Legislature intended to repeal or to render ineffective as to such convicts other general laws pertaining to the classification of convicts, supplying them with proper food and clothing, encouragement for moral reform, educational advantages, infliction of punishment for the enforcement of prison discipline, prescribing and enforcing rules for the government of the prison system, the employment of suitable persons as guards, requiring such guards to familiarize themselves with the law and prison rules and regulations pertaining to their duties and to take and subscribe to the oath of office prescribed by the Constitution, keeping of records and making reports with respect to the conduct and time of service of such convicts, hours of labor required of them, affording them proper medical treatment and attention, prohibition against gambling, the discharge and punishment of guards for violation of prison rules or law, and many others too numerous to mention here. (Ch. 10, p. 143, Gen. Laws, 4th C. S., 31st Leg.)

If, then, these laws, as we think, were not intended to be repealed as to such convicts, but are to remain applicable to them, who is charged by law with the authority, duty and responsibility of enforcing them? Clearly only the Board of Prison Commissioners. No such duty, authority or responsibility is placed upon or vested in the Board of Managers.

Section 8 of Chapter 10, page 145, General Laws, Fourth Called Session, Thirty-first Legislature, reads as follows:

"That said Prison Commission shall be vested with the exclusive management

and control of the Prison System of this State, and shall be held responsible for the proper care, treatment, feeding, clothing and management of the prisoners confined therein, and at all times for the faithful enforcement of the spirit, intent and purpose of the laws and rules governing said system; provided, that the Prison Commission shall be held responsible for maltreatment of prisoners, and if permitted, it shall be grounds for removal from office."

Section 60 of said Chapter 10 provides, among other things, that:

"When convicts are worked on public works owned by the State or a subdivision of the State, the humane provisions of this act shall be strictly complied with."

It is unnecessary to set out here the numerous other provisions of this chapter relating to the control, management, treatment and care of our State convicts and the duty, authority and responsibility placed upon the Board of Prison Commissioners for the enforcement of the same.

While these provisions are only legislative enactments and not binding, of course, upon the Thirty-seventh or any other Legislature, still, as they have not been expressly, nor, as we think, impliedly, repealed, and were no doubt in the mind of the Legislature when it passed said Senate Bill No. 267, they are at least entitled to be considered in construing the provision here under consideration, even if they are not in full force and effect, and we do not say they are not.

Without further discussion we think it evident that such convicts, when and after "furnished" by the Board of Prison Commissioners and placed at the "disposal" of the Board of Managers as here authorized, will nevertheless remain inmates of the prison system, and that the Board of Prison Commissioners will remain charged with the duty and responsibility of enforcing, as to them, the laws of this State, and the rules and regulations of the prison system applicable to State convicts.

This being true, we conclude that this provision does not mean that the Board of Managers shall have the sole, exclusive, unlimited and unregulated "disposal" of these convicts as such, but shall have at its "disposal," that is, shall have the right to determine and designate, the time, place, character and manner of the labor and service of these convicts in "improving and repairing" the Texas State Railroad, consistent with the duties and responsibilities of the Board of Prison Commissioners with respect to such convicts.

This labor is not and cannot be at the "disposal" of the Board of Managers unless nor until these convicts be placed where the work is to be done, and be there so guarded, controlled, maintained and cared for as to enable them to perform the labor and services required of them; that is, their labor and services are not and cannot be at the "disposal" of the Board of Managers in improving and repairing this railroad so long as they remain at Huntsville, on the State farms, or elsewhere other than on said railroad, nor unless so guarded, controlled, maintained and cared for where the work is to be done as to enable them to perform such labor or services.

It is our opinion, therefore, that it is the duty of the Board of Prison Commissioners to "furnish," that is, to supply and make available to the Board of Managers at any and all times during the year beginning March 12, 1921, the labor and services of fifty able-bodied State con-

victs for the purpose of improving and repairing the Texas State Railroad by placing and keeping such convicts at or upon said railroad and by there so guarding, controlling, maintaining and caring for them as to enable and require them to perform such labor and services, and to pay any necessary expenses incurred by it in so doing out of such funds as are available to it for the conduct of the prison system, said Board of Prison Commissioners, however, remaining charged with all the duties and responsibilities enjoined upon it by law with respect to such convicts in like manner and to the same extent as if such convicts remained, as, in effect, as we have already seen, they will remain, inmates of the prison system of this State, except, and except only, that the time, place, manner and character of labor and services to be performed by them with respect to improving and repairing the Texas Railroad will be at the direction and under the control of the Board of Managers.

The Board of Prison Commissioners, however, being only required to make this labor available to the Board of Managers for the length of time and for the purposes provided for in this act, will not be required to furnish or supply such tools, implements, material and the like as may be necessary or appropriate to be used in delivering or applying the labor or services thus made available by them.

Yours very truly,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2321, Bk. 55, P. 376.

TEXAS STATE RAILROAD—CONTROL AND MANAGEMENT OF—APPROPRIATIONS FOR—BOARD OF PRISON COMMISSIONERS—
BOARD OF MANAGERS.

No public or State funds, now or heretofore in the hands of the Board of Prison Commissioners, whether as a direct appropriation or as proceeds from the operation of the Prison System, can now be expended in any way with respect to the Texas State Railroad, except:

(a) So much of the \$7250 appropriated by Chapter 87, page 410, General Laws of the Second Called Session of the Thirty-sixth Legislature "for fifteen thousand creosoted ties, or equivalent, placed in track of entire line, to be used as needed," for the fiscal year ending August 31, 1921, as was not, on March 12, 1921, expended or contracted by the Board of Prison Commissioners for the purpose for which appropriated, and such balance may be expended or contracted within the present fiscal year by the board of managers of the Texas State Railroad, created under Senate Bill No. 267, as passed by the Regular Session of the Thirty-seventh Legislature, for the purposes for which the same was appropriated.

(b) So much of the balance remaining on hand of any appropriation, as may have been heretofore made to or for the benefit of the Texas State Railroad for any particular fiscal year, may be expended for the purpose, and only for the purpose, of discharging financial obligations legally contracted by the Board of Prison Commissioners during that particular fiscal year, respectively, for the purposes for which such appropriations, respectively, were made.

(c) Financial obligations, legally contracted by the Board of Prison Commissioners prior to March 12, 1921, and after September 16, 1920, but not otherwise, "for the purpose of maintaining and operating the Texas State Railroad,"

to the extent of not to exceed fifty thousand dollars, may be paid out of any funds derived from the conduct of the Prison System, as authorized by Chapter 30, page 49, of the General Laws, passed by the Third Called Session of the Thirty-sixth Legislature, but no part of the proceeds arising from the operation of the Prison System can be otherwise expended on account of said railroad.

(d) No part of the \$550,000, appropriated at the Prison Commission by Senate Bill No. 278, passed by the Regular Session of the Thirty-seventh Legislature, can be used in any way with respect to the Texas State Railroad, neither in the payment of obligations incurred, nor in the control, maintenance, management or operation of said railroad.

The "full and plenary control and management of the Texas State Railroad" was taken out of the hands of the Board of Prison Commissioners and placed with the board of managers by Senate Bill No. 267, passed by the Regular Session of the Thirty-seventh Legislature, effective March 12, 1921, and repealed all laws and parts of laws in conflict therewith, and the Board of Prison Commissioners has not now, and has not had since March 12, 1921, any power or authority to control, manage, maintain or operate the Texas State Railroad, and is not now and has not been since March 12, 1921, charged with any duty with respect to the control, management, maintenance or operation of same.

Should the board of managers fail or refuse, for any reason, to take over this property and dispose of or operate the same, as provided by said Senate Bill No. 267, a contingency which we cannot assume has arisen or will arise, it is suggested that the matter be called to the attention of the Governor by the Board of Prison Commissioners that the Governor may take such action with respect to the property, as, in his judgment, the law and the facts will warrant and require.

AUSTIN, TEXAS, April 5, 1921.

Board of Prison Commissioners, Hon. J. A. Herring, Chairman, Huntsville, Texas.

Hon. Lynch Davidson, Lieutenant Governor, Houston, Texas.

GENTLEMEN: The Attorney General is in receipt of an inquiry under date of March 29, 1921, from the Board of Prison Commissioners, which reads as follows:

"We desire to have you consider and give us your answer and reply to the following questions:

"1. Has the Board of Prison Commissioners of the State of Texas any authority to furnish to the Texas State Railroad the sum of \$50,000, or any other amount either from its general fund or from the appropriation of \$550,000 recently made by the Legislature? We desire especially to know if we are authorized to furnish any amount of money to the board of managers for the said State Railroad as created by Senate Bill No. 267 and recently approved by the Governor.

"2. It seems that said Senate Bill No. 267 which creates the new board of managers for the Texas State Railroad expressly repeals all laws and parts of laws in conflict therewith. In view of said provision, we would like to know what is the present status of the Prison Commission with reference to the management of the road. If the board of managers provided for in said Senate bill should refuse to take over the said railroad from the Prison Commission, then we would like to know what we are authorized to do with it, and whether or not we have any further authority to manage the road in any event?

"3. We desire particular information with reference to the further operation of said State Railroad, should the new board of managers refuse to take over the same. We have no money with which to operate said railroad, and if the new board of managers refuses to operate the same, we would like to know whether or not we have authority to assemble the rolling stock and other equipment belonging to said railroad and place a guard over the same for the purpose of protecting State property, and cease operation?"

The Attorney General is also in receipt of an inquiry from Hon.

Lynch Davidson, Lieutenant Governor, under date of March 31, 1921, which reads as follows:

"Senate Bill 267, approved March 12th, empowered the board of managers it created, to take over, upon their demand, possession of the Texas State Railroad, and thereafter to proceed along some one of the several courses open to it in handling the State Railroad. The powers granted by the act, and the performance of the duties prescribed in it were made contingent upon the demand of the board of managers upon the Prison Commission for the delivery of the road. This demand has not been made by the board, for reasons that are set out in the copy of a letter I have addressed to the chairman of the Prison Commission, attached hereto, and to which I invite your consideration.

"Assistance was granted the State Railroad by the Thirty-sixth Legislature, both in money and in materials; and, as stated in the attached letter, the board of managers is informed that neither the money nor the materials provided for have been used in the improvement and repair of the road. The board of managers is now in the position that it is unable, at this time, to take over the road, because the things provided for it by the Thirty-sixth Legislature have not been done. If the money and materials provided had been put into the road, the board could now make a deal with a connecting railway line to take the road off the State's hands, or if such money and materials were now made available and used in the repair and improvement of the road, the board feels that it could make such a deal.

"Therefore, the board of managers would like to have your opinion as to whether or not our not having decided, for the reasons stated, to take over the railroad, would or would not, leave the road still in the hands of the Prison Commission, and empower them to do the things, and to provide the money and materials for the improvement and repair of the State Railroad authorized or directed by the various acts of the Thirty-sixth Legislature."

We do not set out here the copy of the letter referred to by the Lieutenant Governor as having been addressed to the Prison Commission, same not being necessary to a decision of the questions presented by the Lieutenant Governor. The letter he refers to relates to the appropriation of certain sums of money to "The State Railroad" for the fiscal year ending August 31, 1919, for piling, caps, stringers, guard rails, labor, ties, and electric alarms for grade crossings (Ch. 168, p. 330, Gen. Laws, Reg. Ses. 36th Leg.), and to the appropriation of certain other sums to "Texas State Railroad" for the fiscal year ending August 31, 1920, and August 31, 1921, for the purpose of buying and installing a motor car, for railroad ties and for overhauling engine No. 7 (Ch. 85, p. 410, Gen. Laws, 2nd C. S., 36th Leg.) and to Chapter 30, page 49, of the General Laws passed by the Third Called Session of the Thirty-sixth Legislature, providing, among other things, that "The Board of Prison Commissioners of the State of Texas is hereby authorized to expend its funds in a sum not to exceed fifty thousand dollars for the purpose of maintaining and operating the Texas State Railroad," and which letter makes certain statements based upon information as to the disposition made of these several appropriations by the Board of Prison Commissioners.

In answer to these inquiries, we beg to advise as follows:

1. That no public or State funds, now or heretofore in the hands of the Board of Prison Commissioners, whether as a direct appropriation or as proceeds from the operation of the prison system, can now be expended in any way with respect to the Texas State Railroad, except:
 - (a) So much of the \$7,250.00 appropriated by Chapter 87, page 410, of the General Laws passed by the Second Called Session of the

Thirty-sixth Legislature "for fifteen thousand creosoted ties, or equivalent, placed in track over entire line, to be used as needed" for the fiscal year ending August 31, 1921, as was not, on March 12, 1921, expended or contracted by the Board of Prison Commissioners for the purposes for which appropriated, and that such balance may be expended or contracted within the present fiscal year by the Board of Managers of the Texas State Railroad, created under Senate Bill No. 267, passed by the Regular Session of the Thirty-seventh Legislature, for the purposes for which the same was appropriated.

(b) So much of the balance remaining on hand of any appropriation that may have been heretofore made to or for the benefit of the Texas State Railroad for any particular fiscal year may be expended for the purposes, and only for the purposes, of discharging financial obligations legally contracted by the Board of Prison Commissioners during that particular fiscal year, respectively, for the purposes for which such appropriations, respectively, were made.

(c) Financial obligations, legally contracted by the Board of Prison Commissioners prior to March 12, 1921, and after September 16, 1920, but not otherwise, "for the purpose of maintaining and operating the Texas State Railroad," to the extent of not to exceed fifty thousand dollars, may be paid out of any funds derived from the conduct of the prison system, as authorized by Chapter 30, page 49, General Laws of the Third Called Session of the Thirty-sixth Legislature, but no part of the proceeds arising from the operation of the prison system can be otherwise expended on account of said railroad.

(d) No part of the \$550,000.00 appropriated to the Prison Commission by Senate Bill No. 278, passed by the Regular Session of the Thirty-seventh Legislature, can be used in any way with respect to the Texas State Railroad, neither in the payment of obligations incurred, nor in the control, maintenance, management or operation of said railroad.

2. That the Board of Prison Commissioners has not now, and has not had since March 12, 1921, any power or authority to control, manage, maintain or operate the Texas State Railroad, and is not now, and has not been since March 12, 1921, charged with any duty with respect to the control, management, maintenance or operation of said railroad.

3. That "full and plenary control and management of the Texas State Railroad" was taken out of the hands of the Board of Prison Commissioners and placed with the Board of Managers of the Texas State Railroad by Senate Bill No. 267, passed by the Regular Session of the Thirty-seventh Legislature, effective March 12, 1921, which said Board of Managers, together with the Governor, was by said act charged with the duty and responsibility of selling or leasing said railroad, provided either could be done to an advantage, and if not so sold or leased said Board of Managers was and is charged by said Senate Bill No. 267 with the duty and responsibility of rehabilitating, maintaining and operating said railroad, together with the discharge of certain other duties enjoined upon them by said Senate Bill No. 267, with respect to said property.

4. Should the Board of Managers fail or refuse, for any reason, to

take over this property and to sell, lease or operate the same, as provided for by said Senate Bill No. 267, a contingency which we cannot assume has arisen or will arise, we suggest that that fact be called to the attention of the Governor by the Board of Prison Commissioners that the Governor may take such action with respect to this property as in his judgment the law and the facts may warrant and require.

Our reasons for the foregoing answers to these inquiries are indicated in the following discussion of the questions raised.

Chapter 168, page 330, General Laws of the Regular Session of the Thirty-sixth Legislature, appropriated certain sums for the benefit of the Texas State Railroad for certain purposes for the fiscal year ending August 31, 1919. The fiscal year for which this appropriation was made expired August 31, 1919, and clearly no part of this appropriation can now be expended except that the unexpended balance of same, if any, may be expended for the purpose, and only for the purpose, of discharging financial obligations legally contracted by the Board of Prison Commissioners after the act was passed and prior to August 31, 1919, for the purposes stated in that act.

Chapter 87, page 410, General Laws of the Second Called Session of the Thirty-sixth Legislature, appropriates certain sums for the benefit of the Texas State Railroad for certain purposes for the fiscal year ending August 31, 1920, and the sum of \$7,250.00 for "fifteen thousand creosoted ties, or equivalent, placed in track over entire line, to be used as needed," for the fiscal year ending August 31, 1921. Clearly no part of this appropriation made for the fiscal year ending August 31, 1920, can now be expended, except that the balance, if any, remaining on hand may be applied in the payment of financial obligations legally contracted by the Board of Prison Commissioners after the act became effective and before August 31, 1920, for the purposes provided for by that act, and not otherwise, and this for the reason that the fiscal year for which said appropriation was made expired on August 31, 1920. We are of the opinion, however, that so much of the \$7,250.00 appropriated by this act for the fiscal year ending August 31, 1921, as has not been expended or legally contracted, may be expended at any time before August 31, 1921, for the purposes for which it was appropriated. This appropriation was made to and for the benefit of the Texas State Railroad and not to nor for the benefit of the prison system of the State, and inasmuch as the custody, control, management and operation of this railroad has been taken from the Board of Prison Commissioners and placed with the Board of Managers, we are of the opinion that this balance, if any, may now be expended by said Board of Managers.

The next act we have is Chapter 30, page 49, General Laws of the Third Called Session of the Thirty-sixth Legislature. We will here refer to and discuss only Section 1 of this act. Said section reads as follows:

"The Board of Prison Commissioners of the State of Texas is hereby authorized to expend its funds in a sum not to exceed fifty thousand dollars for the purpose of maintaining and operating the Texas State Railroad."

What is meant by the words "its funds," as here used?

At the time this act was passed, Chapter 180, page 392, General Laws:

of the Regular Session of the Thirty-fifth Legislature, was effective, and Section 5 of that act expressly provided that:

"All expenses connected with the extension, equipment and operation of said railroad * * * shall be paid only from proceeds of sale of such bonds or debentures, from donations made such railroad, and from net income from operation thereof. No part of any other moneys belonging to the State and the Prison Commission shall be expended in connection with such construction, extension, equipment or operation * * * of such railroad."

Furthermore, at the time said Chapter 30 was passed there existed no appropriation to or for the benefit of the prison system other than the general appropriation made by Chapter 87, page 45, General Laws of the Third Called Session of the Thirty-sixth Legislature, which so far as it relates to the prison system, reads as follows:

"The proceeds of all convict labor on farms and elsewhere, the proceeds of all manufactured products, all farm products and all other proceeds of the penitentiary system and of all other sources connected therewith, or so much thereof as may be necessary, are hereby appropriated for the maintenance and support of the penitentiary system, including buildings, farms and improvements, and repairs on same, for the years ending August 31, 1920, and August 31, 1921."

Under this state of the law, what funds did the Legislature have in mind when it used the words, "its funds," in said Chapter 30? Evidently those funds, and only those funds, that constituted "the proceeds of all convict labor on farms and elsewhere, the proceeds of all manufactured products, all farm products and all other proceeds of the penitentiary system, and of all other sources connected therewith." Not only so, but we think it reasonably clear that said Section 1 of said Chapter 30 was passed in view of and for the purpose of modifying or amending that part of said Section 5, of said Chapter 180, quoted above, as well as that part of the general appropriation bill herein referred to, which restricted the use of the proceeds of the prison system to "the maintenance and support of the penitentiary system, including buildings, farms and improvements and repairs on same" to such an extent as to permit the Board of Prison Commissioners to apply in "maintaining and operating" the Texas State Railroad not to exceed fifty thousand dollars of the proceeds derived from "all convict labor on farms and elsewhere, the proceeds of all manufactured products, all farm products, and all other proceeds of the penitentiary system and of all other sources connected therewith."

Can, then, any part of the proceeds arising from the conduct of the prison system, as provided for by said general appropriation bill, be used "in a sum not to exceed fifty thousand dollars," or so much thereof as has not been so used for that purpose, for the purpose of maintaining and operating the Texas State Railroad? We think not. Certainly it cannot now be used by the Board of Prison Commissioners for that purpose since the Board of Prison Commissioners is not now authorized to maintain and operate this railroad. Neither can it be used by the Board of Managers of the Texas State Railroad because the law makes no provision for the expenditure by the Board of Managers of the Texas State Railroad of any of the proceeds arising from the operation of the prison system for any purpose connected with said railroad, and because the Legislature by the appropriation made by said Senate

Bill No. 267, has evidently made what it deemed to be ample financial provisions for the rehabilitation, maintenance and operation of said railroad.

Hence our conclusion that no part of the fifty thousand dollars named in said Chapter 30 can now be used with respect to this railroad.

We next have the special appropriation of \$550,000, appropriated by Senate Bill No. 267, passed by the Regular Session of the Thirty-seventh Legislature, effective March 12, 1921. Omitting the caption, enacting and emergency clauses, this act reads as follows:

"Section 1. That the sum of five hundred fifty thousand (\$550,000) dollars, or so much thereof as may be necessary, be and the same is hereby appropriated out of any funds in the State Treasury, not otherwise appropriated, to the Prison Commission of the State of Texas to be used by said Prison Commission in paying its operating expenses for the balance of the present fiscal year and to pay the indebtedness incurred by said Prison Commission in the purchase of the farm known as the Blue Ridge Farm and to pay any other existing indebtedness of the said Prison Commission contracted by it under authority of the law.

"Section 2. The appropriation hereby made is intended as a loan to the Prison Commission, and the Prison Commission is hereby directed to pay into the State Treasury, to the credit of the general revenue fund, out of any moneys coming into its hands during the year 1921, a sum of money equal to the aggregate amounts used by it out of the appropriation hereby made.

"Provided, that no part of this appropriation shall be used to pay any part of any claim for purchase price against the State or against the Prison Commission of the State, on account of the purported purchase by the Prison Commission from the Fort Bend Cotton Oil Company of a certain oil mill located at Richmond, Texas, nor shall any improvements or additions to said oil mill or any of its appurtenances, or upon any part of the premises on which same is located, be made or paid for out of the moneys herein appropriated, or coming into the hands of the Prison Commission of Texas from any other source; unless such payment or expenditure shall have first been specifically authorized by the Legislature.

"It is further expressly enacted that the purchase of said oil mill and premises on which same is located is in nowise approved or ratified by the Legislature."

This appropriation is for three, and only three, purposes, viz:

(a) Paying its (the Prison Commission's) operating expenses for the balance of the present fiscal year. Since the control, management, maintenance and operation of this railroad was taken out of the hands of the Board of Prison Commissioners on March 12, 1921, the very day upon which this appropriation became available, it cannot be said, of course, that any expense incurred in the control, management, maintenance and operation of the Texas State Railroad from and after that date could constitute or be "operating expenses" of the Prison Commission, and, hence, no part of this appropriation can be used in paying any expenses that may be, or might be, incurred in the control, management, maintenance and operation of this railroad since March 12, 1921, under the language here used. The Prison Commission could not have any "operating expenses" incurred since that time growing out of the control, management, maintenance or operation of this railroad.

(b) To pay the indebtedness incurred by said Prison Commission in the purchase of the farm known as the Blue Ridge Farm. Of course,

this language would not authorize the expenditure of any of this appropriation with respect to said railroad.

(c) To pay any other existing indebtedness of said Prison Commission contracted by it under authority of the law. It would seem that this language would authorize the use of so much of this appropriation as might be necessary to pay any indebtedness incurred by the Board of Prison Commissioners in the control, management, maintenance and operation of this railroad incurred prior to March 12, 1921, since up to that time the Board of Prison Commissioners was charged with the control, management, maintenance and operation of this railroad, but this is not true for the reason that that part of Section 1 of Chapter 180, General Laws of the Regular Session of the Thirty-fifth Legislature, which provides that

"The credit of the State shall not be given impliedly or expressly, and all persons dealing with the Prison Commission and the Governor with reference to the management or disposition of said railroad, be, and are hereby put on notice that the credit of the State is not bound, morally or expressly"

was in full force and effect, even if it is not now in effect, and we do not say it is not, up to March 12, 1921, when by reason of said Senate Bill No. 267, the Board of Prison Commissioners was deprived of the right to exercise any control or authority over this railroad. This being true, there cannot exist any valid indebtedness incurred by the Board of Prison Commissioners with respect to this railroad, and hence this language in this appropriation bill could not have been intended to authorize the payment out of this appropriation of any indebtedness incurred by the Board of Prison Commissioners with respect to said railroad. The law prohibited the creation of any indebtedness by the Board of Prison Commissioners on account of this railroad, and it follows, of course, that no such indebtedness existed, or could have been in the mind of the Legislature, at the time said Senate Bill No. 278 was passed.

Hence our conclusion that no part of this appropriation was intended to be used, or can be used, in any way with respect to the Texas State Railroad.

We now proceed to a consideration of the other questions raised by these inquiries. These questions may all be summed up in one, namely: What is the present law of this State with respect to the control, maintenance, management and operation of the Texas State Railroad? The last Acts of the Legislature on this subject, except the appropriation bills already referred to, are Chapter 180, page 392, General Laws, Regular Session of the Thirty-fifth Legislature; Chapter 30, page 49, General Laws, Third Called Session of the Thirty-sixth Legislature, and Senate Bill No. 267, passed by the Regular Session of the Thirty-seventh Legislature, and the answer to these questions will be found in a proper construction of these acts with respect to each other.

Is said Senate Bill No. 267 a law? If so, when did or does it become effective as such? This act shows to have passed the House and Senate by a two-thirds vote of each house, entered upon the journal of each house, and shows to have been approved by the Governor and filed in the office of the Secretary of State on March 12, 1921. These things

being true, we must conclude that this act is a law and that it became effective as such on March 12, 1921 (Sec. 1, Art. 2; Sec. 1, Art. 3; Sec. 28, Art. 1; Sec. 39, Art. 3; Sec. 15, Art. 4, St. Con.), unless the act is for some reason unconstitutional, and for the purpose of this opinion, we have assumed its constitutionality. Having concluded that this act is a law it follows that it became effective as such at the time of its approval by the Governor and the filing of it in the office of the Secretary of State, since no authority other than the Legislature can suspend or delay its effect and operation as a law, and the Legislature has not done so.

This being true, what effect, if any, does said Senate Bill No. 267 have upon said Chapters 180 and 30?

Section 9 of said Senate Bill No. 267 expressly declares that: "All laws and parts of laws in conflict herewith are hereby repealed." It follows that so much of the other two acts herein referred to as is in conflict with said Senate Bill No. 267 is expressly repealed by the latter. We shall only note the effect of this repeal as it relates to the questions here presented.

Section of said Chapter 180 provides, among other things:

"That the Prison Commission be, and they are hereby authorized, together with the approval and consent of the Governor, to exercise full and plenary control of said State Railroad."

We think it quite clear that this part of that act is repealed by Section 1 of said Senate Bill No. 267, wherein it is provided:

"The Lieutenant Governor of the State of Texas is hereby authorized to appoint two men who are experienced in the management and practical operation of railroads, who with the Lieutenant Governor of the State of Texas shall constitute the board of managers of the Texas State Railroad, which board shall exercise full and plenary control and management of the Texas State Railroad."

This language is quite clear and concise. It needs no interpretation or construction. It is identical with, and was doubtless taken from, Section 1 of said Chapter 180, as hereinbefore quoted, and can have no other meaning or effect than that of taking from the Board of Prison Commissioners and placing with the Board of Managers, provided for by said Senate Bill No. 267, the "full and plenary control and management of the Texas State Railroad."

This conclusion is further evidenced by the provisions of Section 2 of said Senate Bill No. 267, which reads as follows:

"Immediately after the taking effect of this act, it shall be the duty of Board of Prison Commissioners of the State of Texas, upon demand of the board of managers of the Texas State Railroad, to deliver the possession of said railroad, together with all equipment, supplies, choses, books, records and documents of every character, and all property of whatsoever kind belonging to the said railroad, to the board of managers, created by this act."

Section 1 of said Chapter 180, as well as Section 3 of said Chapter 30, authorizes the Board of Prison Commissioners, with the approval of the Governor, to sell said railroad and all its properties, the latter going so far as to authorize the Board of Prison Commissioners to "take up the rails, ties, bridges, culverts, fences, and sell the same, together with all depots, buildings, rolling stock and all other property

belonging to said railroad, to the best advantage and for the greatest amount obtainable," provided said railroad could not be sold at a satisfactory price as a going concern.

The railroad was never sold by the Prison Commission, as here authorized, and these provisions of said Chapter 180 and said Chapter 30 are clearly in conflict with and must be held to be repealed by said Senate Bill No. 267, and especially by Section 3 of said Senate Bill No. 267, which reads as follows:

"The board of managers is hereby authorized, upon approval of the Governor of the State of Texas, and given full authority to sell or lease said railroad for the highest amount and upon the best terms obtainable, to any person, firm or corporation, and in the event said railroad is sold, to execute and deliver to the purchaser thereof a deed to the right of way and to all other lands owned by the State of Texas and used in connection with said railroad, and to do any and all things necessary to convey the title to said railroad right of way, rolling stock and all other property and choses of whatsoever kind belonging to said railroad to the purchaser, and in the event the board of managers shall lease said railroad, it shall have the authority to execute such a lease agreement as it may deem to the best interest and welfare of the State of Texas, subject, however, to the approval of the Governor of the State of Texas, provided that in the event of the sale of said railroad the proceeds thereof shall be first applied to the payment of the bonds and accrued interest thereon, owned by the public school fund of the State of Texas and against said railroad. Any balance shall be paid into the Treasury of the State."

Of said Chapter 180, Section 2 makes it the duty of the Prison Commission, if deemed advisable by it and the Governor, to construct certain extensions of said railroad, and Sections 3 and 4 provide for the exercise of the power of eminent domain by the Prison Commission in so doing; Section 5 provides, among other things, for the issuance of bonds by the Prison Commission, secured solely by a lien on the properties of the railroad, for the purpose of raising funds with which, together with donations and net income from the operation of said railroad, to meet all expenses connected with the extension, equipment and operation of said railroad; and Section 6 does no more than to authorize the Prison Commission to accept "donations and gifts, either in money or land, or other necessities to be used in the extension of said railroad."

Said Senate Bill No. 267 contains no provisions relating to the matters here referred to as being authorized and provided for by said Sections 2, 3, 4, 5 and 6 of said Chapter 180, but in view of the provisions of Sections 1, 2 and 3 of said Senate Bill No. 267, hereinbefore referred to, as well as other provisions of the latter act, such as the appropriation made by it for the rehabilitation and operation of the road by the Board of Managers, the disposition to be made by the Board of Managers of receipts derived from the operation of the road, certain reports required to be made by the Board of Managers as to its dealings with respect to this property, and the like, it certainly could not be contended that the Board of Prison Commissioners could now exercise the powers and duties with respect to this property that were vested and enjoined upon it by those provisions of Sections 2, 3, 4, 5 and 6 of said Chapter 180, herein noted; that is, we think it could not be said, in view of said Senate Bill No. 267, that the Board of Prison Commissioners now has the authority to construct extensions of said railroad, to exercise the powers of emi-

ment domain in so doing, to issue and sell bonds secured by a lien on the property of said railroad and apply the proceeds of the sale of such bonds in the payment of "the expenses connected with the extension, equipment and operation of said railroad," to operate said railroad, and the like.

As has already been seen, said Senate Bill No. 267 expressly provides that the Board of Managers "shall exercise full and plenary control and management" of this property, makes it the duty of the Board of Prison Commissioners to deliver possession of said railroad and all of its "equipment, supplies, choses, books, records and documents of every character and all property of whatsoever kind belonging to the said railroad, to the Board of Managers created by this act," provides for the sale, lease and operation of the property by the Board of Managers, and makes an appropriation and other financial provisions for the rehabilitation, maintenance and operation of the road, other and different from that provided for by said Chapter 180. In view of these and other provisions of said Senate Bill No. 267, we cannot conceive that it was intended by the Legislature that those provisions of said Chapter 180 and said Chapter 30, herein mentioned, should remain in full force and effect.

We conclude, therefore, that the Board of Prison Commissioners cannot now exercise the powers and authority, and is not charged with the duties and responsibilities, with respect to this railroad and its properties as were vested in and placed upon it by these provisions of said Sections 2, 3, 4, 5 and 6 of said Chapter 180, and Section 3 of said Chapter 30, here referred to, and that same are in effect repealed by said Senate Bill No. 267.

Section 7 of said Chapter 180 relates to the employment of State convicts by the Board of Prison Commissioners "in the construction or extension of said railroad," and also authorized the Prison Commission "to enter said convicts in the service of any corporation that may have in hand the building of said railroad." Since we have held that the Prison Commission is not now authorized to extend this railroad, it follows that convict labor may not now be employed or entered by it for that purpose, and that this section of said Chapter 180 is therefore inoperative and is, in effect, repealed by said Senate Bill No. 267.

Section 8 of said Chapter 180 repeals all laws and parts of laws in conflict with that act and contains no other provision, and the only remaining section of that act, Section 9, deals only with the power of the Railroad Commission with respect to traffic and traffic rates and charges as to said railroad and other railroads connecting with it. This opinion is not to be taken as in any way construing or passing upon this last section of said Chapter 180.

Section 2 of said Chapter 30 authorizes the Board of Prison Commissioners "to work State convicts on the Texas State Railroad for the purpose of putting its track and roadbed in good condition" in a limited number and for a limited period of time. The time within which convicts were permitted to be employed on said railroad under this section of said Chapter 30 expired March 16, 1921, and, of course, the Board of Prison Commissioners is not now authorized to work

State convicts on the Texas State Railroad under the provisions of said Section 2 of said Chapter 30.

Excepting Section 1 of said Chapter 30, which we have already referred to, we have thus completed an analysis of said Chapter 180 and said Chapter 30, with respect to said Senate Bill No. 267, and reach the conclusion that said Chapter 180 and said Chapter 30 are inoperative and are in effect repealed by said Senate Bill No. 267, in so far as they relate to the power, duty or authority of the Board of Prison Commissioners of this State with respect to the control, sale, lease, extension, maintenance, management or operation of the Texas State Railroad.

The only law thus left fixing duties and responsibilities with respect to the control, management, maintenance and operation of said railroad is said Senate Bill No. 267, and as it places no such duties and responsibilities upon the Board of Prison Commissioners it follows that the Board of Prison Commissioners now has no legal right, power or authority to control, manage, maintain or operate said Texas State Railroad.

The question is raised as to whether or not the failure or refusal of the Board of Managers to take over this property and proceed concerning same as provided by said Senate Bill No. 267 would have the effect of leaving the control, management, maintenance and operation of it in the hands of the Board of Prison Commissioners. We think not. If so, by virtue of and under what law? There is none, as we have already seen. Since there is now not only no law so authorizing and requiring, but on the contrary a law, that is, said Senate Bill No. 267, expressly vesting in another body, that is, the Board of Managers, "full and plenary control and management" of this property, requiring the Board of Prison Commissioners "to deliver the possession of said railroad, together with all equipment, supplies, choses, books, records and documents of every character, and all property of whatsoever kind belonging to said railroad" to said Board of Managers "immediately on the taking effect of this act," the conclusion is inevitable that the Board of Prison Commissioners now has no right, power or authority with respect to the control, management, maintenance or operation of this railroad. And this is true even if the Board of Managers provided for by said Senate Bill No. 267 should never in fact be brought into being, or even though such Board, having been brought into being, should for any reason fail or refuse to perform the duties enjoined upon it by said Senate Bill No. 267.

We are not called upon to pass upon the duties, responsibilities, power and authority of said Board of Managers with respect to this railroad, nor does it seem to be necessary in view of the plain provisions of said Senate Bill No. 267.

In the event, however, that the said Board of Managers should for any reason fail or refuse to take over this property, a contingency which we cannot assume has arisen or will arise, and mention it here only because raised by the Board of Prison Commissioners as touching their duty with respect to this property in such a case, we suggest that that fact be called to the attention of the Governor that he may have opportunity to take such steps with respect to this

property as in his judgment the law and the facts, and the best interests of the State, may warrant and require.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2371, Bk. 56, P. 302.

THE MANUFACTURE OF CARBON BLACK—AUTHORITY OF RAILROAD
COMMISSION TO GRANT PERMIT.

Article 7854c, regulating the production of gas and crude oil, prohibits waste, and, upon finding by the Railroad Commission that the manufacture of carbon black is a wasteful utilization of natural gas, it is without authority to grant a permit for the use of natural gas in the manufacture of carbon black.

Extracting a minor portion of the properties of natural gas without utilizing a substantial portion of it, and with a loss of its heat units, comes within the definition of "wasteful utilization."

AUSTIN, TEXAS, July 26, 1921.

Honorable Clarence E. Gilmore, Railroad Commissioner, Capitol.

DEAR SIR: Replying to your request, embodied in the following question, I beg to advise:

"Has the Railroad Commission the authority, under Chapter 155, Acts of the Thirty-sixth Legislature, Regular Session, to grant a permit for the manufacture of carbon black by the burning of natural gas?"

Section 1 of the article referred to provides:

"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,' in addition to its ordinary meaning, shall include: * * * (e) The wasteful utilization of such gas."

The question has been raised in discussing this article whether or not the "wasteful utilization of gas" may mean that in handling it for use as, for instance, in leaky pipes, etc., it shall not be wasted. In Section 2 of the chapter referred to, I find this language:

"* * * Shall not wastefully utilize oil or gas or allow same to leak or escape from natural reservoir, wells, tanks, containers or pipes."

The use of this language by the Legislature clearly indicates that to "wastefully utilize oil or gas" is prohibited and the further prohibition is also invoked against allowing same to leak or escape from containers or pipes, thus distinguishing between leakage and wasteful utilization. It is clear, then, in using the expression "wasteful utilization" in the first section, the Legislature did not have in mind a leakage of gas, but that they had in mind to prohibit in Texas, as has been done in practically all of the States, the use of gas in the business or manufacture which will not consume or utilize all, or a substantial portion of its qualities. No better illustration of "wasteful utilization" could be given than that contained in the case before us, to wit: The use of it in the manufacture of carbon black.

I have your record of the investigation upon the application, and also your conclusion embodied in the formation of your Rule No. 41.

In order to answer the question, it is necessary to determine if the

act referred to and its prohibitions against the use of oil and gas, is within the police powers of the State, and also it will further turn upon the question as to whether or not the burning of natural gas, in the manufacture of carbon black, is a wasteful utilization of the gas. The former is a question of law; the latter is a question of fact.

Your Commission has passed upon the question of fact and has found that it is a wasteful utilization of natural gas. In this, I observe from the records, there is practically no conflict of authorities. It is shown without question that one thousand cubic feet of natural gas contains from thirty to forty pounds of carbon. No claim is made that it is possible to extract from this amount of gas more than one to two pounds of carbon, the balance being a total loss. The entire heat units of the gas, it is conceded, is also lost. The commercial value of one thousand feet of natural gas, in the vicinity of the field in question, is shown by the record to be on the average of forty-three cents. The market value of a pound of carbon black is shown to be from twelve to twenty-five cents. Under this state of facts there could be no doubt that the manufacture of carbon black from natural gas is a great waste of the gas; that is of its properties, as well as its commercial value.

The power of the State to conserve its natural resources has been before the court so frequently and in so many character of cases, it is hardly possible to refer to the various lines of authorities in substantiation of our conclusion that the State of Texas has the right to conserve its natural oil and gas resources by the prohibition placed upon its use in the act referred to. We consider it sufficient to refer to the recent case of Walls, Attorney General of Wyoming, et al. vs. The Midland Carbon Company et al., in 254 U. S., page 300. This case is in point and is thoroughly decisive of the question before us. The Midland Carbon Company had established a plant at a cost of three hundred and seventy-five thousand dollars prior to the enactment of a statute by the Legislature of the State of Wyoming forbidding the use of natural gas in the manufacture of carbon black and questions were raised by the carbon company not available to applicants in the case before you to substantiate a claim of right to have a permit under a previously enacted statute and rule of the Railroad Commission. The Supreme Court of the United States held that the power was in the State to conserve its resources even at the great loss pointed out by the carbon company in the case before the court. In this opinion, Justice McKenna discussed at length the case of Bacon vs. Walker, 204 U. S., 311, in which the Legislature of Idaho had prohibited the grazing of sheep on pre-occupied public lands in which the Supreme Court held the power was in the State to make the regulation.

He also discussed the more pertinent case of Ohio Oil Company vs. Indiana, 177 U. S., 190. This suit was by the State and was based upon a statute which was directed against and prohibited one having possession or control of any natural gas or oil well to permit the flow of gas or oil from any such well to escape into the open air for a longer period than two days after the gas or oil had been struck. The oil company contended that it was using the gas for the pur-

pose of producing or raising the oil; that the oil was a valuable commodity and the gas was not, at the time available to commercial purposes; that to forbid the waste of this gas would be to prohibit the oil company from producing its oil and would thereby confiscate its property without due process of law, etc. The Supreme Court upheld the statute and said that it was a proper exercise of the police power of the State.

The case of *Lindsley vs. Natural Carbonic Gas Company*, 220 U. S., 61, was also discussed. This is a suit brought by the Natural Carbonic Gas Company to restrain the officers of the State of New York from enforcing against it a statute which made it unlawful to pump from wells or otherwise draw by artificial appliances that class of mineral water holding in solution carbonic acid gas or producing an unnatural flow of such water for the purpose of extracting, collecting, compressing, liquifying or vending such gas as a commodity otherwise than in connection with the mineral water and the other mineral ingredients with which it was associated. This statute was passed upon the theory of conservation and was to prohibit a waste of the State's mineral resources by extracting from it a particular portion of same. Pleas of destruction of property rights were interposed in behalf of the complainants but the Supreme Court held that they were insufficient upon which to deny the State's right to conserve its resources.

The waste shown in each of the cases above discussed is small in comparison to that admitted in the carbon black case before the Commission. The proportion of waste or rather of utilization of the carbon in the gas, as disclosed in the Wyoming case, is practically the same as represented and accepted in the investigation which you have conducted, the record of which I have before me. If Indiana, Idaho, Ohio, New York and Wyoming had the right under their police power, as stated by the Supreme Court of the United States, to legislate upon the subjects before them, unquestionably the Oil and Gas Conservation Act, which places power of regulation in the Railroad Commission, is within the police power of the State of Texas, and, in view of the bulletin of the Kansas City Testing Laboratory, the Smithsonian Institution and other accepted authorities on the subject in the record before me that the manufacture of carbon black is a waste of natural gas in connection with the wording of the statute, it is clear to me that the Legislature intended to prohibit the use of natural gas in the manufacture of carbon black, or of any other commodity which uses so small a portion of its properties.

I find no authority placing in the hands of the Commission any discretion in the enforcement of this law, and must therefore conclude that upon a finding of fact that the manufacture of carbon black utilizes a small portion of the carbon and loses the heat units it is a wasteful utilization of natural gas, as that term is used in the statute, and you would have no authority to grant a permit for its use.

Yours very truly,

TOM L. BEAUCHAMP,
Assistant Attorney General.

Op. No. 2438½, Bk. 57, P. —.

CONSTRUCTION OF CHAPTER 88 AND CHAPTER 99, GENERAL LAWS OF
THE THIRTY-SEVENTH LEGISLATURE, THE FORMER PROVIDING
REDUCED FARE ON RAILROADS FOR THE OFFICERS NAMED THERE-
IN, THE LATTER PROVIDING FOR THE GRANTING OF FREE
TRANSPORTATION TO THE OFFICERS NAMED IN SUCH ACT
OVER RAILROADS, INTERURBANS AND STREET
CAR LINES.

The provisions of Chapter 88, page 171, General Laws of the Thirty-seventh Legislature permitting steam and electric railway companies to sell transportation to certain peace officers of the State when traveling on official business between points within the State at the reduced rate of one cent (1c) per mile do not conflict with the provisions made in Chapter 99 wherein railroad and interurban companies are permitted to grant free passes to the persons and officers named in Section 2 of Chapter 99, nor do the provisions of Chapter 88 prohibit the granting of free passes to the persons and officers named in Section 2 of Chapter 99.

AUSTIN, TEXAS, June 28, 1922.

Honorable Thos. D. Barton, Adjutant General, Austin, Texas.

DEAR SIR: We are in receipt of your communication of the 10th instant in which you request to be advised if there is a conflict in the provisions of Chapter 88, General Laws of the Thirty-seventh Legislature, page 171, and Chapter 99, of the same acts, page 191, such as would prohibit the railroad companies from issuing passes to yourself, Major Crawford and Captain Taylor.

Chapter 88, Section 1, provides that the Adjutant General of Texas, State rangers, the sheriff of any county and deputies to be designated by him, constables, chief of police and assistant chief and captains, city marshals, chief of the detectives of any county or city, and assistant detectives shall be permitted by any steam railroad company, electric interurban company, or any person or persons operating the same, to be transported between points wholly within this State at the reduced rate of one cent per mile while traveling on official business connected with their respective offices.

Section 2 of this act provides a penalty for any peace officer named in Section 1 who unlawfully procures such transportation, and states the necessary steps to obtain the benefit of such reduced rates and further provides "that if the sheriff or constable has designated two deputies who are entitled to such reduced rates, *that then and in that event no deputy of such sheriff or constable shall be entitled to free transportation under the provisions of the pass laws of this State.*"

The foregoing provisions were enacted under what is known as Senate Bill No. 263, which was presented to the Governor for his approval on the 12th day of March, A. D. 1921. This act permits any steam railway company or electric interurban railroad company or any person operating same, to sell to the Adjutant General of the State of Texas, State rangers, the sheriff of any county, his deputies to be designated by him, constables, chief of police, and assistant chiefs and captains, city marshals, chief of the detectives of any county or city and assistant detective, upon the presentation of the proper cer-

tificate, transportation over its lines wholly within this State at the reduced rate of one cent per mile.

The above legislative enactment indicates by its emergency clause one of the controlling and material purposes for its enactment, the same being shown by this language:

"And the further fact that the peace officers of the State are greatly handicapped in the enforcement of the law and the suppression of the great crime wave which is sweeping the State because of the refusal of the railroad companies to issue free transportation to them, creates an emergency and an important public necessity," etc.

Chapter 99, page 191, Acts of the Regular Session of the Thirty-seventh Legislature, is designated as House Bill No. 196, and was presented to the Governor for his approval on the 11th day of March, A. D. 1921, or that is to say, just one day prior to the presentation of Chapter 88, page 171, Acts of the Regular Session of the Thirty-seventh Legislature, to the Governor for his approval.

An examination of the House and Senate Journals will disclose the fact that Senate Bill 263 was introduced prior to House Bill 196. We mention these matters for the purpose of arriving at the intent and purpose of the Legislature.

Section 2, Chapter 99, page 191, of the General Laws of the Thirty-seventh Legislature, at its Regular Session, is an act to amend Section 2 of Chapter 83 of the General Laws of the Thirty-second Legislature, relating to the exemption of certain persons and officers from the provision of the statute known as the Anti-Pass Law of this State.

Among many other provisions, Section 2 provides that the provisions of Section 1 of this act (Article 1532) shall not be held to prohibit any steam or electric interurban railway, telegraph company or chartered transportation company or sleeping car company, or the receivers or lessees thereof, or persons operating the same, or the officers, agents or employees thereof, from granting free or exchanging free passes, franks, privileges, substitute for pay, or other things herein prohibited to the following persons: The actual bona fide employees of any such company and the members of their family, bona fide custom and immigration inspectors employed by the government, the State Health Officer and one assistant, * * * also the United States marshals and not more than two deputies of each such marshal; State rangers, constables; *the Adjutant General and Assistant Adjutant General of the State of Texas, the members of the State Militia in uniform and when called into service for the State*, sheriffs and not more than two deputies to each constable or sheriff. Any other bona fide peace officer shall enjoy the same privilege, when their duties are to execute criminal processes; provided that if any such railroad or transportation company shall grant to any sheriff a free pass over its line of railroad, then it shall issue alike free transportation to each and every sheriff in this State who may make to it written application therefor.

In Section 2, Chapter 88, page 171, the Legislature saw fit to make special provision that deputy sheriffs and deputy constables who were designated to receive the benefits of such reduced rates, that then and in that event no such deputy of such sheriff or constable shall be entitled to free transportation under the provisions of the Pass Laws of this

State. This clearly indicates that all other officers named in Section 1 of Chapter 88 were not to be deprived of the privilege of receiving from any steam or electric interurban railway companies free passes.

The provisions made in Chapter 88, page 171, leave the granting of reduced transportation to the officers named therein entirely to the discretion and pleasure of the railroad companies. This is also true with reference to the provisions made in Chapter 99, page 191, relative to the granting of free passes by railroad companies to the officers named in such act.

One of the common and essential rules in the construction of a statute or statutes is to arrive at the intent and purpose of the Legislature in enacting such statute or statutes. Another rule is that when the Legislature has enacted statutory provisions that are apparently in conflict with each other, that if it can reasonably and consistently be done, such statutes are to be construed together and their intent and purpose determined so that each may stand as the valid and existing statute. The Legislature in Section 2 of Chapter 88 used the following language:

"That if the sheriff or constable has designated two deputies who are entitled to such reduced rates, that then and in that event no deputy of such sheriff or constable shall be entitled to free transportation under the provisions of the pass laws of this State."

This language plainly indicates that it was not the intent of the Legislature to prohibit railroad and interurban companies from granting free passes to the officers and persons named in Section 2 of Chapter 99, and it would further indicate that all persons named in Section 1, Chapter 88, except deputy sheriffs and deputy constables, would be entitled to receive the reduced rate provided for in Chapter 88, also the free passes provided for in Section 2 of Chapter 99.

In a further effort to arrive at the intent and purpose of the Legislature it becomes material to refer to the language used in the emergency clause, Section 3 of Chapter 88, page 172, which reads as follows:

"The importance of this act and the fact that the calendar will be crowded throughout the session, and the further fact that the peace officers of the State are greatly handicapped in the enforcement of the law and the suppression of the great crime wave which is sweeping the State because of the refusal of the railroad companies to issue free transportation to them, creates an emergency and an imperative public necessity," etc.

From a careful examination of the provisions made in Chapters 88 and 99, Acts of the Thirty-seventh Legislature, at its Regular Session, we reach the conclusion, first, that if the railroad and interurban companies of this State so desired that they should not be prohibited from granting to the officers named in Section 2 of Chapter 99, free passes over their railroad and interurban lines, but in the event that they did not see fit or proper to issue such free passes to the persons named in such act, that they then would be permitted to sell to the officers named in Section 1 of Chapter 88 transportation over their railroad and interurban lines between points wholly within this State at the reduced rate of one cent per mile while traveling on official business connected with their respective offices.

Therefore, it is the opinion of this Department, and you are so advised, that the provisions made in Chapter 88, Section 1, page 191, General Laws of the Thirty-seventh Legislature, at its Regular Session, does not conflict with the provisions made in Section 2 of Chapter 99, page 192, Acts of the Thirty-seventh Legislature, at its Regular Session, nor do the provisions made in Section 1 of Chapter 88 serve as a statutory inhibition by which steam railways are prohibited from granting free passes to the Adjutant General and Assistant Adjutant General of the State of Texas, the members of the State Militia in uniform and when called into service for the State, or other persons and officers named in Section 2 of Chapter 99.

The foregoing discussion of Chapter 88 and Chapter 99, General Laws of the Thirty-seventh Legislature, is not to be understood as anything more than a construction of the provision contained in such chapter, and we here direct attention to the fact that there is now pending in the Supreme Court of the State the case of the State of Texas vs. The St. Louis, Southwestern Railway Company of Texas et al., which is a suit to determine the constitutionality of what was formerly known as Chapter 83, Acts of 1911, but since the amendment of such act by the provisions made in Chapter 88 of the Thirty-seventh Legislature, or what is commonly known as the Anti-Pass Law, in which it is alleged that such act is unconstitutional for the reason that it is an unjust discrimination created by said act as to passenger traffic, and by this opinion it is not to be understood that any of the rights or contentions made in the above styled suit are waived and in any way modified.

Yours very truly,

C. L. STONE,
Assistant Attorney General.

OPINIONS ON STATE HIGHWAY COMMISSION LAWS

Op. No. 2382, Bk. 56, P. 223.

HIGHWAY LAWS—STATE AID—FEDERAL AID.

It is only in unorganized counties in which the assessed valuations do not permit of the raising of the necessary funds to assure construction of the part of State highways passing through said county, that the State Highway Commission is authorized to construct such part of the same from the State Highway funds available for such purposes.

In counties in which the assessed valuation of property, in the judgment of the Commission, does not warrant the construction of sections of the system of State highways necessary to provide the State with trunk roads, or to connect market centers of the State, as provided for in the act creating the State Highway Commission, the Commission may, in its discretion, increase such allotment of "State aid" not to exceed one-half of the cost of construction of not more than ten miles of such part of the system of State highways in each of such counties in any one year, and may supplement the amount contributed for such purpose out of the highway funds by a like amount out of Federal funds.

Sec. 12, Chapter 71, General Laws, Fourth Called Session, Thirty-fifth Legislature.

AUSTIN, TEXAS, September 20, 1921.

Honorable Rollen J. Windrow, State Highway Engineer, State Office Building, Austin, Texas.

DEAR SIR: Your letter of the 29th ultimo, addressed to the Attorney General, has been received. It reads:

"Reference is made to Section 12 of Chapter 190 of the Acts of 1917, Regular Session, as amended by Chapter 71, General Laws, passed at the Fourth Called Session of the Thirty-fifth Legislature.

"First: Paragraph 2 of this section reads as follows:

"Provided if any State highway shall pass through any unorganized county or other territory in which the assessed valuations do not permit the raising of the necessary funds to assure construction of the part of such State highway, the Commission shall be authorized to construct such part of the State highway from any moneys in the State highway fund available for such purposes."

"We would like to know if in your opinion the words 'or other territory' could be construed as meaning any county in which the assessed valuations do not permit the raising of necessary funds for road construction and if in your opinion the Highway Commission is authorized under this section or any other laws, to grant more than fifty per cent State aid to such counties? By State aid I have reference to registration fees and not Federal aid.

"Second: In the third paragraph the wording in part is as follows:

"In counties in which the assessed valuation of property in the judgment of the Commission does not warrant the construction of sections of the system of State highways necessary to provide the State with trunk roads or to connect market centers of the State as provided in this act, the Commission may in its discretion increase such allotment of *State aid* not to exceed one-half of the cost of construction."

"We would like to know if in your opinion the State Highway Commission is authorized under this section to allot fifty per cent of the cost of construction in State aid and fifty per cent in Federal aid? In other words, in your opinion, is the term 'State aid' intended to mean aid from the registration fees or is it intended to mean both State and Federal aid?"

This Department has heretofore advised your department that your

first question must be answered in the negative. We most respectfully refer you to that opinion.

The only provision we can find in the statutes relating to the duties of the Highway Commission with reference to the appropriation or disbursement of funds appropriated by the United States Government and handled through the Federal Department of Agriculture, is contained in Article 6904½ P, Texas Complete Statutes, 1920. This section merely authorizes the State Highway Commission to co-operate with the Federal Government and to enter into all necessary agreements with the United States Government relating to the construction and maintenance of rural post roads, and provides that all Federal funds appropriated to this State for road construction purposes by the Federal Government, shall be expended on the highways comprising the system of State highways, as may be determined by the State Highway Commission.

We have also carefully examined the several acts of Congress making appropriations for the construction of rural post roads, as well as the rules and regulations of the Secretary of Agriculture for carrying out the provisions of said acts. We find nothing in either State or Federal law which would inhibit the State Highway Commission from granting Federal aid in the construction of a highway built under the provisions of Section 12, and match dollar for dollar the allotment made for such purpose out of the State Highway funds. It is clear from our statute that "State aid" means funds derived from the sources mentioned in Chapter 190, supra, and does not include funds appropriated to the States by the Federal Government. Such funds are commonly referred to as "Federal aid."

Very truly yours,

BRUCE W. BRYANT,
Assistant Attorney General.

Op. No. 2347, Bk. 56, P. 308.

MOTOR VEHICLES.—CHAUFFEUR'S LICENSE.

Chauffeurs who are citizens of the city of Juarez in the Republic of Mexico, who convey passengers by automobile, for hire, from Juarez into the city of El Paso in the State of Texas, are subject to the provisions of Chapter 207, General Laws, passed at the Regular Session of the Thirty-fifth Legislature, and must secure chauffeur's license as is required by said act.

Chapters 190, 207, General Laws, Regular Session, Thirty-fifth Legislature.

Chapter 73, General Laws, Fourth Called Session, Thirty-fifth Legislature.

Constitution of United States, Subdivision 3, Section 8, Article 1.

Hendrick vs. Maryland, 235 U. S., 610.

Kane vs. State of New Jersey, 242 U. S., 161.

Chapter 131, General Laws, Thirty-seventh Legislature.

AUSTIN, TEXAS, May 17, 1921.

Honorable Will H. Pelphray, County Attorney, El Paso, Texas.

DEAR SIR: Your letter of the 4th ult., addressed to the Attorney General, has been received. It reads:

"Please advise me if under Article 820t of the Penal Code, a person duly

licensed as a chauffeur in Juarez, Mexico, and who receives employment to haul persons to this side, or into El Paso, would be subject to this article, which requires a chauffeur's license? We have quite a number of licensed chauffeurs in Juarez who are daily bringing people from Mexico to the United States, and who have no chauffeur's license for the State of Texas. The people, as I understand it, do not solicit any employment in El Paso, but merely fulfill a contract entered into in Mexico.

"Please let me hear from you at your earliest convenience."

We regret that we have been unable to answer this communication sooner. Our desk has been so crowded with other matters which demanded immediate attention that we have been unable to write you at an earlier date. Please accept our apology for the delay.

At the Regular Session of the Thirty-fifth Legislature, the State Highway Department was created. (Chap. 190.) At the same session of the Legislature another act was passed for the regulation of the operation of motor vehicles. (Chap. 207.)

Section 16 of Chapter 190 provides for the registration of motor vehicles of all classes that may be operated upon the public highways of this State and provides a system of registration fees to be paid by the owners thereof, and said act further provides for the securing of permanent number plates to be placed upon the front and rear of all automobiles, and for an annual seal to be placed upon the radiator of said vehicles.

Section 24 of the act provides a penalty for the owner or person operating a motor vehicle, or motorcycle, upon the public highways of this State without having the number plates displayed thereon in accordance with the requirements of the act, and provides a penalty for anyone owning and operating a motor vehicle, or motorcycle, upon the public highways of this State without the distinguishing seal provided by the State Highway Department for each year.

By the provisions of Chapter 207, provisions are made for the licensing of chauffeurs. Sections 14, 24, 25, 26, 27, 28, 29, and 30 of said act deal with this subject, and are as follows:

"Sec. 14. Chauffeurs Required to Have License.—No person shall employ for hire as a chauffeur of a motor vehicle any person not licensed as in this act provided.

"No person shall allow a motor vehicle owned by him or under his control to be operated by any chauffeur who has no legal right to do so."

"Sec. 24. Revocation of License.—(a) In case of the arrest three times within a period of sixty (60) days of any person for the violation of Section 20 of this act regulating the speed of vehicles upon the highways, followed by the conviction of such person upon each of such charges; or in case of two arrests and convictions of such persons within a period of sixty (60) days for the violation of Section 13 of this act, relating to intoxicated persons, the Department shall forthwith revoke the license of such person to operate a motor vehicle on the public highways of this State, in case such violations occur in connection with the operation of a motor vehicle.

"Upon so revoking the license the Department shall forthwith send notice of such revocation to the operator and to the local police authorities, and shall make demand upon the operator for the return to the Department of the license certificate theretofore issued to him, and of the badge in case of a chauffeur. It shall be the duty of the operator to return such license certificate, and of a chauffeur to return also his badge in compliance with the demand so made. The Department shall not again issue any such license to such person until the expiration of six months from the date of the last conviction of such person as hereinabove provided for, and it shall be unlawful for such person so convicted

to operate or drive any motor vehicle or motorcycle upon the public highway anywhere within this State during a period of six months after the date of the last conviction.

"(b) In addition to all of the punishments provided in this act, the court may for a period not to exceed thirty days, suspend an operator or chauffeur's license upon such conviction of the licensee for violation of any of the provisions of this act.

"Sec. 25. An application for a license to operate a motor vehicle as a chauffeur (and by 'chauffeur' is meant any person whose business or occupation is that he operates a motor vehicle for compensation, wages or hire), shall be made by mail or otherwise to the Department upon blanks prepared for such purpose, and shall be accompanied by an annual fee of \$3.00, provided, that the first fee payable under this act shall be \$2.00 for the period of time expiring December 31, 1917, and said fee shall be payable on July 1, 1917, and thereafter on the first of January of each year there shall be paid by each chauffeur to the Department a fee of \$3.00, accompanied by the application, as herein provided for; provided, that any person wishing to engage in the business of a chauffeur at any time after January 1, 1918, shall pay \$3.00 when making his application, which shall pay his license fee till the 31st of December following the date of such application. The application for license to be issued to a chauffeur shall be in conformity with the requirements prescribed by the Department, and shall be sworn to by the applicant, and shall also, after being sworn to, be endorsed and vouched for by two reputable citizens of the place where the said applicant lives or resides at the time of making such application, setting forth that they have known or been acquainted with the applicant for a period of not less than sixty days prior thereto, and that the said applicant is trustworthy, sober and competent to operate motor vehicles upon the highways of this State. Upon the receipt of such application, and provided the Department is satisfied that the applicant is a proper party to whom a chauffeur's license should be issued, and is over eighteen years of age, they shall issue to him a distinguishing number or mark and shall also issue to him a license certificate in such form as the Department may determine.

"At the time of issuing said certificate to the chauffeur the Department shall also mail or deliver to him, free of charge, a metal badge to be at all times prominently displayed on his clothing when engaged in the operation of motor vehicles on the public highways or in prosecuting his said business.

"Upon the receipt of such applications to be licensed as a chauffeur the Department shall record the same in the office in a book kept for that purpose in the manner designated for recording the registrations of the owners of motor vehicles, and when the Department has issued license certificate and assigned to him a badge number, such applicants' names shall be noted in said records; and the names of the licensed chauffeurs shall be furnished to the county clerks and chiefs of police of the cities of this State in the same manner as is provided with respect to the owners of motor vehicles.

"Sec. 26. No person shall operate or drive a motor vehicle as a chauffeur upon any public highway in this State unless such person shall have complied in all respects with the requirements of this act, and shall at all times have in his possession his certificate or license and wear the badge issued to him by the Department, prominently displayed on his clothing, and failure on the part of such chauffeur to perform either or all of the acts hereinbefore prescribed shall constitute a misdemeanor, and upon conviction thereof he shall be punished by fine not to exceed one hundred (\$100) dollars; provided, that if it shall be made to appear to the satisfaction of the Department that any chauffeur shall have driven or operated a motor vehicle within this State while under the influence of intoxicating liquor during the period of such license, the Department shall thereupon immediately cancel the license of said chauffeur and shall not renew the same until after the expiration of six months from and after the date of such cancellation.

"Sec. 27. The badge issued to the chauffeur by the Department shall be valid only during the term of the license of the chauffeur to whom it is issued. Upon filing in the office of the Department an affidavit to the effect that the original

badge is lost, stolen or destroyed, and upon the payment of the fee of one (\$1.00) dollar, a duplicate badge will be furnished.

"No chauffeur having been licensed as herein provided shall permit any other person to possess or use his license or badge; nor shall any chauffeur, while operating or driving a motor vehicle, use or possess any license or badge belonging to another person, or a fictitious license or badge, and any violation of this section of the act shall constitute a misdemeanor punishable by fine not to exceed one hundred (\$100) dollars.

"Sec. 28. Upon the receipt of an application for a chauffeur's license the Department shall thereupon file the same and register the application in a book or on index card, which shall be kept in the same manner subject to public inspection as the books or index cards for the registration of motor vehicles.

"Sec. 29. No person shall use a fictitious name in applying for chauffeur's license; nor shall any chauffeur voluntarily allow any other person to possess or use his license certificate or badge; nor shall any chauffeur while operating or driving a motor vehicle use or possess any license certificate or badge belonging to any other person, or a fictitious certificate or badge.

"Sec. 30. No person shall operate or drive a motor vehicle as a chauffeur upon a public highway in this State after the first day of July, 1917, nor shall any owner of a motor vehicle permit such vehicle to be so operated or driven after such date unless the requirements of this act applicable to chauffeurs, shall have been in all respects complied with."

Section 45, as amended by the Second Called Session of the Thirty-fifth Legislature, prescribes a penalty for violations of Sections 14, 29, and 30 of the act.

Section 26 of the act makes it an offense, punishable by fine not exceeding one hundred (\$100) dollars for any person to operate or drive a motor vehicle as a chauffeur upon any public highway in this State, unless such person shall have complied in all respects with the requirements of this act. To the same effect are the provisions of Section 30, except by the latter provision, it is made an offense for the owner of a motor vehicle to permit such vehicle to be operated upon a public highway in this State by a chauffeur, unless such chauffeur has complied with all the provisions of said act.

It will therefore be observed that though a motor vehicle or motorcycle has been registered and the permanent number plates secured and attached to said motor vehicle, or motorcycle, as is required by the act, and though the annual distinguishing seal has been obtained and attached to the automobile, or motorcycle, in the manner prescribed by the act, the motor vehicle, or the motorcycle, cannot be operated by a chauffeur upon the public highways of this State without violating the provisions of Chapter 207, unless said chauffeur has complied with all the provisions of said chapter and secured his license as a chauffeur, which permits him to operate a motor vehicle upon the public highways of this State.

It is plain from the provisions of this latter act that no citizen of this State can operate a motor vehicle, or motorcycle, as a chauffeur upon the public highways of this State without first having secured a chauffeur's license. In an opinion prepared by this Department under date of June 26, 1917, by Honorable B. F. Looney, former Attorney General, a "chauffeur" within the meaning of Section 25, Chapter 207, Acts of the Regular Session of the Thirty-fifth Legislature, was defined as "any person who is engaged chiefly in driving or operating a motor vehicle, either for wages or salary in the employ of an-

other, or who operates for hire for the transportation of persons or property and on a vehicle, or vehicles, under their control."

The question you submit to this Department of whether the provisions of the law, above referred to, apply to a resident of a foreign nation who pursues the business of a chauffeur in said foreign country and occasionally brings passengers into this State, for hire, from said foreign country. In answer to this question we are naturally led to ask the question, "If our laws do not apply, then why not?" Is it because of that provision of our Federal Constitution, commonly referred to as the "commerce section," subdivision 3, Section 8. Article 1, which reads as follows: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

That a chauffeur residing in Juarez in the Republic of Mexico who brings passengers into the City of El Paso, for hire, is engaged in foreign commerce within the purview of that provision of the Federal Constitution, quoted above, it seems to us not to be doubted.

On July 1, 1910, the State of Maryland had a State Highway law in many respects similar to the Highway Law (Chapter 190), passed by the Regular Session of the Thirty-fifth Legislature of this State. We will quote a summary of the provisions of Sections 132, 133, 136, 137, and 140a of that law.

"The Governor shall appoint a commissioner of motor vehicles, with power to designate assistants, who shall secure enforcement of the statute. Before any motor vehicle is operated upon the highways the owner shall make a statement to the commissioner and procure a certificate of registration; thereafter it shall bear a numbered plate. This certificate and plate shall be evidence of authority for operating the machine during the current year (Sec. 133). Registration fees are fixed according to horsepower—six dollars when 20 or less; twelve dollars when from 20 to 40; and eighteen dollars when in excess of 40 (Sec. 136). No person shall drive a motor vehicle upon the highway until he has obtained at a cost of two dollars an operator's license, subject to revocation for cause (Sec. 137). Any owner or operator of an automobile, non-resident of Maryland, who has complied with the laws of the State in which he resides requiring the registration of motor vehicles, or licensing of operators thereof, etc., may under specified conditions obtain a distinguishing tag and permission to operate such machine over the highways for not exceeding two periods of seven consecutive days in a calendar year without paying the ordinary fees for registration and operator's license (Sec. 140a); but residents of the District of Columbia are not included amongst those to whom this privilege is granted (Sec. 132). Other sections relate to speed, rules of the road, accidents, signals, penalties, arrests, trials, fines, etc. All money collected under the provisions of the act go to the commissioner, and except so much as is necessary for salaries and expenses must be paid into the State Treasury to be used in construction, maintaining, and repairing the streets of Baltimore and roads built or aided by a county or the State itself. Section 140a is copied in the margin." (235 U. S.)

Section 140a of the act reads:

"140a. Any owner or operator not a resident of this State who shall have complied with the laws of the State in which he resides, requiring the registration of motor vehicles or licensing of operators thereof and the display of identification or registration numbers on such vehicles, and who shall cause the identification numbers of such State, in accordance with the laws thereof, and none other, together with the initial letter of said State, to be displayed on his motor vehicle, as in this subtitle provided, while used or operated upon the public highways of this State, may use such highways not exceeding two periods of

seven consecutive days in each calendar year, without complying with the provisions of Sections 133 and 137 of this subtitle; if he obtains from the Commissioner of Motor Vehicles and displays on the rear of such vehicle a tag or marker which the said Commissioner of Motor Vehicles shall issue in such form and contain such distinguishing marks as he may deem best; provided, that if any non-resident be convicted of violating any provisions of Sections 140b, 140c, 140d, 140e and 1401 of this subtitle, he shall thereafter be subject to and required to comply with all the provisions of said Sections 133 and 137 relating to the registration of motor vehicles and the licensing of operators thereof; and the Governor of this State is hereby authorized and empowered to confer and advise with the proper officers and legislative bodies of other States of the Union and enter into reciprocal agreements under which the registration of motor vehicles owned by residents of this State will be recognized by such other States, and he is further authorized and empowered, from time to time, to grant to residents of other States the privilege of using the roads of this State as in this section provided in return for similar privileges granted residents of this State by such other States."

It will be observed that under the provisions of this law it was unlawful for any person to drive a motor vehicle upon the highways of the State of Maryland until he had obtained at a cost of two dollars an operator's license, and that any owner or operator of an automobile, non-resident of Maryland, might, under specified conditions, obtain a distinguishing tag and permission to operate such machine over the highways of that State for not exceeding two periods of seven consecutive days in the calendar year without paying the ordinary fees of registration and operators' license.

On July 27, 1910, John T. Hendrick was a citizen of the United States, resident and commorant in the District of Columbia. On that day he left his office in Washington in his own automobile and drove it into Prince George's County in the State of Maryland, and while temporarily there was arrested on the charge of operating it upon the highways without having procured the certificate of registration required by Section 123 of the Motor Vehicle Law. He was tried before a justice of the peace and convicted. He appealed from the judgment of conviction and the case finally reached the Supreme Court of the United States. See *Hendrick vs. Maryland*, 235 U. S., 616.

Hendrick attacked the validity of the law, alleging:

"It discriminated against residents of the District of Columbia; attempts to regulate interstate commerce; violates the rights of citizens of the United States to pass into and through the State; exacts a tax for revenue—not mere compensation for the use of facilities—according to arbitrary classifications and thereby deprive citizens of the United States of the equal protection of the law."

In passing upon this case, Mr. Justice McReynolds, speaking for the court, used this language:

"The movement of motor vehicles over the highways is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves. Their success depends on good roads, the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the States for better facilities, especially by the ever increasing number of those who own such vehicles. As is well known, in order to meet this demand and accommodate the growing traffic the State of Maryland has built and is maintaining a system of improved roadways. Primarily for the enforcement of good order and the protection of those within its own jurisdiction the State put into effect the above described general regulations,

including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious.

"In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horsepower of the engines—a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. * * * The statute is not a mere revenue measure and a discussion of the classifications permissible under such an act would not be pertinent."

The State of New Jersey in 1906 passed an automobile law which was amended in 1908. This law provides, in substance:

"No person, whether a resident or non-resident of the State, shall drive an automobile upon a public highway unless he shall have been licensed so to do and the automobile shall have been registered under the statute; and also that a non-resident owner shall appoint the Secretary of State his attorney upon whom process may be served 'in any action or legal proceeding caused by the operation of his registered motor vehicle, within this State, against such owner.' The statute fixes the driver's license fee for cars of less than thirty horsepower at two dollars and more than thirty horsepower at four dollars. It fixes the registration fee at three dollars for cars of not more than ten horsepower; five dollars for those from eleven to twenty-nine horsepower; and ten dollars for those of thirty or greater horsepower. Both license fees and registration fees, whensoever issued, expire at the close of the calendar year. The moneys received from license and registration fees in excess of the amount required for the maintenance of the motor vehicle department are to be applied to the maintenance of the improved highways. Penalties are prescribed for using the public highways without complying with the requirements of the act." (242 U. S.)

Kane, a resident of New York, was arrested while driving his automobile on the public highways of New Jersey and tried in the recorder's court. The facts in the case may best be stated by quoting from the opinion of the Supreme Court of the United States in the case of Kane vs. New Jersey, 242 U. S.:

"Kane had been duly licensed as a driver under the laws of both New York and New Jersey. He had registered his car in New York but not in New Jersey. He had not filed with the Secretary of State of New Jersey the prescribed instrument appointing that official his attorney upon whom process might be served. When arrested he was on his way from New York to Pennsylvania. The aggregate receipts from license and registration fees for the year exceeded the amount required to defray the expenses of the motor vehicle department, so that a large sum became available for maintenance of the improved roads of the State. Kane contended that the statute was invalid as to him, a non-resident, because it violated the Constitution and laws of the United States regulating interstate commerce and also because it violated the Fourteenth Amendment. These contentions were overruled; and he was fined five dollars. The conviction was duly reviewed both in the Supreme Court and by the Court of Errors and Appeals. The contentions were repeated in both of those courts; and both courts affirmed the conviction. Kane vs. New Jersey, 81 N. J. L., 594. The case was brought here by writ of error."

The court in passing upon this case said:

"The power of a State to regulate the use of motor vehicles on its highways

has been recently considered by this court and broadly sustained. It extends to non-residents as well as to residents. It includes the right to exact reasonable compensation for special facilities afforded as well as reasonable provisions to insure safety. And it is properly exercised in imposing a license fee graduated according to the horsepower of the engine. *Hendrick vs. Maryland*, 235 U. S., 610. Several reasons are urged why that case should not be deemed controlling:

"1. The Maryland law did not require the non-resident to appoint an agent within the State upon whom process may be served. But it was recognized in discussing it, that 'the movement of motor vehicles over the highways is attended by constant and serious dangers to the public' (p. 622). We know that ability to enforce criminal and civil penalties for transgression is an aid to securing observance of laws. And in view of the speed of the automobile and the habits of men, we cannot say that the Legislature of New Jersey was unreasonable in believing that ability to establish, by legal proceedings within the State, any financial liability of non-resident owners, was essential to public safety. There is nothing to show that the requirement is unduly burdensome in practice. It is not a discrimination against non-residents, denying them equal protection of the law. On the contrary, it puts non-resident owners upon an equality with resident owners.

"2. The Maryland law contained a reciprocal provision by which non-residents whose cars are duly registered in their home State are given, for a limited period, free use of the highways in return for similar privileges granted to residents of Maryland. Such a provision promotes the convenience of owners and prevents the relative hardship of having to pay the full registration fee for a brief use of the highways. It has become common in state legislation; and New Jersey has embodied it in her law since the trial of this case in the lower court. But it is not an essential of valid regulation. Absence of it does not involve discrimination against non-residents; for any resident similarly situated would be subjected to the same imposition. A resident desiring to use the highways only a single day would also have to pay the full annual fee. The amount of the fee is not so large as to be unreasonable; and it is clearly within the discretion of the State to determine whether the compensation for the use of its highways by automobiles shall be determined by way of a fee, payable annually or semi-annually, or by a toll based on mileage or otherwise. Our decision sustaining the Maryland law was not dependent upon the existence of the reciprocal provision. Indeed, the plaintiff in error there was not in a position to avail himself of the reciprocal clause; and it was referred to only because of the contention that the law discriminated between non-residents; that is, that Maryland extended to residents of other states privileges it denied to residents of the District of Columbia.

"3. In *Hendrick vs. Maryland*, it appeared only that the non-resident drove his automobile into the State. In this case it is admitted that he was driving through the State. The distinction is of no significance. As we there said (622): 'In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others.'

"4. In the *Hendrick* case it did not appear, as here, that the fees collected under the motor vehicle law exceeded the amount required to defray the expense of maintaining the regulation and inspection department. But the Maryland statute, like that of New Jersey, contemplated that there would be such excess and provided that it should be applied to the maintenance of improved roads. And it was expressly recognized that the purpose of the Maryland law 'was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious'.

"The judgment should be affirmed."

These opinions announce the following principles of law:

"The movement of motor vehicles over highways being attended by constant and serious dangers to the public and also being abnormally destructive to the highways is a proper subject of police regulation by the State.

"In the absence of national legislation covering the subject, a State may prescribe uniform regulations necessary for safety and order in respect to operation of motor vehicles on its highways including those moving in interstate commerce.

"A reasonable graduated license fee on motor vehicles when imposed on those engaged in interstate commerce does not constitute a direct and material burden on such commerce and render the act imposing such fee void under the commerce clause of the Federal Constitution.

"A State may require registration of motor vehicles; and a reasonable license fee is not unconstitutional as denial of equal protection of the laws because graduated according to the horse power of the engine. Such a classification is reasonable.

"The reasonableness of the State's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress.

"A State which, at its own expense, furnishes special facilities for the use of those engaged in interstate and intrastate commerce may exact compensation therefor; and if the charges are reasonable and uniform they constitute no burden on interstate commerce. The action of the State in such respect must be treated as correct unless the contrary is made to appear.

"A State motor vehicle law imposing reasonable license fees on motors, including those of non-residents, does not interfere with rights of citizens of the United States to pass through the State." (235 U. S., 611.)

And

"A registration fee, not unreasonable in amount, which is exacted by a State from residents and non-residents alike as a condition to the use of its highways by motor vehicles, is not a discrimination against the citizens of other States either (a) because the amount of the fee is fixed for each calendar year without reference to the extent to which the highways are used, or (b) because the liability of non-residents to pay is not tempered by the allowance of any period of free use in reciprocation for like privileges allowed by the States in which they reside.

"It is clearly within the discretion of the State to determine whether the compensation for the use of highways by automobiles shall be determined by way of a fee, payable annually or semi-annually, or by a toll based on mileage or otherwise.

"The power of the State, in the absence of national legislation upon the subject, to regulate the use of its highways by motor vehicles moving in interstate commerce, applies as well to such as are moving through the State as to such as are moving into it only.

"As applied to vehicles of non-residents moving in interstate commerce as well as to vehicles of residents, the amount of the registration fee may properly be based not only on the cost of inspection and regulation, but also on the cost of maintaining improved roads." (242 U. S., 160, 161.)

Section 16 of the original automobile act, in providing for the registration of motor vehicles and motorcycles, and providing for the payment of fees therefor, states that the object of the same is to provide funds to effectuate the provisions of the act. This section has twice been amended, the last time by Chapter 131, General Laws of the Regular Session of the Thirty-seventh Legislature. Sections 11 and 12 of the act prescribe the plan for a highway system and for the construction of State highways by the State, acting in conjunction with the counties of the State. Section 23 of the act provides:

"All funds coming into the hands of the Highway Commission, derived from registration fees hereinbefore provided for, or from other sources, if collected, shall be deposited with the State Treasurer to the credit of a special fund designated as 'The State Highway Fund.' * * *

"The said State Highway fund shall be expended by the State Highway Com-

mission for furtherance of public road construction and the establishment of a system of State highways, as contemplated and set forth in this act. * * * One-half of the gross collection of registration fees on all motor vehicles and motorcycles, received from the several counties of the State by the State Highway Department, as provided in this act, shall be remitted to the county treasurer in the counties from which such collections were respectively made; and provided further, that such allotment of registration fees to the counties shall constitute a special fund 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."

By Chapter 73 of the Acts of the Fourth Called Session of the Thirty-fifth Legislature, it is provided that the registration and transfer of motor vehicles should be done with and by the county tax collectors who are to remit on Monday of each week the portion of the receipts derived therefrom to the State Highway Department, and the remaining portions are to be paid into the county depository of the respective counties, and appropriates all funds coming into the hands of the State Highway Department from registration, and all sources, for the purpose of carrying out all provisions of the act creating the State Highway Department, regulating the operation of motor vehicles and of this act.

It was the purpose of these several acts to create a fund with which to construct a better system of highways throughout the State. The full purpose may be summed up in the same language used by the court in the case of *Hendrick vs. Maryland*.

"Primarily for the enforcement of good order and the protection of those within its own jurisdiction, the State put into effect the above-described general regulations, including requirements for registration and licenses. A further evident purpose was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious."

These several statutes are not mere revenue measures but measures for the purposes above stated. The license and registration fees provided for are small and reasonable. The minimum cost of registering an automobile is \$7.50. This includes one pair of permanent number plates and the distinguishing seal which entitles the particular car registered to operate upon the public highways of this State for one year and for an additional cost of \$3 an annual chauffeur's license may be obtained.

Clearly under the above authorities a State, in the exercise of its police power, may require a non-resident to obtain a license or pay a registration fee before operating his car upon the public highways of this State, although such non-resident may be driving into or through the State and engaged at the time in interstate commerce. If such a requirement is reasonable and lawful and can be made to apply to the citizens of sister states of this Republic, we know of no rule of international law which would favor the citizens of another nation under similar circumstances and exempts them from the payment of such fees or charges, thereby discriminating against the citizens of this Republic who are not citizens of this State.

Section 22 of the act creating the State Highway Department provides:

"Motor vehicles owned by citizens of other States temporarily in this State will be exempt from the provisions of this act for a period of ninety days, if they show the State Highway Department that they have complied with similar laws of some other State, or of a municipality of another State providing adequate identification of such motor vehicle or motorcycle. Provided, however, that if such citizen of another State shall remain in Texas longer than thirty days, he shall execute authority to the chairman of the State Highway Commission to accept service in his behalf in any action that may be brought against him in the courts of this State, because of the use in this State of such motor vehicle or motorcycle. Provided further, that if such citizen of another State shall remain in Texas longer than thirty days, he shall be required, and it shall be his duty, to apply for and to receive from the State Highway Commission a seal bearing such identification as the Commission may require, for which seal a fee of one (\$1.00) dollar will be required."

This act exempts motor vehicles owned by "citizens of other States temporarily in this State" from the operation of the act, but citizens of Mexico are not citizens of "other States" within the meaning of the statute. Even if this provision of the act could be construed to include citizens of Mexico, Canada, or any other foreign nation, it would not obviate the necessity of a chauffeur operating said car, from securing the license provided for in Chapter 207, Acts of the Regular Session of the Thirty-fifth Legislature, or from complying with all the provisions of said act. Both Sections 26 and 30 of the act regulating chauffeurs are specific in their provisions to the effect that, "No person shall operate or drive a motor vehicle as a chauffeur upon any public highway in this State, unless such person shall have complied in all respects with the requirements of this act, and shall at all times have in his possession his certificate or license and wear the badge issued to him by the department prominently displayed on his clothing. * * *" A heavy penalty is prescribed for violation of these provisions.

It may be contended that the State highway funds cannot be used for the purpose of constructing highways within the corporate limits of the cities of this State, and inasmuch as the State does not contribute to the construction or maintenance of the streets of El Paso over which the chauffeurs under consideration travel, the law would not apply to them. The streets of the City of El Paso are but a part of the State's highways, and it could scarcely be argued with effect that a citizen of the City of El Paso could operate his automobile over the streets of said city, without first having complied with the registration laws of this State, and without subjecting himself to the penalties of the act. In other words, we do not believe that it could be successfully contended that a resident of a city could operate his automobile within the limits of said city without complying with the provisions of the automobile registration law, and that he must only comply with said law when he passed beyond the corporate limits of the city and out onto the public roads of the State.

This Department has heretofore held the law to be such that counties might co-operate with cities in paving around its public buildings and in paving its streets where said streets were but a continuation of the State's highways. We know of no reason why the funds derived from the registration of automobiles and from the licensing of chauffeurs could not be used for this purpose.

It is the opinion of this Department, and you are so advised, that chauffeurs in the City of Juarez who make it a business to bring passengers into this State, for hire, are subject to the provisions of Chapter 207, General Laws, passed at the Regular Session of the Thirty-fifth Legislature.

Yours very truly,

BRUCE W. BRYANT,
Assistant Attorney General.

MISCELLANEOUS OPINIONS

ON

**KU KUX KLAN, AGRICULTURAL DEPARTMENT, BOARD OF PARDONS,
NEGOTIABLE INSTRUMENTS, STATE RANGERS, ADJUTANT
GENERAL, LIVE STOCK SANITARY COMMISSION, FREE
TEXT BOOKS, WEIGHTS AND MEASURES, MEDICAL
PRACTICE ACT, WAREHOUSES, CENSUS—POPU-
LATION, INTOXICATING LIQUORS, AND
OTHER MATTERS.**



KU KLUX KLAN

Op. No. 2393, Bk. 56, P. 259.

AUSTIN, TEXAS, October 14, 1921.

His Excellency, Hon. Pat M. Neff, Governor, Capitol.

DEAR SIR: You submit to this Department an inquiry asking to be advised as to the legal status in this State of the operation of the organization known as the Knights of the Ku Klux Klan and to be advised as to the duties of the various officers of the State in relation thereto.

Numerous inquiries have reached this Department from county attorneys of this State in substance calling for the same advice. Evidently it has been difficult to make a complete statement of facts and none of the inquiries contain a full statement of facts, but have principally stated hypothetical cases. It shall be my purpose in this communication to make this opinion applicable to all phases of the questions which have been submitted to this Department.

It is generally understood and commonly accepted as true that certain individuals styling themselves the Knights of the Ku Klux Klan has proclaimed for its general purposes, among other things, the betterment of the moral conditions of the country which they seek to bring about, not through the officers and courts of the country, but through a system of intimidation and fear, and in some instances, personal violence. This plan of operation is generally evidenced by the display of mottoes and threatening notices displayed in public places and during parades, some of which in substance reading as follows:

"We are for the separation of Church and State,"

"Bootleggers must go,"

"Wife beaters; this is your only warning,"

"Gamblers must leave the City,"

"We believe the Bible should be read in our schools,"

"Jitney drivers, we have your number,"

"Good niggers need have no fear,"

"Gossipers, beware."

In some instances notices have been sent out, copy of one of which I now have before me, reading as follows:

"Sir: You have brought into disrepute the good name of one of our young girls. To shield this girl you will be handled by this organization. Do not disregard this warning. You are hereby demanded to leave this county and do not return and do so at once.

"(Signed) Knights of the Ku Klux Klan."

This communication, the county attorney says, was written on the letterhead of the Ku Klux Klan, bearing the seal of the order. In another instance, a notice similar to this was sent demanding that the party leave the city, which command was ignored by the party re-

ceiving the notice, and, thereafter the party was beaten and tarred and feathered by a band of men.

The above statement of facts will suffice for the purposes of this opinion.

To avoid repetition, we will now quote the provisions of the Constitution and statutes of the State, to which we will refer in this opinion, as being applicable to the various phases of this case. They are as follows:

Section 19 of Article 1 of the Constitution:

"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."

Section 15 of Article 1 of the Constitution:

"The right of trial by jury shall remain inviolate."

Section 10 of Article 1 of the Constitution:

"a. In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury.

"b. He shall have the right to demand the nature of the cause of the accusation against him and have a copy thereof.

"c. He shall not be compelled to give evidence against himself.

"d. He shall have the right of being heard by himself, or counsel, or both, shall be confronted with the witnesses against him and shall have compulsory process for obtaining witnesses in his favor.

"e. And no person shall be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment otherwise than the penitentiary, * * *"

"Art. 435. (299) 'Unlawful assembly' defined.—An 'unlawful assembly' is the meeting of three or more persons with intent to aid each other by violence, or in any other manner either to commit an offense, or illegally to deprive any person of any right, or to disturb him in the enjoyment thereof. (O. C., 355.)"

"Art. 446. (310) To frighten any one by disguise.—If the purpose of the unlawful assembly be to alarm and frighten any person by appearing in disguise, so that the real persons so acting and assembling cannot be readily known, and by using language or gestures calculated to produce in such person the fear of bodily harm, the punishment shall be by fine not exceeding five hundred dollars."

"Art. 477, P. C. (311) (291) To disturb families.—If the purpose of the unlawful assembly be to repair to the vicinity of any residence, and to disturb the inmates thereof by loud, unusual or unseemly noises, or by the discharge of firearms the punishment shall be by fine not exceeding five hundred dollars. A residence may be either a public or private house."

"Art. 448, P. C. (312) To effect any other illegal object.—If the purpose of the unlawful assembly be to effect any illegal object other than those mentioned in the preceding articles of this chapter, all persons engaged therein shall be liable to fine not exceeding two hundred dollars."

"Art. 449, P. C. (313) Lawful meetings not included.—No public meeting for the purpose of exercising any political, religious or other lawful rights, no assembly for the purpose of lawful amusements or recreation, is within the meaning of this chapter."

"Art. 450, P. C. (314) Lawful meetings included if unlawful purpose is afterward agreed on.—Where the persons engaged in any unlawful assembly, met at first for a lawful purpose, and afterward agreed upon an unlawful purpose, they are equally guilty of the offense defined in Article 435."

RIOT.

"Art. 460, P. C. (324) Preventing any person from labor.—If any person, by engaging in a riot, shall prevent any other person from pursuing any labor,

occupation or employment, or intimidate any other person from following his daily avocation, or interfere in any manner with the labor or employment of another, he shall be punished by confinement in the county jail not less than six months nor more than one year."

"Art. 451, P. C. (315) 'Riot' defined.—If the persons unlawfully assembled together do or attempt to do any illegal act, all those engaged in such illegal act are guilty of riot."

"Art. 462, P. C. (320) Committing any other illegal act.—If any person, by engaging in a riot, shall commit any illegal act other than those mentioned in the ten preceding articles, he shall, in addition to receiving the punishment affixed to such illegal act by other provisions of this code, be also punished by confinement in the county jail not exceeding one year, or by fine not exceeding one thousand dollars."

"Art. 463, P. C. (327) Half penalty when object not accomplished.—When the purpose of the riot was to effect any of the illegal acts mentioned in the preceding articles of this chapter, and such unlawful object is not effected, the punishment may, in the discretion of the jury, be diminished to half the penalty affixed to such riot where the illegal purpose was effected."

"Art. 464, P. C. (328) All participants guilty.—A person, engaged in any riot whereby an illegal act is committed, shall be deemed guilty of the offense of riot, according to the character and degree of such offense, whether the said illegal act was in fact perpetrated by him or by those with whom he is participating."

"Art. 465, P. C. (329) Where assembly was at first lawful.—Where the assembly was at first lawful and the persons so assembled afterward agreed to join in the commission of an act which would amount to riot, if it has been the original purpose of the meeting, all those who do not retire when the change of purpose is known are guilty of riot."

"Art. 468, P. C. (332) Duty of officers in case of riot.—If any person shall be unlawfully or riotously assembled together, it shall be the duty of any magistrate or peace officer, so soon as it may come to his knowledge, to go to the place of such unlawful or riotous assembly and command the persons assembled to disperse; and all who continue so unlawfully assembled or engaged in a riot, after being warned to disperse, shall be punished by the addition of one-half the penalty to which they would otherwise be liable if no such warning had been given."

WHITECAPPING.

"Art. 1189, P. C. 'Whitecapping', defined punishment for.—Any person who shall post anonymous notice, or make any threats or signs, or skull and cross bones, or shall, by any other method, post any character or style of notice or threats to do personal violence or injury to property on or near the premises of another, or who shall cause the same to be sent with the intention of interfering in any way with the right of such person to occupy said premises, or to follow any legitimate occupation, calling or profession, or with the intention of causing any person to abandon such premises, or precincts, or county, in which such person may reside, shall be deemed guilty of the offense of whitecapping, and, upon conviction therefor, shall be punished by confinement in the State penitentiary for any period of time not less than two years, nor more than five years."

"Art. 1182, P. C. Prohibited, penalty for so doing.—If any person shall send, or cause to be sent, deliver, or caused to be delivered, to any person any anonymous letter, or written instrument of any character whatsoever, reflecting upon the integrity, chastity, virtue, good character or reputation of the person to whom such letter or written instrument is sent or addressed, or of any other person, or wherein the life of such person is threatened, said person so sending such letter or written instrument shall be guilty of a misdemeanor and, on conviction thereof, shall be punished by a fine of not less than two hundred dollars nor more than one thousand dollars, and by imprisonment in the county jail for not less than one month nor more than twelve months."

"Art. 1183, P. C. Definition of.—By an anonymous letter or written instrument, within the meaning of this law, is meant where the sender of such letter or written instrument withholds his or her full and true name from the same,

or where no name is signed thereto, or where any description of such sender instead of a name is used, such as 'a friend', or 'a true friend' or the like."

CONSPIRACY.

"Art. 1433, P. C. (953) Definition.—A 'conspiracy' is an agreement entered into between two or more persons to commit any one of the offenses hereafter named in this chapter. (O. C., 776; Acts 1871, p. 15.)"

"Art. 1434, P. C. (954) When offense complete.—The offense of conspiracy is complete although the parties conspiring do not proceed to effect the object for which they have so unlawfully combined. (O. C., 777; Id.)"

"Art. 1435, P. C. (955) Agreement must be positive.—Before any conviction can be had for the offense of conspiracy, it must appear that there was a positive agreement to commit one of the offenses hereafter named in this chapter. It will not be sufficient that such agreement was contemplated by the parties charged. (O. C., 788; Id.)"

"Art. 1436, P. C. (956) Mere threat not sufficient.—A threat made by two or more persons acting in concert will not be sufficient to constitute conspiracy. (O. C., 779; Id.)"

"Art. 1437, P. C. (957) What crimes the subject of.—The agreement, to come within the definition of conspiracy, must be to commit one or more of the following offenses, to wit: Murder, robbery, arson, burglary, rape, or any other offense of the grade of felony. (O. C., 780; Id.; Acts 1184, p. 25.)"

"Art. 1438, P. C. (958) Punishment.—Conspiracy to commit murder shall be punished by confinement in the penitentiary not less than two nor more than ten years. Conspiracy to commit any one of the other offenses named in the preceding article shall be punished by confinement in the penitentiary not less than two nor more than five years. (O. C., 781; Id.; Acts 1871, p. 15.)"

THREATS.

"Art. 1442, P. C. (962) Threats to take life, etc.—If any person shall threaten to take the life of any human being, or to inflict upon any human being any serious bodily injury, he shall be punished by fine of not less than one hundred nor more than two thousand dollars, and, in addition thereto, he may be imprisoned in the county jail not exceeding one year. (O. C., 784; Acts 1875, p. 51.)"

"Art. 1445, P. C. (965) Certain threats not included.—A threat that a person will do any act merely to protect himself, or to prevent the commission of some unlawful act by another, does not come within the meaning of this chapter. (O. C., 787; Id., p. 52.)"

"Art. 1446, P. C. (966) (813) Sending threatening letter.—If any person shall knowingly send or deliver to another any letter or writing, whether signed or not, threatening to accuse such other person of a criminal offense, with a view of extorting money, property, thing of value, or any advantage whatever from such other person, or threatening to kill or in any manner injure the person of such other, or to burn or otherwise destroy or injure any of his property, real or personal, or to do any other injury to such other person, he shall be punished by fine not less than one hundred nor more than one thousand dollars, and, in addition thereto, may be imprisoned in the county jail not exceeding one year."

"Art. 142, C. C. P. (132) Duty of magistrates and peace officers to suppress, etc.—Whenever a number of persons are assembled together in such a manner as to constitute a riot, according to the penal law of the State, it is the duty of every magistrate or peace officer to cause such persons to disperse. This may either be done by commanding them to disperse or by arresting the persons engaged, if necessary, either with or without warrant."

"Art. 144, C. C. P. (134) What means may be adopted to suppress.—The officer engaged in suppressing a riot, and those who aid him, are authorized and justified in adopting such measures as are necessary to suppress the riot, but are not authorized to use any greater degree of force than is requisite to accomplish that object."

"Art. 145, C. C. P. (135) Unlawful assembly.—All the articles of this chap-

ter relating to the suppression of riots apply equally to an unlawful assembly and other unlawful disturbances, as defined by the Penal Code."

"Art. 1101, P. C. (671) In suppressing riots.—Homicide is justifiable when necessary to suppress a riot, when the same is attempted to be suppressed in the manner pointed out in the Code of Criminal Procedure, and can in no way be suppressed except by taking life."

"Art. 1105, P. C. Homicide is permitted by law when the party slain in disguise is engaged in any attempt by either gesture or otherwise to alarm some other person or persons and put them in bodily fear."

The great bulwark of our government is its written Constitution and its laws safeguarding the life, liberties and property of its citizens. There can be no division of our governmental power. All proper power must rest in the written law of the land and must be administered by the duly constituted officers of the country.

We therefore conclude that all efforts of persons under any name they may have assumed to better the moral conditions of the country through the medium of threats, fear, intimidation and personal violence is violative of the spirit and letter of the Constitution and laws of our State, and each and every act done and performed by them carrying out or furthering any illegal purpose, or which has for its object the doing of any act forbidden by law, would involve the guilt of all participants having knowledge of a general purpose to do illegal acts or actual knowledge of the doing of illegal acts.

We will now recur to that part of the statement of facts wherein a notice was sent to a party to leave the country. This act is in direct violation of Article 1189 of the Penal Code defining and punishing whitecapping. This article has been set out above and it is unnecessary to copy it again. The punishment for violation of this article is a felony which therefore makes applicable the conspiracy statute as is defined by Article 1433 and Article 1437. Under the law of conspiracy it is well established that if two or more persons enter into a combination or confederation to accomplish some unlawful object, any act done by any of the participants in pursuance of the original plan and with reference to the common object is in contemplation of law the act of all. For a full discussion of this principle see 10 L. R. A., 333.

Each conspirator is responsible for everything done by his confederate which the execution of the common design makes probable in the nature of things as a consequence, even though such consequence was not intended as a part of the original design or common plan. *Bowers vs. State*, 24 Tex. App., 542; also reported in 5 Am. St. Rep., 901, with copious notes. In this case several parties had entered into a conspiracy to whip another with a leather strap. The party being whipped resisted and in the fight one of the conspirators bit off the thumb of the subject of the conspiracy. The question arose as to whether or not all members of the conspiracy were guilty of maiming, since the original conspiracy was only to whip the party with a strap and only one of the conspirators during the fight committed the crime of maiming.

Judge Willson of our Court of Criminal Appeals announced the rule thus:

"Upon the subject of the responsibility of a conspirator for the acts of his co-

conspirators, the rule as we deduct from the authorities is that each conspirator is responsible for everything done by his confederates, which follows incidentally probable and natural consequences, even though it was not intended as a part of the original design or common plan. In other words, the act must be the ordinary and probable effect of the wrongful act specifically agreed on so that the connection between them may be reasonably apparent and not a fresh and independent product of the mind of one of the confederates outside of or foreign to the common design."

The court holds in this case that if the jury concludes that the act done by the conspirators incidentally in the execution of the common design in one of its probable and natural consequences, although it was not originally intended as such, the court will permit the verdict of the jury to stand.

The courts have also held that where several parties conspire together to do violence to one man and by mistake another man falls the victim, the conspiracy being complete to do an unlawful act, it will be held that each conspirator is responsible for the crime committed against the innocent victim. *Spies et al. vs. the People*, 12 N. E. Rep., 865.

This principle is also well announced in the case of *Martin vs. State*, 8 S. E. Rep., 23, where two parties had agreed to drive another out of a saloon and after the party fled they pursued, brandishing knife and six-shooter. They encountered an officer and unexpectedly one of the party killed the officer, although they had no original designs against this officer, and only one of the party did any act of violence toward the officer. The other was prosecuted for conspiracy and the court held that he was guilty of murder, not on the theory that they had conspired together to hurt this officer, because this was not the fact, but on the theory that they had conspired together to do an unlawful act, and one of the reasonable and probable consequences of this act was the encounter with the officer which resulted in his death. Therefore the court held both parties equally guilty of taking the life of the officer.

These cases could be multiplied indefinitely because this doctrine is unquestioned.

If an association is formed for innocent purposes and its powers are afterwards abused by those who have the management of it and used for purposes of injustice and oppression all of those who consent thereto will be criminally liable. *Spies vs. the People*, 112 Ill., 1.

When a party joins a conspiracy to do an unlawful thing, all acts of his co-conspirators, all things said and done by them prior to his joining the conspiracy, but which are in furtherance of the conspiracy as made, are binding and admissible in evidence against such person, even though they were all made in his absence and before he entered the conspiracy. *Smith vs. State*, 46 Tex. Crim. App., 267; 81 S. W., 936; 108 U. S. R., 991, with full notes.

It is also a well-established principle of law that all who accede to a conspiracy after its formation and while it is in execution, and all with a knowledge of the facts concur in the plans originally formed, and aid in executing them, are fellow conspirators. They commit an offense when they become parties to the transaction, or further the original plan. *Taylor vs. State*, 3 Tex. Civil Appeals, 169; *Sapp*

vs. State, 190 S. W., 489. And, also, that a person coming into a conspiracy after its formation is deemed in law a party to all acts done by any of the other parties, either before or after, in furtherance of the common design. *Blaine vs. State*, 33 Tex. Crim. App., 236; 26 S. W., 63; *Loggins vs. State*, 8 Tex. App., 434; *Taylor vs. State*, 3 Tex. App., 169.

We therefore think that it is well established and conclusive that when two or more persons conspire together which would be in violation of Article 1189, P. C., then all persons conspiring together to do such act would be guilty of conspiracy by reason of Article 1433, P. C., and Article 1437, P. C.

We will now pass to the other statutes applicable to the statements made to us.

If three or more persons with the intent to aid each other by violence, or in any other manner either to commit an offense, or illegally to deprive any person of any right, or to disturb him in the enjoyment thereof, he would be guilty of violating Article 435. This would be applicable where the parties agreed to compel a person to leave the county. This would certainly be a disturbance of the rights of this party, since there is no statute compelling any person to leave the county for any offense.

If any of these means are thought to be applied by frightening the person in disguise, Article 446, P. C., would be violated.

If the purpose of the assembly be to effect any illegal object not named, the parties would likewise be guilty of violating Article 448, P. C.

If the meeting is called for a lawful purpose and three or more persons are assembled and afterwards agree to do some unlawful act, all parties are equally guilty of the offense defined in Article 435, P. C., prohibiting unlawful assembly.

If the effect of the notice is to prevent any person from pursuing any labor, occupation or employment or intimidate any other person from following his daily avocation, then such act would violate Article 460, P. C.

If the parties assembled attempt to do any unlawful act, all that are engaged in such unlawful act would be guilty of riot. Article 451, P. C.

If any person engaged in a riot shall commit any illegal act, other than those mentioned in the articles defining unlawful assembly and riot, shall be guilty of violating Article 452, P. C.

If several parties engaged in any riot whereby an illegal act is committed, all parties are guilty of any act committed by anyone of the participants under Article 464, P. C.

Where the assembly was at first lawful but afterwards the persons so assembled agreed to join in the commission of an act which would amount to riot, if it had been originally convened for that purpose, all of those who do not retire when the change of purpose is known are guilty of riot under Article 465, P. C.

If any persons shall be unlawfully or riotously assembled together, it shall be the duty of any magistrate or peace officer, so soon as it

may come to his knowledge, to go to the place of such unlawful assembly and compel the party to disperse under Article 468, P. C.

There are several other of these statutes which may be violated under certain facts and circumstances.

It, therefore, follows that if any order, organization or body of individuals agree and confederate among themselves to do any act which would be in violation of the laws of the country, and every act of every individual composing the conspiracy in the furtherance of the conspiracy would be illegal. This would apply to the masked parades where such parade is a part of, and in furtherance of, a purpose to do some act which would be in violation of the law.

Very respectfully yours,

W. A. KEELING,
First Assistant Attorney General.

BOARD OF PARDONS

Op. No. 2272, Bk. 55, P. 76.

PARDON ADVISERS, BOARD OF.

The Board of Pardon Advisers are merely employes of the Governor's office. They are not officers within the meaning of the Constitution and laws of this State. They hold their positions at the pleasure of the Governor, and he may discharge such employes at any time. They have no term of office. They execute no bond; are not required to take an oath of office. They perform no functions of government, and it is not incumbent upon the Governor to retain such board.

The incoming Governor, if he so desires, may dispense with their services, and not appoint a board to serve during his term of office.

Chapter 1, Title 100, Revised Statutes, 1911.

AUSTIN, TEXAS, January 21, 1921.

Honorable Pat M. Neff, Governor of Texas, Capitol.

MY DEAR GOVERNOR: You have verbally requested the Attorney General to render you an opinion upon your right to dispense with the services of the Board of Pardon Advisers and to fail to make an appointment of such board during your administration.

The Board of Pardon Advisers came into existence under the Act of 1893, which became Article 3582a of the Revised Statutes of 1911, and is in the following language:

"Article 3582a. The Governor is hereby authorized to call to his aid, for a time not exceeding one hundred days per annum, two qualified voters of this State, who shall perform such duties as may be directed by him, consistent with the Constitution, as he may deem necessary in disposing of all applications for pardon. The said two voters shall be known as a Board of Pardon Advisers, and shall be paid out of any money in the State Treasury, not otherwise appropriated, five dollars each per day they may so serve, on voucher approved by the Governor."

This act was amended by the Act of 1897 by merely changing the compensation of the members of the board from five dollars per day to four dollars per day. Subsequently, by an act of the Twenty-ninth Legislature, this act was again amended, which amendment is now the law of the State governing the appointment and activities of the board. This act is as follows:

"Article 3582a. The Governor is hereby authorized to appoint two qualified voters of the State of Texas and who shall perform such duties as may be directed by him consistent with the Constitution, as he may deem necessary in disposing of all applications for pardon. The said two voters shall be known as the Board of Pardon Advisers, and shall be paid out of any money in the treasury not otherwise appropriated a salary of two thousand dollars each per annum on monthly vouchers approved by the Governor.

"Section 2. Said board shall be required to keep a record in which will be entered every case sent it by the Governor, giving the docket number of the convict, his name, when and where convicted, his sentence, his offense, when received from the Governor, the action taken by said board and the date of said action.

"Section 3. Said board shall be given a room in the capitol, properly furnished with necessary furniture and file cases, and provided with such stationery,

letter books and other appliances which may be necessary for the speedy and proper transaction and dispatch of the business for which it is organized. In addition to the thorough examination of each application which the Governor may refer to said board, and the reporting thereon its recommendation thereon to him, it shall perform any other work in connection with said business the Governor may direct, and said board shall spend such time each year as may be necessary in personally looking into the condition of such convicts as it may desire, or as may be designated by either the Governor, the Superintendent of Penitentiaries or either of his assistants, or by the Prison Physician, or either of the Penitentiary Commissioners, giving special attention to the cases of those of long service, who may be thus designated, and who have no means or facilities for getting a proper petition before the Governor, to the end that the board may have before it such data as will enable it to judge the condition of each. All cases shall be taken up, considered and acted upon by said board in the regular order of reference by the Governor, except when it appears to said board there is extraordinary emergency in any case."

The salary of each member of the Board of Pardon Advisers was increased to twenty-five hundred (\$2500) dollars per annum by Chapter 48, Acts of the First Called Session of the Thirty-fifth Legislature. This, together with the acts above cited, constitute all legislative acts upon the subject.

It will thus be seen that under the acts of the Legislature, the members of this board are not required to give bond, take the oath of office nor to discharge any of the functions of government. Their term of office is not fixed and they hold their positions at the pleasure of the Governor. They are simply the employees of the Governor to discharge such duties as he may deem necessary in disposing of applications for pardon.

In the case of *Baltimore vs. Lyman*, 84 Am. Stat. Rep., 524, we find a full discussion of the distinction between an officer and an employee, and particularly of those essentials necessary to constitute one an officer, and we quote from that case, at page 526, as follows:

"Judge Cooley, in the case of *Throop vs. Langdon*, 40 Mich., 683, where it is held that the position of chief clerk in the office of the assessors of the city of Detroit was not an office, says: 'The officer is distinguished from the employe in the greater importance, dignity, and independence of his position; in being required to take an official oath and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance in office, and usually, though not necessarily, in the tenure of his position. In particular cases other distinctions will appear which are not general.' In *Olymstead vs. Mayor, etc.*, 42 N. Y., Sup. Ct., 482, it was held that one who received no certificate of appointment, takes no oath of office, has no term or tenure of office, discharges no duties, and exercises no powers depending directly on the authority of law, but simply performs such duties as are required of him by the persons employing him and whose responsibility is limited to them, is not an officer and does not hold an office. And in the recent case of *School Commrs. vs. Goldsborough*, 90 Md., 207, 44 Atl., 1055, we said: 'Civil officers are governmental agents; they are natural persons in whom a part of the State's sovereignty is vested or reposed, to be exercised by the individuals so intrusted with it for the public good. The power to act for the State is confided to the person appointed to act. It belongs to him upon assuming the office. He is clothed with the authority which he exerts and the official acts done by him are done as his acts and not as the acts of a body corporate.'"

An employee is thus defined by Judge Freeman, in his note on the case of *Mayor and City Council of Baltimore vs. Lyman*, 84 Am. St. Rep., at page 527:

"Officer.—One who receives no certificate of appointment, takes no oath of office, has no term or tenure of office, discharges no duties and exercises no powers depending directly on the authority of the law, but simply performs such duties as are required of him by the persons employing him, and whose responsibility is limited to them, is not an officer, although those employing him are public officers, and his employment is in and about a public work or business: See the monographic note to *Thompson vs. Kyle*, 63 Am. St. Rep., 193. Consult, also, the recent case of *Patton vs. Board of Health*, 127 Cal., 388, 78 Am. St. Rep., 66, 59 Pac., 702."

The members of the Board of Pardon Advisers, appointed under the statute quoted, are merely employees of the executive office, just as other employees of your office are appointed by you, to perform the particular duties assigned to them by you. They can perform no services whatever not expressly authorized by you, and, if in your judgment, their services are not essential to the due and proper administration of the executive office, you are at liberty to dispense therewith. There is nothing mandatory in the act. It simply authorizes you to appoint the board to perform such duties as you may direct them to perform with reference to your disposition of applications for pardon. It is true that in the last section of the act quoted, the board is required to spend as much time each year as may be necessary in personally looking into the condition of certain convicts, but this is a mere naked authority without power to act, for it is expressly provided in the last sentence of this paragraph that all cases shall be taken up, considered and acted upon by said board in regular order of reference by the Governor, and therefore such board cannot of its own motion take up the question of granting a pardon to any convict until the matter is referred to them by the Governor.

The Legislature has not sought to confer upon this board any power whatsoever with reference to the granting of a pardon. Indeed, had such been the purpose of the Legislature, it would have been absolutely void, for the reason that by Section 11, Article 4 of the Constitution of this State, the pardoning power is conferred upon the Governor alone, and no other board or official could be authorized to exercise such power or any portion thereof. Section 11, Article 4, is 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. With the advice and consent of the Senate, he may grant pardons in cases of treason, and to this end he may respite a sentence therefore, until the close of the succeeding session of the Legislature; provided, that in all cases of remissions of fines and forfeitures, or grants of reprieves, commutation of punishment or pardon, he shall file in the office of the Secretary of State his reasons therefor."

Upon the exclusiveness of the Governor's power to pardon, we quote from Cooley's Constitutional Limitations as follows:

"Such powers as are specially conferred by the Constitution upon the Governor, or upon any other specified officer, the Legislature cannot require or authorize to be performed by any other officer or authority, and from those duties which the Constitution requires of him he cannot be excused by law."

In the case of *Rich vs. Chamberlain*, 27 L. R. A., 573, the Supreme Court of Michigan held that the pardoning power of the Gov-

error could not be infringed upon by the Legislature passing an act making it a condition precedent to an order transferring a prisoner from the penitentiary to the house of correction, that the board of pardon advisers recommended such transfer and the court held the act void as such an infringement upon the pardoning power. In a dissenting opinion in this case, it is said that the law in question did nothing more than to prescribe the regulations for obtaining the information, which must be conceded to be necessary for an intelligent and proper exercise of the pardoning power. In this expression contained in the dissenting opinion in the Chamberlain case, we find fully set out the power and authority of the Board of Pardon Advisers of this State. They are for the purpose only of obtaining information upon which the Governor is to act. The statute does not undertake to say that the Board of Pardon Advisers is the only avenue through which he may obtain this information. He may direct any other employee of his office to make such investigation and report to him such facts as he may desire. The members of the Board of Pardon Advisers are simply employees of the Governor's office, charged with such duties as he may impose upon them relative to gathering information. Their action is not a condition precedent to any act of his exercising the pardoning power. He is in no way obligated to accept their advice, and in fact, he can exercise the pardoning power irrespective of any investigation or advice from such board.

We, therefore, advise you that in the opinion of this office the Board of Pardon Advisers, and the members thereof, are not officers of this State, but on the other hand, are merely employees of the executive office, and if in your judgment their services are not necessary to the proper discharge of your duties under the pardoning power vested in you by the Constitution, then you are at liberty to decline to appoint such a board.

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

NEGOTIABLE INSTRUMENTS

Op. No. 2446, Bk. 57, P. 229.

NEGOTIABLE INSTRUMENTS, LOST OR STOLEN—LIABILITY OF MAKER.

1. When a negotiable instrument is stolen or lost by its owner before maturity and finds its way into the hands of an innocent purchaser for value, such purchaser obtains good title as against all the world and can enforce collection.

2. Maker paying negotiable instrument known to have been lost or stolen remains liable thereon to the true owner, unless he first requires the party to whom payment is made to show that he is a bona fide holder who received the instrument in the usual course of trade before maturity and for a valuable consideration.

3. Burden of proving that person to whom payment of a lost or stolen negotiable instrument was made was a bona fide holder rests upon the maker, if at the time of paying he had notice of such loss or theft. The proof required must be such as would satisfy an ordinarily prudent business man that the person claiming same was the holder in good faith for value before maturity.

AUSTIN, TEXAS, August 8, 1922.

Honorable Audley Harris, County Attorney, Nacogdoches, Texas.

DEAR SIR: On July 31st you wrote the Attorney General as follows:

"On June 2, 1919, Nacogdoches county issued and sold \$800,000.00 worth of county bonds, and the proceeds were deposited in the county depository.

"On the 20th day of January, 1921, the county was advised that \$62,000.00 worth of these bonds had been stolen from the registered mail, in a mail robbery in Chicago, and on the 18th of January, 1921, this robbery occurred.

"For this reason, payment of both the principal and interest on this \$62,000.00 worth of bonds was stopped. In some manner, a northern bonding house came in possession of \$19,000.00 worth of these bonds, and requested payment from the county, and to meet the interest payment. The bonding house referred to in this letter is the Halsey-Stuart Company, Chicago, Illinois. These parties purchased the securities from Courtenay-Hineline Company of Minneapolis, Minnesota, who claim to have purchased them from The Interurban State Bank of St. Paul. We are not advised in what manner the bank secured the bonds.

"The Halsey-Stuart Company, who now hold the bonds, claim to have purchased them in due course of trade for value, and before maturity, they being negotiable instruments.

"Will you please advise me whether or not I would be secure in advising the county to pay the Halsey-Stuart Company upon their demand. The Halsey-Stuart Company who claim to be the present legal owner and holder of bonds aggregating \$19,000.00, and interest coupons annexed thereto, have made formal demand upon this county for payment, and your opinion will, in all probability, save this county the trouble and expense of a lawsuit. Halsey-Stuart Company claims to have purchased bonds aggregating \$10,000.00, on November 14, 1921, from Courtenay-Hineline Company, and thereafter, January 16, 1922, they purchased from the same people bonds aggregating \$9,000.00. These bonds are marked from 631 to 635, 695 through 699, 704 to 713, 784 to 785.

"This is a matter of considerable importance to the county, as the company is vigorously pushing a settlement. I will, therefore, thank you to give this matter your prompt attention and early reply."

Replying to the above letter, we have to say that the general rule with reference to lost or stolen negotiable instruments is expressed in Ruling Case Law, Volume 3, paragraph 210, as follows:

"It is familiar law that one in possession of chattels by theft can convey no title to an innocent purchaser. Coin and bank bills, however, are excepted from the rule. As to those, even if feloniously obtained, the holder can convey a good title to an innocent purchaser. And from the highest considerations of public policy, the law also excepts from the rule negotiable instruments acquired for value in good faith before maturity and without notice. Such paper takes the place and performs, to a large extent, the office of money. It is used for the transaction of much the largest part of the business of mankind. It would be most embarrassing, therefore, if every taker of such paper was bound, at his peril, to inquire into the title of the holder, and if he was obliged to take it with all the imperfections and subject to all the defenses which attach to it in the hands of the holder. It has, therefore, become the settled rule that a thief or any other person having possession of such paper fair upon its face can give a holder in due course a good title to it, against all the parties thereto, as well as the true owner. It may be taken, then, to be the well-settled rule of law that the transfer of stolen commercial paper, negotiable by delivery, to a bona fide purchaser, for value, without notice and before maturity, vests him with a good title against all the world. The rule seems to be the same in the case of instruments that have been lost by the owner. The due course holder of a lost or stolen negotiable instrument may recover against the maker and indorsers thereof, and the damage must be borne by the person from whose possession the instrument was lost or stolen."

The rule universally obtains that if a negotiable instrument issued by a public corporation is stolen or lost by its owner *before maturity* and finds its way into the hands of an *innocent purchaser for value*, such purchaser obtains *good title* as against all the world *and can enforce collection*. Abbott on "Public Securities," Section 234.

Negotiable bonds or coupons "although stolen, are collectible by a bona fide holder who took them for value in the usual course of business before maturity and without notice." Dillon on "Municipal Corporations," Vol. 2, Sec. 960.

If a bond is stolen or lost before maturity, and after it is issued and delivered, the purchaser for value before maturity and without notice of the loss or theft can hold such bonds *against all the world* and the title of such purchaser is *superior to that of the owner from whom stolen*.

McQuillin on "Municipal Corporations," Vol. 5, Sec. 2308;

Welch vs. Sage, 47 N. Y., 143;

Seybel vs. Nat'l Currency Bank, 54 N. Y., 288;

Murray vs. Lardner, 2 Wall., 110;

Everston vs. National Bank of Newport, 66 N. Y., 14;

City of Adrian vs. Whitney Cent. Nat. Bank (Mich.), 146 N. W., 654;

State vs. Wells, 15 Calif., 336.

In Welch vs. Sage, *supra*, the court held:

"The law may be regarded as settled, that a purchaser, for value advanced, of negotiable paper, including bonds, is not bound to exercise such care and caution as wary, prudent men would exercise. Negligence will not impair his title. It is a question simply of good faith in the purchaser. Unless the evidence makes out a case upon which a jury would be authorized to find fraud or bad faith in the purchaser, it is the duty of the court to direct a verdict. * * *

"The rule, after considerable hesitation, and after full discussion and deliberation, has been thus settled in the interest of commerce. It puts the consequences of neglect or misfortune upon the party upon whom they have fallen; upon those who have negligently put such paper in circulation or from whom it is stolen. It sustains the ready and safe transfer of negotiable paper to those who honestly purchase it for value advanced."

In *Seybel vs. Nat'l Currency Bank*, supra, we find:

"One who purchases negotiable paper before due for a valuable consideration, in good faith and without actual knowledge or notice of any defect of title, holds it by a title valid as against every other person.

"A dealer of United States bonds, payable to bearer, is not bound to make inquiry of one offering to sell as to his right or title thereto, or to take any special precautionary measures to ascertain or protect the interests of others; and in case of the purchase by him of such bonds which have been stolen, the fact of an omission on his part to examine and regard notices of the theft left at his place of business, will not, of itself without actual knowledge or notice, deprive him of the character of a bona fide purchaser."—(Syllabus.)

The United States Supreme Court, in the case of *Murray vs. Lardner*, 2 Wall., 110, 69 U. S., 857 (opinion by Mr. Justice Swayne), held:

"The possession of such paper carries the title with it to the holder: 'The possession and title are one and inseparable.'

"The party who takes it before due for a valuable consideration, without knowledge of any defect of title and in good faith, holds it by a title valid against all the world.

"Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part.

"The burden of proof lies on the person who assails the right claimed by the party in possession. * * *

"We are well aware of the importance of the principle involved in this inquiry. These securities are found in the channels of commerce everywhere, and their volume is constantly increasing. They represent a large part of the wealth of the commercial world. The interest of the community at large in the subject is deep rooted and wide branching. It ramifies in every direction, and its fruits enter daily into the affairs of persons in all conditions of life. While courts should be careful not so to shape or apply the rule as to invite aggression or give an easy triumph to fraud, they should not forget the considerations of equal importance which lie in the other direction."

In the case of *City of Adrian vs. Whitney Cent. Nat. Bank*, supra, the court held (quoting from syllabus):

"The manager of a hotel took from the hotel safe bonds of a guest who had given them to him for safe-keeping. The bonds were payable to bearer. The manager applied to a bank for loans secured by the bonds, which he exhibited before their maturity. The bank ascertained that the manager was, as he represented, the manager of the hotel, and, believing the manager's statements that the bonds were his, made the loan and took the bonds as collateral without notice of any defect in his title. The loans were not paid. Held, that the bank was, as against the actual owner of the bonds, a holder in due course, within Negotiable Instrument Act."

A holder of a *negotiable instrument* who was at one time a holder in due course of the instrument, and who subsequently reacquired title to the instrument, may enforce payment against the maker thereof, although such holder at the time of reacquisition knew that the instrument had been stolen.

"* * * It is to be observed further that, as a general rule, the purchaser can never be placed on a worse footing than his transferrer, although he himself could not in the first instance have acquired the vantage ground occupied by such transferrer. And, therefore, even if he have notice that there was fraud in the inception of the paper, or that it was lost or stolen, or that the consideration has failed between some anterior parties, or the paper be overdue and dishonored, he is, nevertheless, entitled to recover, provided his immediate indorser

was a *bona fide* holder for value unaffected by any of these defenses. As soon as the paper comes into the hands of a holder, unaffected by any defect, its character as a negotiable security is established, and the power of transferring it to others, with the same immunity which attaches in his own hands, is incident to his legal right, and necessary to sustain the character and value of the instrument as property, and to protect the *bona fide* holder in its enjoyment." Daniel on Negotiable Instruments, Sec. 803.

"The rule as to who is a *bona fide* holder is subject to an exception where the holder takes from a *bona fide* holder, in which case he occupies the same position as his transferer, notwithstanding the subsequent holder has actual notice of defenses, was a purchaser after maturity, or is not a purchaser for value." 8 Corpus Juris, Sec. 685, page 466.

In *Cromwell vs. County of Sac*, 96 U. S., 51, it is held that a purchaser of a bond although he has notice of infirmities in its origin, may nevertheless enforce payment thereof when he has acquired it from a holder in due course.

Scotland County vs. Hill, 132 U. S., 107, 115-17;
Radcliff vs. Costello (Va., 1915), 85 S. E., 469.

Plaintiff was a holder in due course. He sold the note and afterwards reacquired it, at which time he had knowledge of infirmities therein. Held, that this did not impair his original position as a holder in due course. The negotiable instruments law was not cited on this point.

In *Masterson vs. Ross* (Texas), 152 S. W., 1156, it is held that where one acquired in good faith and for value negotiable paper, it is immaterial whether a subsequent holder thereof pays value or has notice of infirmities therein at the time the subsequent holder acquires it.

In *Hollimon et al. vs. Karger* (Texas, 1902), 71 S. W., 299, it is held that knowledge of defenses to a note which would defeat an action on it by the payee, will not defeat recovery thereon by one who obtained title from a *bona fide* purchaser.

In *Herman et al. vs. Gunter* (Texas, 1892), 18 S. W., 428, it is held that in an action upon a note by the holder thereof it is immaterial whether such holder paid value or had notice of infirmities therein at the time of acquisition, if such holder acquired the note from a holder in due course.

The Negotiable Instruments Act has, in the following section, codified the common law upon this subject:

"In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But the holder who derives his title through a holder in due course, and who is not himself a party to any fraud or duress or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to such holder."

In the second paragraph of your letter you state that the county was advised that these bonds had been stolen from the registered mail in a mail robbery in Chicago. The county having received notice of the theft would remain liable for the bonds to the true owner, unless it requires the firm now claiming the bonds to show that it is a *bona fide* holder, receiving the bonds in the usual course of trade, before maturity and for a valuable consideration.

In the case of *Bainbridge vs. City of Louisville*, American State Re-

ports, Volume 4, page 153, the court held that the burden of proving that the person to whom payment of a lost or stolen negotiable instrument was made was a bona fide holder rests upon the maker, if at the time of paying he had notice of such loss or theft, and that payment to a party who *claimed* to be a bona fide holder after notice of loss to the maker is not sufficient to protect him against the claim of the real owner. He must not only assert his claim but establish his title such as would satisfy an ordinarily prudent business man that he was the holder in good faith for value.

Quoting again from *Bainbridge vs. City of Louisville*, supra, "it was incumbent upon the City of Louisville in this case having had undoubted evidence or notice of the loss of this paper to show when payment had been made, after the loss and notice thereof, that the holders were purchasers in good faith before maturity and for value. The mere belief that the party presenting the paper was an innocent holder is not sufficient. The notice of the loss placed the city upon inquiry, and as to those coupons paid a perfect title in the holder must be shown. The fact that the law may presume the holder of such paper to be a transferee for value affords the maker no protection when the paper has been lost by the original owner and notice brought home to the maker before payment. 'The onus of proof to show that he came honestly by the bill or note lies on the plaintiff; it is cast upon him by proof of the instruments having been lost by accident or theft.' *Edwards on Bills*, Sec. 438. 'But when the defendant in such suit has proved that the instrument was obtained by illegal means or by fraud, felony or loss, or has since been the subject of fraud, felony, or loss, then the holder must take up the burden of showing that he gave value for the instrument.' *Parsons on Notes and Bills*, 2nd Ed., 280 * * *. It cannot be presumed in such a case that the holder is in good faith, and entitled to the money. The maker pays it at his peril, and particularly in a case where he has notice of the loss by the real owner; but even without notice of the loss, the fact that the paper is overdue is such a notice of the want of title as will place the party who is about to purchase it, or the maker of the paper, on inquiry."

Applying the doctrine announced in the court decisions above quoted to the Nacogdoches County bonds, you are advised that if Halsey-Stuart Company acquired the bonds for value without notice and before maturity, they would be entitled to payment. Nacogdoches County having been notified of the theft of the bonds should require Halsey-Stuart Company to establish its title to the bonds such as would satisfy an ordinarily prudent business man that it was the holder in good faith for value. An ordinarily prudent business man would undoubtedly require Halsey-Stuart Company to submit the following proof:

1. Copies of the confirmation tickets showing sale of the bonds by Courtenay-Hineline Company to Halsey-Stuart Company, which copies should be verified by affidavit of the proper officer of Halsey-Stuart Company.

2. Affidavit of the proper officer of Halsey-Stuart Company, setting out in detail all the facts relative to the purchase of these bonds from the Courtenay-Hineline Company and stating further in said

affidavit that at the time of said purchase Halsey-Stuart Company had no knowledge of the facts that the bonds, or any of them, had been lost or stolen.

In addition to the above, Nacogdoches County should give formal notice to the parties who gave the county notice of the theft of the bonds that Halsey-Stuart Company are claiming the bonds and that they claim to be the bona fide purchasers of said bonds and coupons for value in the regular course of business in negotiations with responsible dealers and that they have submitted proof of that fact to the county and the county should give such persons a reasonable time within which to submit any proof they may have that said Halsey-Stuart Company are not the bona fide holders of the securities. We think that thirty days after the date of such notification to such parties would be a reasonable time.

The county, of course, has the right to demand any other proof of ownership from Halsey-Stuart Company which an ordinarily prudent business man would demand in a similar case.

Yours very truly,

C. F. GIBSON,
Assistant Attorney General.

ADJUTANT GENERAL

Op. No. 2344, Bk. 56, P. 218.

RESPONSIBILITIES OF THE FEDERAL "PROPERTY AND DISBURSING" OFFICER AND THE ASSISTANT QUARTERMASTER GENERAL OF TEXAS.

The Federal "Property and Disbursing" Officer is responsible to the United States for "all funds and property belonging to the United States in possession of the National Guard of his State."

The Assistant Quartermaster General of Texas is responsible to the State of Texas "for all military stores, supplies and other property of this State or of the United States coming into his possession or intrusted to his care for the use of the military forces of this State."

Section 67, National Defense Act; Article 5801, Complete Texas Statutes, 1920.

AUSTIN, TEXAS, May 13, 1921.

Brigadier General Thos. D. Barton, Adjutant General, Capitol.

DEAR SIR: Your letter of inquiry of date April 12, 1921, addressed to the Attorney General, received. Your inquiry is as follows:

"1. Since the passage of the last statutes outlining the duties and the responsibilities of the Assistant Quartermaster General, as officer of this department, certain improvements of immense value, consisting of buildings, machinery, etc., have been made upon the property belonging to the State of Texas located in a northwesterly direction from the city, known as Camp Mabry, Texas.

"2. There has also been created in this department an office known as the U. S. Property and Disbursing Officer, whose duties are to receive, keep, and disburse all Federal property and funds coming into the State through this department, and whose other duties and responsibilities, regarding the State of Texas, have never fully been defined.

"3. It is my desire to establish without further doubt just which officer of this department can be held directly responsible for this particular property, or which officer is by law made responsible for same; therefore, with this desire in view, I write you this letter to respectfully request that you furnish this department with your official opinion on this matter."

Section 67 of the National Defense Act provides for the designation by the Governor of the State's Adjutant General or an officer of the National Guard of the State "who shall be regarded as property and disbursing officer of the United States. He shall receipt and account for all funds and property belonging to the United States in possession of the National Guard of his State." This officer is required to make a good and sufficient bond to the United States conditioned "for the faithful performance of his duties and for safe keeping and proper disposition of the Federal property and funds intrusted to his care." This officer is paid by the United States.

Clearly the National Defense Act makes the "property and disbursing" officer responsible for all property belonging to the United States in the possession of the National Guard of Texas. It is equally clear that the act does not make this officer responsible for the military property belonging to the State of Texas. The bond required is only conditioned for the safe keeping "of the Federal property."

We look to the laws of Texas to ascertain who has the custody of,

and is responsible for the military property belonging to the State of Texas.

Article 5801, Complete Texas Statutes, 1920, provides that the Assistant Quartermaster General shall be appointed by the Governor on the recommendation of the Adjutant General. "He shall before entering upon the duties of his office enter into a bond with two or more good and sufficient sureties, to be approved by the Governor, which bond shall be in the sum of \$10,000, payable to the Governor of this State and his successors in office, and conditioned faithfully to discharge the duties of his office and disburse and account for all moneys and to faithfully keep, issue and account for all military stores, supplies and other property of this State or of the United States coming into his possession or intrusted to his care for the use of the military forces of this State." He is required upon assuming the duties of his office to receipt to the Adjutant General for all military property belonging to this State or to the United States and he is required to receipt to the Adjutant General for such other military property as may from time to time be received from the United States or from other sources. "He shall be responsible for all quartermaster's, subsistence, ordnance, medical, signal, and all other military stores and supplies belonging to this State, or which may be issued to this State by the United States, except such of the above mentioned stores and supplies as may be issued to officers and organizations of the military forces of this State in accordance with the regulations in force." It is also made his duty to care for, disburse and safely keep the arms, ordnance, accoutrements, equipments and all other military property belonging to this State or issued to this State by the United States, etc.

From the foregoing it is clear that the Assistant Quartermaster General has the custody of and is responsible for the military property belonging to the State of Texas, and in addition is responsible for the military property "of the United States coming into his possession or intrusted to his care for the use of the military forces of this State." This does not mean that there is necessarily any conflict in the duties of the Assistant Quartermaster General and the "Property and Disbursing" Officer of the United States. The State of Texas is responsible to the Federal Government for certain military property issued by the Federal Government and used by the State of Texas. The Assistant Quartermaster General is made responsible to the State of Texas for this Federal property. The "property and disbursing" officer is by law also made responsible to the Federal Government "for safe keeping and proper disposition of the Federal property."

From the foregoing it is apparent that the Assistant Quartermaster General is responsible for all military property located at Camp Mabry that belongs to the State of Texas and that no responsibility for the State's property attaches to the Federal "Property and Disbursing" Officer as such. However, the "property and disbursing" officer is also an officer of the National Guard of Texas and as such may in certain instances be responsible for property belonging to the State.

The Assistant Quartermaster General is also responsible to the State of Texas for all Federal property located at Camp Mabry or

elsewhere "coming into his possession or intrusted to his care for the use of the military forces of this State."

I am, with respect,

Very truly yours,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2332, Bk. 55, P. 420.

STATUTORY CONSTRUCTION.

An opinion construing Article 5486, Revised Civil Statutes of Texas held: That an officer on temporary duty reorganizing the 36th Division, Texas National Guard, is not, in the event he is taken ill, or injured, entitled to be taken care of and provided for at the expense of the State.

AUSTIN, TEXAS, April 18, 1921.

General Thomas D. Barton, Adjutant General, Capitol.

DEAR SIR: The Attorney General has received your communication of April 12, reading as follows:

"1. I respectfully request that you render this department an opinion on the enclosed case as well as upon the applicability of Article 5846, Revised Statutes, to the present officers now on temporary duty reorganizing the Thirty-sixth Division.

"2. This opinion is sought in order that all other officers on temporary duty in the future may be guided by same."

It appears that Major C. H. Test, who is an Assistant Inspector, Thirty-sixth Division, while on temporary duty in connection with the reorganizing of the Thirty-sixth Division, became ill or was injured, necessitating medical treatment from Dr. F. W. Francis, of Fort Worth, on February 14, 1921. Dr. Francis made out his account for medical services rendered Major Test, amounting to \$5.00 and sent the account to the headquarters of the Thirty-sixth Division, asking that the account be paid out of State funds. The account bears this endorsement of March 2, 1921:

"1. Disapproved.—No provision in G. O. No. 13, H. N. G. T., whereby this account could be paid.

"2. You will collect personally from Major Test.

"(Signed)

JOHN H. ZACHRY,

"Lt. Col., Ord. Dept., T. N. G."

Thereafter, on April 6th, Major Test addressed a letter to the Commanding General of the Thirty-sixth Division, Texas National Guard, asking that the account of Dr. Francis be paid out of State funds. This letter was transmitted to the Adjutant General of Texas, with the following endorsement of date April 11th thereon:

"1. For decision.—The Division Commander is of the opinion that the laws of the State do not authorize allowance requested by Major Test. Attention is invited to Art. 5846, Revised Statutes, page 6, memorandum 6, enclosed herewith.

"(Signed)

JOHN A. HULEN,

"Major General, Texas National Guard."

In answering your inquiry, attention is first directed to the article of the statute in question, which reads as follows:

"Art. 5846. State to provide for wounded or disabled, when.—Every member of the military forces of this State who shall be wounded or disabled while in the service of this State, in case of riot, tumult, breach of the peace, resistance to process, invasion, insurrection or imminent danger thereof, or whenever called upon in aid of the civil authorities shall be taken care of and provided for at the expense of the State."

If this article had provided that all members of the military forces of this State, while in the active service of the State, shall have all necessary medical treatment at the expense of the State, there would be no question but that Dr. Francis' account for medical treatment given Major Test should be paid by the State. However, the Legislature has used words of limitation. Under the statute, a member of the military forces of this State is in no event entitled to medical treatment at the expense of the State under this statute, unless he be "wounded or disabled." The first word of this term may be defined "to be hurt by violence." It has been held that this constitutes a "wound," and must be a separation of the whole skin, a separation of the cuticle or upper skin not being sufficient. *Reg. vs. McLoughlin*, 8 Car. and P., 635; *Commonwealth vs. Massachusetts*, 47 Mass., 565.

In later decisions the word "wound" is defined as a hurt given by violence, and includes a bruise. *State vs. Owen*, 5 N. C., 452, 4 Am. Dec., 571; *Shaddock vs. Alpine Plank Road Company*, 79 Mich., 7.

The word "disabled" as used in this statute is harder of definition. In some instances, the word "disabled" has been defined as inability to perform work similar to that previously done by the injured party, and without reference to how such person was "disabled," whether by injury caused by violence, accident or sickness, but when used in connection with the context of the statute under consideration, the use of the word "disabled" may be limited to the definition of an injury caused by violence. Without deciding this intricate question, we can state that unquestionably persons in the military service in this State cannot receive medical treatment under this statute, except they be "wounded or disabled," and such wound or disability must occur while the person is in the active service of the State, and then only in the following instances:

"In case of riot, tumult, breach of the peace, resistance to process, invasion, insurrection or imminent danger thereof, or whenever called upon in the aid of civil authorities * * * ."

Again the Legislature has used words of limitation. This statute is one to which may be very properly applied the maxim "expressio unius exclusio alterius," that is to say, the Legislature by naming the class of service the military servant of the State must be engaged in when "wounded or disabled" in order to entitle such person to be taken care of and provided for at the expense of the State has expressly excluded all other classes or kinds of service except those named in the statute. By the use of the term "wounded or disabled" the Legislature must be considered as having expressly excluded all injuries and sickness that may befall the soldier even when engaged in the kind or class of service named in the statute except those injuries or illnesses that may come within the meaning of the term "wounded or disabled."

We agree with General Hulen and Colonel Zachry that Dr. Francis'

account for medical services rendered to Major Test cannot be paid out of State funds.

You are therefore, respectfully advised that an officer of the Texas National Guard on temporary duty reorganizing the Thirty-sixth Division is not, in the event he is taken ill or injured, entitled to be taken care of and provided for at the expense of the State by reason of the provisions of Article 5846, Revised Civil Statutes of Texas.

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

STATE RANGERS

Op. No. 2357, Bk. 56, P. 500.

ADJUTANT GENERAL—PRIVILEGED COMMUNICATIONS—INFORMATION CONCERNING TEXAS RANGERS.

A communication by a public officer not required by law to be made and not necessary to the discharge of his official duties is not privileged under the libel laws of this State.

Information concerning the personnel of the ranger force may be refused by the Governor and Adjutant General if in their opinion such information would interfere with the efficiency of the ranger force or be detrimental to the public welfare.

AUSTIN, TEXAS, March 8, 1921.

Brigadier General Thomas D. Barton, Adjutant General, Capitol.

DEAR GENERAL BARTON: I have your letter of March 7th, addressed to the Attorney General, asking to be advised whether you should comply with the following request made by Honorable Adrian Pool, member of the Legislature from El Paso County:

"Sometime during the year 1920 there was a public hearing relative to certain activities of the Rangers stationed in El Paso county and I am advised that your department has a stenographic copy of the testimony taken at such hearing. I know that the hearing was public and much of the testimony was published.

"I desire a complete copy of this testimony and shall thank you to let me have same. If there is any cost incident to making a copy of this testimony, I will pay such costs.

"Please let me have also a list of those now in the ranger service of this State. I want the names, ages, home address and present location of each."

Your inquiry raises many important questions.

Before entering upon a discussion of these questions it is necessary that we first consider the matter of your duties and to whom you are responsible as Adjutant General of Texas.

Article 5785, Vernon's Complete Texas Statutes, 1920, provides:

"There shall be at the seat of government of this State an executive department known as the Adjutant General's Department, and the Adjutant General shall be the head thereof."

The Adjutant General shall be in control of the military department of this State "subordinate only to the Governor" and he shall perform such duties as may be "entrusted to him by the Governor" and he shall conduct the business of the department "in such manner as the Governor shall direct." Article 5790.

The Adjutant General is the custodian of the records, papers and property of his department. He shall "keep in his office all records and papers required to be kept and filed therein. * * * He shall report annually to the Governor." Article 5793.

The report made to the Governor shall be printed and "laid before the Legislature for its information." Article 5794.

With reference to the State Rangers the law provides that the Governor shall appoint the captain and quartermasters and these officers

may be removed at the pleasure of the Governor. "The enlisted men and non-commissioned officers of each company shall be appointed by the Governor, acting by and through the Adjutant General." These men may be "removed by the Governor or the Adjutant General, for cause." Article 6755.

The ranger force "shall always be under the command of the Governor" and shall perform such duties "as the Governor may direct, acting by and through the Adjutant General." Article 6758.

We find that there is but little, if any, discretion vested by law in the Adjutant General with reference to the military forces of the State or with reference to the State Rangers, instead, practically all discretion is vested in the Governor and the Adjutant General is only an agent of the chief executive in dealing with the military matters and in directing the operation of the State Rangers.

The Constitution makes the Governor the commander-in-chief of the military forces of this State. Section 7, Article 4. The Adjutant General is the chief of staff to the commander-in-chief of the military forces of our State and in that capacity he acts as the assistant to or the agent of the commander-in-chief. The Governor is also made the chief law enforcement officer of the State. "He shall cause the laws to be faithfully executed." Section 10, Article 4, State Constitution.

The State Militia and the State Rangers are the forces provided by which the Governor is to carry out the mandate of the Constitution, viz., to enforce the laws of this State. As commander-in-chief of the military forces, the Governor is in supreme command of the State Militia so long as they are acting for and in behalf of the State and are not called into Federal service. The statute places the rangers at the disposal of the Governor "to be appointed under his direction in such manner, in such attachments, and in such locality as the Governor may direct." Article 6759. It is the duty of the Adjutant General to see that the orders of the Governor are executed. The orders must originate with the Governor and not the Adjutant General.

The request from Mr. Pool is for information concerning "certain activities of the rangers stationed in El Paso County." He also wants "a list of those now in the ranger service * * *, the names, ages, home address and present location of each."

Under the law the activities of the rangers are absolutely controlled by the Governor. He directs their activities through the Adjutant General.

We are not advised what the stenographic copy of the testimony taken at El Paso desired by Mr. Pool contains. It may contain matters defamatory to the reputation of some person or persons. If it does, will you be liable in an action for libel for communicating the contents of this testimony to Mr. Pool? It is stated by Mr. Pool in his letter that this testimony was taken at a public hearing. If he is correct in this it would not be libellous for you to comply with the request unless the court or magistrate before whom the hearing was had, prohibited the publication of the testimony. Section 1, Chap. 25, Acts of the Legislature, Regular Session, 1919.

In a conversation with the writer you stated that it was your understanding that this testimony was not taken at a public hearing.

You will observe that Article 5793 makes it the duty of the Adjutant General to report annually to the Governor and then states what this report shall contain. From time to time it may be necessary that you communicate information received by you in your official capacity to your supreme officer, the Governor, anything contained in your annual report or any communication made by you at any time in your official capacity to the Governor in the absence of express malice would be privileged. In support of this proposition we refer you to the opinion and the great list of American legal authorities cited therein, given by this Department to Honorable R. H. Hoffman, State Food and Drug Commissioner, reported in the 1916-18 Reports and Opinions of the Attorney General, beginning on page 356.

An entirely different question is presented by the request of Mr. Pool. The Legislature has great power and authority. It is supreme in its own particular field of activity, subject only to the limitations placed upon it by the Constitution. It is independent of the executive authority and of the judiciary. The executive department is equally independent of the legislative and of the judiciary and the judiciary enjoys this same degree of independence with reference to the legislative and executive departments. Section 1, Article 2 of the State Constitution.

Mr. Pool as a member of the Legislature is vested with no more authority than that possessed by any other citizen. The Constitution expressly declares that "the legislative power of this State shall be vested in a Senate and House of Representatives." Section 1, Article 3. The legislative power is not vested in the individual members of the Legislature, but in all the members. It is an undivided power and rests upon the entire membership and not upon the individual membership.

Members of the Legislature, however, are the representatives of the true sovereign, the people, and are directly interested in the welfare of the State, and as such they are entitled to be shown every courtesy by the members of the executive department. While the Adjutant General, as such, is not a member of the executive department of the State government, he is very closely connected with the executive department and to the end that the public may be served and the business of the government carried on in an efficient manner it is politic that all three branches of the government, viz., the legislative, executive and judiciary, work in harmony each with the other and it was so intended by the men who founded our State government.

As already pointed out, the Governor is responsible to the people for the activities of the Adjutant General's department and the Adjutant General is responsible to the Governor and not to the legislative or judiciary.

The law does not require the Adjutant General to make a report to the Legislature. This is true even though his annual report is to be "laid before the Legislature for its information." The annual report compiled by the Adjutant General is made "to the Governor." Neither does the law require the Adjutant General to furnish information to the Legislature as a whole or to any member thereof concerning the business or management of his department.

Any communication from the Adjutant General to the Legislature

or any member thereof, or to any citizen in the absence of any law requiring him to make such communication would be a voluntary act on his part and if the communication contained anything "tending to blacken the memory of the dead, or tending to injure the reputation of one who is alive," action for damages could be maintained for publishing such communication. Transmission from one person to another of a written or printed document is publication within the meaning of the libel law.

We have necessarily had to discuss this question in the abstract and we are not advising or attempting to advise you not to furnish Mr. Pool a copy of the testimony referred to in his letter. We have attempted to advise you of the legal consequences that might follow your complying with his request. We stated in the beginning that we did not know what the testimony contained nor whether it had or had not been taken at a public hearing. You know the facts. We have stated our understanding of the law.

You "especially" wanted to be advised whether you should furnish Mr. Pool with the "names, ages, home address and present location of each" ranger.

We have already pointed out that under the law the activities of the rangers are controlled exclusively by the Governor. Their activities are "directed" by the Governor through the Adjutant General. The Adjutant General has no independent authority in their control or direction. The lawful acts of the Adjutant General are in effect the acts of the Governor. Any information furnished by the Adjutant General concerning the rangers would essentially be information from the Governor. Full discretion is given to the Governor in appointing and removing men from the ranger force. Article 6755. The Legislature can repeal and amend this law but so long as it remains on the statute books in the present form, the Governor is under no obligation to disclose any information concerning the personnel of the ranger force to any member of the Legislature.

In many instances State officers are appointed by the Governor with the consent and approval of the Senate. There is no such restrictions placed upon the Governor with reference to the appointment of rangers. The entire responsibility for the appointment of good men on the ranger force rests squarely on the shoulders of the chief executive.

We are not to be understood as saying that you should not furnish this information to Mr. Pool. What we do say is that as a matter of law Mr. Pool is not entitled to this information.

If in your opinion and in the opinion of the Governor it would be detrimental to the public welfare or would interfere with the efficiency of the ranger force to comply with Mr. Pool's request you have the right to decline to furnish the requested information. If, on the other hand, in the opinion of the Governor and yourself, it would not be disadvantageous to the public welfare and would not interfere with the constitutional duty of the Governor to "cause the laws to be faithfully executed" to furnish the desired information to Mr. Pool, there is nothing in the law prohibiting you from complying with his request.

In other words, the action to be taken by you with reference to

furnishing the names, etc., of the rangers rests in the sound discretion of the Governor and yourself.

I am, with respect,

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2445, Bk. 57, P. 288.

RANGER FORCE—APPROPRIATIONS—PORT BILL—STATUTORY
CONSTRUCTION.

1. Title 116, R. S., construed.
 - (a) *Component Parts of Ranger Force* are (1) a regular ranger force, not to exceed seventy-five officers and men; (2) an increase of that force in cases of emergency.
 - (b) *Method of Appointment and Enlistment*: (1) Captains and quartermaster by Governor; (2) enlisted men and non-commissioned officers by Governor, acting by and through Adjutant General; (3) increase of force in cases of emergency appointed and enlisted in same manner.
 - (c) Term of appointment and enlistment two years, unless sooner removed by Governor. Governor may remove any officer, non-commissioned officer or enlisted man at his pleasure. Adjutant General may remove any non-commissioned officer or enlisted man "for cause."
2. (a) Legislature, in making appropriations for lesser number of rangers than general law provides, does not impair power of Governor to appoint full number, or, in case of emergency, to still further increase the force.
 - (b) The appropriation act does not amend or repeal the general law.
3. Port Bill, Chapter 5, General Laws, Fourth Called Session, Thirty-sixth Legislature, construed.
 - (a) Section 16 of the act authorizes employment (not appointment) of men to be designated as special rangers.
 - (b) Special rangers do not enlist or take an oath.
 - (c) Purpose of employment is "to be used in enforcement of act," and their duties should be so restricted.

AUSTIN, TEXAS, July 22, 1922.

Honorable Pat M. Neff, Governor of Texas, Austin, Texas.

DEAR SIR: You have called attention to the fact that only fifty officers and men are being carried on the State Ranger Force, because appropriation was made for the salaries and subsistence of only fifty officers and men, during the fiscal years ending August 31, 1922 and 1923, by the Appropriation Act, Chapter 53, General Laws, First Called Session, Thirty-seventh Legislature, whereas, provision is made in Title 116, Revised Statutes of the State of Texas, for a much larger State Ranger force. You ask whether, by reason of the appropriation bill, you are prohibited from recruiting the State Ranger force to the full limit, contemplated by Title 116 of the Revised Statutes.

The Ranger Force and Its Component Par'ts.

Title 116, R. S., creates the Ranger Force. It contemplates a force as follows:

First. A regular Ranger Force "to be organized by the Governor * * * for the purpose of protecting the frontier against marauding or thieving parties, and for the suppression of lawlessness and

crime throughout the State, and to aid in the enforcement of the laws of the State." Article 6754.

Article 6755 relates to the organization of the force. The regular Ranger Force "shall consist of not to exceed one headquarters company and four companies of mounted men. Said five companies shall be composed as follows:

(1) The headquarters company shall consist of one captain, * * * designated the senior captain of the force, one sergeant, and not to exceed four privates," making a total of six men.

(2) Each of the four mounted companies shall consist of "not to exceed one captain, one sergeant and fifteen privates," making a total for each company of seventeen, and a total, for the four, of sixty-eight.

(3) In addition to the above, Article 6755 provides for the appointment of "a quartermaster for the Ranger Force." This gives a grand total for, what we have termed, the regular Ranger Force of seventy-five.

Second. Article 6755, R. S., in addition to the above, provides for an increase of the State Ranger Force "in cases of emergency." When cases of emergency arise, "the Governor shall have authority to increase the force to meet extraordinary conditions." The exact language of the statute is:

"The ranger force shall consist of not to exceed one headquarters company and four companies of mounted men, except in cases of emergency, when the Governor shall have authority to increase the force to meet extraordinary conditions."

This means that the Governor shall be the judge of what constitutes a case of emergency, and also of the number to be added to the regular ranger force to meet the extraordinary conditions. It also means that, in case of emergency, the Governor may increase both the number of companies and the number of men composing such companies.

Method of Appointment and Enlistment.

The method of appointment and enlistment, both, in bringing the regular ranger force to its full limit of seventy-five, and in increasing the force "to meet extraordinary conditions" is the same, and is that prescribed in Articles 6755 and 6759, R. S.

Article 6755 provides: "The *captains* and the *quartermaster* shall be appointed by the Governor and shall be removed at his pleasure; unless so removed by the Governor they shall serve for two years and until their successors are appointed and qualified."

The *enlisted* men and *non-commissioned officers* of each company "shall be appointed by the Governor, acting by and through the Adjutant General, who shall pass upon the qualifications of such men, and, so far as practicable, shall make such appointment upon the recommendation of the captain under whom such men are to serve. The enlisted men and non-commissioned officers shall serve for two years, unless sooner removed by the Governor or the Adjutant General for cause." We think this last means that the Governor may remove enlisted men and non-commissioned officers "at his pleasure," as is provided in respect to captains and the quarter-

master, and that the Adjutant General may remove *enlisted men and non-commissioned officers* of each company, at any time, "for cause." This is made plain when we come to consider the provisions of Article 6759, R. S., which relates to the term of enlistment.

Article 6759 is as follows: "The Governor is authorized to keep this force, or so much thereof as he may deem necessary in the field as long as in his judgment there may be necessity for such a force; and men who may be enlisted in such service shall do so for such term not to exceed two years, subject to disbandment in whole or in part at any time and reassemblage or reorganization of the whole force, or such portion thereof as may be deemed necessary by order of the Governor."

Power of Appointment Not Affected by Appropriation Act.

Coming back now to the original question, it is our opinion that the Legislature did not intend, by making provision for the salaries and subsistence of only fifty officers and enlisted men, to limit the power of appointment conferred, by Title 116, R. S., upon the Governor, and upon the Governor, "acting by and through the Adjutant General," either in bringing the regular ranger force to its full limit of seventy-five, or in increasing the regular ranger force "to meet extraordinary conditions," in cases of emergency. We believe that the Legislature did not intend, by this appropriation bill, to, in any manner, repeal or amend a general law, passed for the purpose of creating a mobile force to be used at all times by the executive branch of the government, for the protection of the frontier, the suppression of lawlessness and crime throughout the State, to aid in the enforcement of the laws of the State, and to meet extraordinary conditions in cases of emergency. Such is not the effect ordinarily given to an appropriation act, and such a construction of acts of this nature would mean a re-writing of the laws pertaining to the various departments of the government every two years, and cause an instability and uncertainty, which would impair the efficiency of the government in every respect.

It may be certainly asserted that the Legislature did not intend by this appropriation act to take from the Governor the power and authority "to increase the (ranger) force to meet extraordinary conditions," arising from cases of emergency. No emergency existed at that time. They were not considering an emergency when the appropriation was passed. Certainly, they were not considering that which now exists. In making the appropriation for only fifty officers and men they evidently intended to provide what they deemed a sufficient number on the ranger force to carry out the general purposes of the act, mentioned in Article 6754, taking into consideration only the conditions existing in the State at the time the appropriation was made. They knew that the general law made ample provision for cases of emergency. It would be unreasonable to presume that they had intended anything, except providing sufficient appropriation to meet the ordinary requirements of the act, under normal conditions, during the years 1922 and 1923. An emergency, according to Webster, is "an unforeseen occurrence; a sudden occasion; an unforeseen occurrence or combination of circumstances which calls for immediate

action or remedy." Such things may happen after a Legislature has adjourned, and very properly provision, as in this case, is made by general law to care for the same. Very properly also the general law does not require that the Legislature be assembled to determine whether an emergency exists, but leaves the determination of that fact to an executive officer. An emergency "calls for immediate action or remedy."

Port Bill.

Chapter 5, General Laws, Fourth Called Session, Thirty-sixth Legislature, commonly referred to as the Port Bill, is a separate and distinct law, to care for a particular condition or a particular emergency, described in the act. It, in no way, conflicts with any of the provisions of Title 116 of the Revised Statutes. Showing the intention of the Legislature, the act itself, in Section 17, contains the following provision:

"This act shall be construed as cumulative of the existing laws of this State, and shall not be held to repeal any of the same except where in direct conflict herewith."

We find no conflict.

Among other things, in Section 16, it provides:

"The State rangers may be used in the enforcement of the provisions of this act; if a sufficient number of rangers are not available, the Governor is authorized to employ any number of men to be designated as special rangers, and such men shall have all the power and authority of the regular rangers, and shall be paid the same salary as the rangers are paid, and such salaries shall be paid out of the appropriation made to the Executive Office for the payment of rewards and the enforcement of the law."

It must be noted that this provision authorizes the employment (not the appointment), of "any number of men, to be designated as special rangers," and while, by the act, "such men shall have all the power and authority of the regular rangers, and shall be paid the same salary as the rangers are paid," yet their term of employment is not fixed by the act and they are not required, as in the case of the regular rangers, before entering on the discharge of their duties, to take an oath "that each of them will faithfully perform his duties in accordance with the law." They are not appointed and do not enlist. They are employed, and employed for a particular purpose, to wit: To "be used in the enforcement of the provisions of this act." Their duties, therefore, should be restricted to those necessary for "the enforcement of the provisions of this act," and, as far as possible, in "the enforcement of the provisions of this act" to the territory specified in the Governor's proclamation. They are not State officers, but are State employees, employed by authority contained in Section 16 of the Port Bill, and not enlisted under the provisions of Article 6759 of Title 116.

The Governor's authority for the employment of such men arises "if sufficient number of rangers are not available" to enforce the provisions of the act, at the time and place that the conditions are such as to call for an application of the act.

It will also be noted that the salaries of the men, thus employed

as special rangers, "shall be paid out of the appropriation made to the executive office, for the payment of rewards and the enforcement of the law." Thus the question of the issuance of salary warrants and the payment thereof to such special rangers is already provided for, and, in no way, depends upon the construction of the act, appropriating moneys for the salaries and maintenance of the regular ranger force.

Very truly yours,

JNO. C. WALL,
First Assistant Attorney General.

LIVE STOCK SANITARY COMMISSION

Op. No. 2252, Bk. 54, P. 477.

LIVE STOCK SANITARY COMMISSION—UNITED STATES BUREAU OF ANIMAL INDUSTRY.

The Texas Live Stock Sanitary Commission, under the provisions of the so-called Tick Eradication Law, is charged with carrying out the purposes and enforcing the provisions of the law.

The United States Bureau of Animal Industry has no authority under this law, except that it may co-operate with the Live Stock Sanitary Commission in establishing interstate quarantine lines and rules and regulations for protecting the live stock industry of this State.

The Texas Live Stock Sanitary Commission has complete control of intrastate movements of live stock from or into a quarantine district in this State.

AUSTIN, TEXAS, October 1, 1920.

*Honorable W. A. Wallace, Chairman, Live Stock Sanitary Commission,
701 Wheat Building, Fort Worth, Texas.*

DEAR MR. WALLACE: I have your letter of October 1st, reading as follows:

"Will you kindly furnish the Live Stock Sanitary Commission the following legal advice:

"We are conducting tick eradication in the State of Texas in co-operation with the United States Bureau of Animal Industry. This work is being conducted under authority of the laws of the State of Texas. We would like to be advised if the Live Stock Sanitary Commission has entire control of this work in Texas. Has the United States Bureau of Animal Industry any authority over same? If the bureau co-operates with us, must they do so according to the methods approved by the Live Stock Sanitary Commission? In other words, is the Live Stock Sanitary Commission the supreme authority in the State of Texas in the control of tick eradication?

"We would also be glad to have you advise us if the Live Stock Sanitary Commission has complete control over intrastate movements of live stock. The following incident has occurred, and we would like to know our legal status in reference to same:

"The Fort Worth Stock Yards maintains a native (or tick-free) division of said yards into which is admitted nothing but cattle that are free of the fever tick. Cattle originating in any territory under quarantine must be accompanied by a certificate showing said cattle to be free of infection. There are several counties in Texas under quarantine, and also a number of local premises under quarantine. The United States Bureau of Animal Industry insists that cattle originating in any of these quarantine counties in Texas must be accompanied by a Federal certificate before they are admitted into the native (tick-free) division of the Fort Worth Stock Yards. Inasmuch as this is an intrastate movement, we consider that this Commission has entire control of the same, and that the Bureau exceeds its authority in undertaking to prescribe any regulations for such movement. These movements originate in Texas, and are destined to a Texas point, to wit: the Fort Worth Stock Yards.

"Will you kindly advise us if the Bureau has the authority to enforce such a regulation or is this matter entirely in the hands of this Commission?"

In answering your first question as to whether or not the Live Stock Sanitary Commission is the supreme authority in the State of Texas with reference to carrying on and directing the work of tick eradica-

tion, it becomes necessary to examine the statutes of Texas in order to ascertain who has this power or authority.

In the beginning, we shall give a very brief historical regime of the Live Stock Sanitary Commission and its duties with reference to tick eradication work in Texas.

The Live Stock Sanitary Commission, it seems, was first created by an act of the Legislature in 1893 (see Acts 1893, page 70). In 1913 it was proposed in a bill submitted to the Legislature that the law of 1893 be amended so as to more effectually protect the live stock industry of this State, and especially with reference to eradicating the fever carrying tick. This bill proposed to give to the Federal authorities the right and power to enforce the provisions of the bill. This the Legislature declined to do, and the amendment as finally adopted and enacted into law made it the duty of the Live Stock Sanitary Commission of Texas to enforce and carry out the provisions of the act. (Acts 1913, page 353 et seq.)

This historical regime shows conclusively that the Legislature of Texas intended that the Live Stock Sanitary Commission should enforce this law, and not the United States Bureau of Animal Industry.

In the absence of the above facts, the act itself, in language free from ambiguity, clearly states that it is the duty of the Live Stock Sanitary Commission to enforce this law.

The act provides:

"It shall be the duty of the Commission, provided in Article 7312, Revised Civil Statutes, to protect the domestic animals of the State from all malignant, contagious or infectious diseases of a communicable character, whether said diseases exist in Texas or elsewhere; and for the purpose it is hereby authorized and empowered to establish, maintain and enforce such protective measures and quarantine lines and sanitary rules and regulations as it may deem necessary, when it shall determine upon proper inspection that such diseases exist."

Continuing, it is further provided:

"It shall be the duty of said Live Stock Sanitary Commission to quarantine any district, county or part of county, or premises within this State when it shall determine upon proper inspection the fact that cattle, sheep or other live stock in such district, county, part of county or premises are affected with any malignant, contagious, infectious or communicable disease, or with the agency or transmission of such diseases * * * ." (Acts 1917, Chapter 60, Section 1.)

It is also provided that it is the duty of the Live Stock Sanitary Commission "as far as possible to destroy and eradicate the fever carrying tick which produces splenetic fever." (Acts 1917, Chapter 60, Section 2.)

Section 4 of the same act, as amended in 1917, makes it the duty of the Live Stock Sanitary Commission "whenever they have reason to believe or shall receive notice that any malignant, contagious, infectious or communicable disease * * * exists among any domestic animals of this State * * * to immediately quarantine such animals upon the premises upon which they are located."

Section 9 of this same act, as amended in 1917, makes it the duty of the Live Stock Sanitary Commission, immediately after March 1,

1919, to certify to the Governor of Texas a list of the names of the counties in Zone Number One that have not been freed from ticks, etc.; and immediately after January 1, 1920, that it shall certify to the Governor a list of the names of the counties in Zone Number Two that have not been freed from ticks, etc.; and immediately after January 1, 1922, to make and certify to the Governor of Texas a list of the names of the counties in Zone Number Three that have not been freed from ticks, etc.

Also see Section 1, Chapter 12, Acts 1917, First Called Session, and Section 20, Chapter 60, Acts of 1917, defining further the duties of the Live Stock Sanitary Commission. The language of this law is so clear and free from ambiguity as to need no interpretation or construction. It states in plain and unmistakable language that the various duties enumerated are to be performed and discharged by the Live Stock Sanitary Commission and does not even indicate that any other officer, board or individual is to perform the duties therein named.

Answering your second question with reference to the power of the Live Stock Sanitary Commission to control intrastate movements of live stock, your attention is directed to the following provisions of the so-called tick eradication law, wherein it is provided that the Live Stock Sanitary Commission "shall make and promulgate rules and regulations which shall permit and govern the movement and shipment of cattle and other live stock from or into a quarantined district, county or part of county, or premises into any other district, county, part of county or premises in this State where such cattle or other live stock are to be immediately slaughtered, and furnish prompt inspection when demanded by the owner or person in charge of such cattle or other live stock so intended to be moved or shipped for immediate slaughter, and it is hereby so authorized, and directed." (Acts 1917, Chapter 60, Section 1.)

Had it been the intention of the Legislature that the United States Bureau of Animal Industry should enforce the provisions of this law or control the intrastate movement of live stock in this State, it is reasonable to suppose that it would have used language somewhere in the act indicating such intention. The United States Bureau of Animal Industry is mentioned twice in the act. In Section 1, Chapter 60, Acts of 1917, it is provided that:

"It shall also be the duty of said commission to co-operate with the Live Stock Sanitary Commission and officers of other States, and with the United States Secretary of Agriculture, in establishing such State quarantine lines, rules and regulations as shall best protect the live stock industry of this State against the fever-carrying tick (*Magararopic annulatus*) which produces the splenic fever and other malignant, contagious, infectious or communicable diseases of live stock."

Again, in Section 21, Chapter 60, Acts 1917, it is provided that the "dipping bath in the treatment of sheep scab" must at all times be maintained at a strength of not less than one and one-half ($1\frac{1}{2}$) per cent of sulphide sulphur or any other dip officially approved by both the Live Stock Sanitary Commission of Texas and the United States Bureau of Animal Industry."

Continuing this same section of the act provides that "the dip to

be used in the treatment of cattle for ticks shall be the arsenical dip approved by the United States Bureau of Animal Industry, or any other dip officially approved by both said bureau and the Live Stock Sanitary Commission of Texas."

The provisions of Section 1 wherein is mentioned United States Bureau of Animal Industry only provides for co-operation between the Live Stock Sanitary Commission and the bureau with reference to two matters:

1. Establishing interstate quarantine lines; and
2. Establishing rules and regulations for the protection of the live stock industry of Texas.

Clearly it is right and proper for the Federal Bureau to have the authority to co-operate with the Live Stock Sanitary Commission in fixing interstate quarantine lines, and when the bureau and the commission co-operate in promulgating rules and regulations for the protection of the live stock industry in Texas, the enforcement of these rules and regulations is vested solely in the Live Stock Sanitary Commission.

It follows that your second question must also be answered in the affirmative.

By way of recapitulation, you are respectfully advised:

1. That the Live Stock Sanitary Commission, under the provisions of the so-called Tick Eradication Law, is charged with carrying out the purposes and enforcing the provisions of the law. The United States Bureau of Animal Industry has no authority under this law, except that it may co-operate with the Live Stock Sanitary Commission in establishing interstate lines and rules and regulations for protecting the live stock industry of this State.

2. The Texas Live Stock Sanitary Commission has complete control of intrastate movements of live stock from or into a quarantine district in this State.

I am, with respect,

Very truly yours,

E. F. SMITH,
Assistant Attorney General.

FREE TEXT BOOKS

Op. No. 2317, Bk. 55, P. 298.

FREE TEXT BOOKS—DEALERS—STATE SUPERINTENDENT OF PUBLIC INSTRUCTION.

Dealers in text books adopted by the State, other than the State depository and the publishers of said books, may charge for said books a different price from that fixed by the contract between the State and the publishers of said book.

Chapter 44, Acts of the First Called Session of the Thirty-fifth Legislature.

Chapter 29, Acts of the Regular Session of the Thirty-sixth Legislature.

AUSTIN, TEXAS, March 23, 1921.

Miss Annie Webb Blanton, State Superintendent of Public Instruction, Capitol.

DEAR MISS BLANTON: This will acknowledge receipt of your letter of the 16th instant, addressed to the Attorney General, together with a letter from Mr. Edward A. Burke, Dallas, Texas, addressed to your department. Your letter reads:

"I am enclosing copy of letter from Mr. Edward A. Burke, Dallas, Texas.

"You will notice that he is complaining that he has been charged 90 cents for a State-adopted text book which is under contract to sell at 70 cents per copy. Please let me know how to enforce this provision of the Text Book Commission Act."

Mr. Burke's letter is as follows:

"Wish to advise that some time ago I bought an elementary algebra from Van Winkle's Book Store, situated in this city. Today I read on the cover that the price was fixed at 70 cents, and any deviation therefrom should be reported. I was charged ninety cents (\$0.90). Some of my friends have also been charged more than 70 cents. Name of this book is Hopkins & Underwood Elementary Algebra."

I cannot tell from Mr. Burke's letter whether the Van Winkle Bookstore at Dallas is a State depository, as is provided for by Section 6 of Chapter 29 of the Regular Session of the Thirty-sixth Legislature, but for reasons hereinafter stated, I presume it is not.

Chapter 44 of the First Called Session of the Thirty-fifth Legislature creates the Texas State Book Commission, while Chapter 29 of the Acts of the Regular Session of the Thirty-sixth Legislature provides for the purchase and disposition by the State of free textbooks to the public schools of the State, and is hereafter referred to as the Free Textbook Act. Both acts of the Legislature provide for the establishment of a State depository, to wit, by all persons having a contract with the State to furnish textbooks and where a stock of books must be kept to supply all immediate demands for that particular book. The particular subject of the establishment of a State depository is provided for by Section 21 of the act creating the Textbook Commission, and by Section 6 of the Free Textbook Act. These two sections deal with the same subject and are *pari materia* and must be considered together.

Section 21 provides, not only for the establishment of a State depository by all parties with whom a contract has been made for the furnishing of books where a stock of books must be kept sufficient to supply all immediate demands, but must establish and maintain in all counties one or more depositories, according to the necessities of the county, as provided for in the act. Section 6 of the Free Textbook Act substantially rewrites this section, but makes it necessary for each contractor to establish only one State depository. The requirement that depositories be established in each county seat and in each city containing five hundred inhabitants or over, as is provided for by Section 21 of the Free Textbook Commission Act, being entirely omitted, this being the last expression of the Legislature on this subject, it supersedes Article 21 of the Free Textbook Commission Act. It is now only necessary for book companies, having contracts with the State, to establish and maintain one depository within the State.

A portion of Section 6 reads:

"Any person, school not controlled by the State, or dealer in any county in the State may order books from the said State agency or depository and the books so ordered shall be furnished at the same rate and discount as are granted to the State; provided that in such case the State depository or agency may require that the price of books so ordered shall be paid in advance."

Section 15 of the Free Textbook Act reads:

"Books may be bought from the local boards of trustees by pupils or parents of pupils attending the public schools of the State, said boards to furnish the books at the retail contract price. Any book may be purchased from the State depository designated by the contractor holding the contract for said book by State institutions, or by private schools, or church schools, such purchase to be made on the same terms as those given to the State for the same book. All money accruing from sales of books by district boards or school trustees shall be forwarded to the State Text Book Fund not later than one month after the sale."

We have carefully examined the provisions of both of these acts and nowhere do we find any attempt by the Legislature to fix the prices which ordinary book dealers may charge for textbooks contracted for by the State and which are to be furnished to the children of the State free of charge. The statute has provided that such books may be bought from the local board of school trustees by the pupil or parents of the pupils attending the public schools of the State, at the retail contract price. Opportunity is also given to any person to order books direct from the State depository and the price to be paid for any book is fixed as the "regular retail price." State institutions, private and church schools have been given the opportunity to purchase books from the State depository upon the same terms as the State or any person, parent or pupil.

If any person does not wish to avail himself of these privileges, then there is no limitation placed by the statute upon the price that may be charged by the ordinary dealer for adopted textbooks. Certainly textbook dealers must have some profit on their investments if they are to carry in stock a class of books, such as the adopted books of this State, for the convenience and use of the public who are compelled for some reason or other to buy the same when they do not

wish to be put to the trouble and inconvenience of ordering books from the State depository, as set out in Sections 6 and 15, quoted above.

In Section 6 of the Free Textbook Act, it is provided that "any dealer in any county in the State may order books from the State agency, or depository and the books so ordered shall be furnished at the same rate and discount as are granted the State," but there is nowhere in the act, or in the Free Textbook Commission Act, any restrictions placed on the price which the dealer may charge the public for such books. In the absence of such a limitation, he may charge such a price as he may be able to obtain.

It is true that Section 22 of the Free Textbook Commission Act contains the following provisions:

"The price marked hereon is fixed by the State, and any deviation therefrom should be reported to the State Superintendent of Public Instruction."

It is our opinion that the deviation from the established price therein referred to has reference only to the price charged by the State depository and the local depositories required to be established by that act, but since the Free Textbook Act only provides for the establishment of one general depository, the provision of the former act requiring local depositories in each county is repealed by the later act. Therefore the provisions of said section quoted above could in no wise refer to the local dealer in textbooks.

It is the opinion of this Department, and you are so advised, that there is no action that may be taken by you to restrain book dealers from charging more for State adopted textbooks than the contract price fixed by the State with the publishers of said books.

Should the Van Winkle Bookstore be a State depository for the algebra adopted by the State, such as bought by Mr. Burke, then there would clearly be a breach of contract between the State and the book company, and if you so advise us this Department will take the necessary steps to protect the State in the matter.

Yours very truly,

BRUCE W. BRYANT,
Assistant Attorney General.

WEIGHTS AND MEASURES

Op. No. 2454, Bk. 57, P. 379.

**STANDARD CONTAINERS AND GRADES FOR FRUITS AND VEGETABLES—
INSPECTION LAWS—INTRASTATE AND INTERSTATE COMMERCE.**

1. A State may adopt standard containers for the packaging of fruits and vegetables, grown within the State, and may prescribe the shape, size and cubical contents thereof, and may enforce the exclusive use thereof by penal provisions as to such commerce moving wholly within the State when Congress has not made any conflicting regulation.

2. A State may require the use of such containers in the packaging and shipping of such produce moving in interstate and foreign commerce, when Congress has not made a conflicting regulation, and when such requirement is a part of an inspection statute designed to improve the quality of articles produced by the labor of a country; to fit them for exportation; to extend the commerce of the State by establishing and maintaining uniform standards for quantity, quality and condition; and to protect the good name of the State and the reputation of its products for standard, quantity, quality and condition.

3. A State may inhibit the manufacture of containers, not standard, within the State, for sale and use within this State.

4. A State cannot inhibit the importation of containers not standard.

5. A State may inhibit the use of such containers so imported as to commerce moving wholly within the State; and may inhibit the use of such containers in interstate and foreign commerce, under the conditions set out above in Subdivision "2" of this syllabus.

6. A State may establish standards of grades or quality for produce grown within the State when such produce moves in commerce wholly within the State, and in interstate commerce when Congress has not made any conflicting regulation.

7. A State may pass an inspection law for the purposes set out in Subdivision "2" of this syllabus when such commerce moves wholly within the State, and as to commerce moving in interstate or foreign commerce when Congress has not made any conflicting regulation. In either event an inspection tax may be charged for carrying out the inspection when such tax will not, clearly and obviously, exceed the cost of such inspection.

AUSTIN, TEXAS, June 29, 1922.

Honorable E. W. Cole, Director of Markets, Department of Agriculture, State Office Building, Austin, Texas.

DEAR SIR: Your letter of the 26th ult., addressed to the Attorney General, has been received. It reads as follows:

"Since the announcement of certain recent court decisions affecting commerce as it relates to the regulatory prerogatives of the States, and also official opinions pursuant thereto, I, as a State enforcement officer, am uncertain and very much disturbed about the legal status of my official position in the exercise of the regulatory police powers authorized and required under Chapter 181, General Laws of Texas, passed by the Thirty-fifth Legislature of Texas, wherein State standards for containers, grades and packs were established and a consequential State enforcement and inspection service authorized in connection therewith.

The questions involved are:

First. Whether the State of Texas has a right to establish State standards for containers, which containers are to be used in packaging fruits and vegetables or other products produced within the State of Texas, and the power to enforce such standards whether such standardized containers be manufac-

tured within or without this State, and whether used to package fruits or vegetables or other products intended for sale or shipment in (a) intrastate commerce or (b) interstate commerce.

Second. Whether the State of Texas has a right to establish State standards for grades and packs of fruits or vegetables or other products produced within the State of Texas and the power to enforce such standards, whether the products for which standards may be established shall enter (a) intrastate commerce or (b) interstate commerce.

Third. Whether the State of Texas has a right to levy and collect an inspection fee or fees against fruits or vegetables or other products produced within the State of Texas for the purpose of supporting and maintaining an adequate enforcement and inspection service pursuant to the establishment of official standards, whether such products shall enter (a) intrastate commerce or (b) interstate commerce.

Another purpose of this inquiry is to ascertain if the State has the constitutional right to establish standards for containers to be used in the shipment of fruits and vegetables, grown within this State, to other States and foreign countries; and to establish standards for grades and packs for fruits and vegetables produced within the State of Texas and to be shipped to other States and foreign countries; and to pass adequate inspection laws governing the same, and fixing a fee for services rendered incident to the inspection which will not greatly exceed the actual cost of inspection. The object being to protect the farmers and other citizens of Texas against unnecessary and preventable high freight rates now levied against fruits and vegetables caused by shipping diseased, damaged and decaying products, unfit for food; the harvesting, packing, hauling, freight and good will cost of which must be charged against the better quality products; and to extend the commerce of the State and its citizens by establishing and maintaining uniform standards for quantity, quality and condition, which will assure foreign buyers of a reliable supply of dependable quality, and thus create new demands and broaden the markets for Texas-grown fruits and vegetables; and to protect the good name of the State and the reputation of its products for standard, quantity, quality and condition.

Under the circumstances, I feel that it is absolutely necessary that I have the benefit of the best counsel and advice that the State's Attorney General is capable of giving on these questions, and I therefore beg and request of your good offices a copy of all American court decisions—new and old—relating to and covering the questions herein involved, pro and con, and your official interpretation of their meaning and power as relates to the questions stated above and your advice as to what course I shall hereafter pursue in the administration of Chapter 181, General Laws.

Personally, I have always felt and do yet believe that the States have a right to establish standards for containers, grades and packs of their own products for the benefit of their own industries and citizenship, and that such rights were reserved to the States under the Constitution of the United States, and have strong convictions that the States have a moral right to exercise such prerogatives.

May I have the benefit of your counsel at the earliest possible time after you shall have given this question proper consideration?"

We will attempt to answer your several inquiries in the order in which they have been submitted. They all involve Federal Constitutional questions. It is provided in Section 8, Article 1 of the Constitution of the United States, that "The Congress shall have power to * * * fix the Standard of Weights and Measures."

In the case of *Williams vs. Sandles* (1915), 93 Ohio St., 92, 112 N. E., 206, the Supreme Court of Ohio, in referring to this provision of the Constitution, says:

"It is quite apparent, therefore, that the power to adopt and prescribe a standard of weights and measures was not conferred by the Constitution exclusively upon the Congress of the United States, and that it is within the

power of the Legislatures of the several States to enact laws fixing and regulating standards of weights and measures in all respects in which Congress has not legislated upon the subject."

In the case of *Higgins vs. California Petroleum, etc., Co.* (1895), 109 Cal., 310, 41 Pac., 1087, the Supreme Court of California used this language:

"The regulation of weights and measures by a State is valid so far as not in conflict with any act of Congress and a California statute providing that 'the hundredweight consists of one hundred avoirdupois pounds, and twenty hundredweight constitute a ton,' is valid."

"The Congress has the power 'to fix the standard of weights and measures.' This power it has never exercised. And until it is exercised, the respective States may, for themselves, regulate weights and measures." *Harris vs. Rutledge* (1865), 19 Ia., 390.

"Congress is given power by the United States Constitution, Art. 1, Sec. 8, to 'fix the standard of weights and measures' in the absence, however, of the exercise by the national legislative body of the power thus conferred the States may fix a standard of their own weights and measures, on the theory that the States may exercise powers granted to Congress where Congress fails to exercise them, except when the grant is in express terms exclusive or coupled with a prohibition to the State of whether the grant to the one would make the exercise by the other absolutely and totally repugnant." 28 Ruling Case Law, pp. 3, 4.

"Under the Constitution of the United States, Congress is given power to establish uniform weights and measures. This power it has never exercised. (Except as to standard troy pound weight. U. S. Comp. St. (1901), pp. 2370, 2371.) And until it is exercised the respective States may, for themselves, regulate weights and measures. But by a joint resolution, adopted June 14, 1836, provision was made for sending to each State a full set of standards. These standards were early adopted by some States, and have continued in force ever since. And in every State in the Union weights and measures have been constantly governed either by a standard established by a State statute or by the common law of the State." 40 Cyc., 880, 881.

In 1918, the City of St. Louis established an ordinance which required farmers and truck gardeners to use a standard-sized container for marketing their produce in said city, and fixed the shape and cubic contents of the bushel and half-bushel measures, and forbade the sale of certain produce in containers of different size or capacity. The section which established this standard for bushel box and fractional part thereof reads:

"There is hereby established a standard bushel box, the dimensions of which shall be as follows: Length, twenty-two inches; depth, eight and one-half inches; width, eleven and one-half inches. which bushel box shall contain twenty-one hundred and fifty and five-tenths cubic inches. There is hereby established a standard half-bushel box, the dimensions of which shall be as follows: Length, twenty-two inches; depth, four and one-fourth inches; width, eleven and one-half inches. which half-bushel box shall contain one thousand seventy-five and two-tenths cubic inches. All boxes or containers in which fruits and vegetables are sold or offered for sale shall be of the foregoing dimensions and standards, unless otherwise provided by ordinance."

The penalty clause of this ordinance reads:

"A person, firm or corporation who shall sell or offer for sale in the City of St. Louis any fruits or vegetables except fresh berries, cherries, currants or other small fruits in any box or receptacle that is of a capacity different from that hereinbefore provided shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five dollars nor more than five hundred dollars."

The validity of this ordinance was attacked in the case of *Stegmann et al. vs. Henry L. Weeke*, Commissioner of Weights and Measures of the City of St. Louis, 214 S. W., 137, 5 American Law Reports, Annotated, 1060, upon the ground that it violated the provisions of Article 1, Section 10, of the United States Constitution in that it prohibited a person from selling his produce in any form or manner or in any quantity which he sees fit and which his purchasers desire, so long as his method is fair and characterized by honest dealing with his purchaser, impairs the right to make contracts. The court sustained the validity of the act. The opinion cites many cases as sustaining its views and the annotations in *Ruling Case Law*, *supra*, contain many more.

In the case of *Allion vs. City of Toledo*, 124 N. W., 237, a city ordinance, fixing standard sizes of bread loaves and prescribing loaves of one pound avoirdupois as the minimum weight that may be manufactured and sold by a baker was held to be not an unreasonable or arbitrary exercise of police power, and is constitutionally valid. This case is also reported in 6 American Law Reports, Annotated, 426, and many cases are thereunder annotated. These cases are too numerous and varied to attempt to discuss them in detail, but they all deal with statutes and ordinances which prescribe a package or measure of a definite, fixed amount, and require the specified articles to be sold in this manner. They may be classified into three classes: (a) Those prescribing a minimum weight or quantity of an article that may be sold; (b) those prescribing that, when an article is sold other than in bulk and by weight, it must be sold in loaves or packages containing a specified weight or quantity; and (c) those prescribing that an article must be sold in loaves or packages of a certain weight or quantity and making no provision for sale in any other manner; in fact, expressly or impliedly prohibiting sale in any other manner. Statutes and ordinances taking the one or the other of these forms have generally been sustained as constitutional.

We, therefore, conclude that in the absence of legislation by Congress establishing standards for containers to be used in packaging fruits and vegetables or other products, the State of Texas may do so, as to such products grown within the State, and if it has the power to establish such standards it necessarily follows that it has the power to enforce the use of same, for such purposes, by appropriate legislation, when such containers, either filled or empty, move in commerce wholly within the State of Texas.

We think it immaterial as to where containers of the established size may be manufactured, whether in this State or without it. We do not believe the State can inhibit the sale within this State of containers of different size and dimensions to those established as standards by the State, and which were shipped into the State from other States or foreign countries. In our opinion such an act would contravene the commerce clause of the Federal Constitution. However, there could be no question but what the State may inhibit the use of such non-standard containers in packaging produce, grown within the State, when Congress has not legislated upon the subject and established standard containers.

It also seems to be an established rule of law that:

"The Legislature of a State has the power in many cases to determine, as a matter of State policy, whether to permit the manufacture and sale of articles within the State or entirely to forbid such manufacture and sale, *so long as the Legislature is confined to the manufacture and the sale within the State.* Those are questions of public policy which belong to the legislative department to determine, but the legislative policy does not extend so far as to embrace the right to prohibit absolutely the introduction within the limits of the State of an article not injurious, properly and honestly manufactured." *Schollenberger vs. Pennsylvania* (1898), 171 U. S., 15, and the authorities therein cited.

It, therefore, appears that the State may, under its police power, absolutely inhibit the manufacture of other than standard-sized containers, which it has adopted, within the State, for sale and use within this State.

This brings us to the consideration of the question as to the power of the State to enforce the statute which establishes standard containers for packaging produce, fruits and vegetables, grown within the State, when such produce is to be shipped beyond the borders of the State. The principles involved in this question are so similar to those involved in the remaining questions submitted that we will discuss it along with the others, and then state our conclusion as to all of them.

Without referring to the several provisions of Chapter 181, Acts 1917, we will proceed to discuss the general provisions involved in your inquiry, and will, therefore, discuss such provisions of the Federal Constitution and decisions of the Supreme Court of the United States as are applicable.

Article 1, Section 8 of the Constitution of the United States provides that:

"The Congress shall have power * * * to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

It is provided in Article 1, Section 10, of the Constitution of the United States that:

"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by a State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

It is now well established that the State can not, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce. *Savage vs. Jones*, 225 U. S., 524, and authorities therein cited.

There is a well-established exception to this general rule and that is where the local police regulation has real relation to the suitable protection of the people of the State, and is reasonable in its requirements. Such a law is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority. *Savage vs. Jones*, supra, p. 525, and the many authorities therein cited.

Inspection laws come within this exception. In *5 Ruling Case Law*, 780, is found the following:

"Whenever State inspection laws act on a subject before it becomes an article of commerce, they are confessedly valid, as when the purpose of the inspection is to prepare products of the State for exportation, or to aid in the detection of possible violations of the criminal laws of the State from which such articles may be shipped. And interstate and foreign commerce is subject to a State inspection law. Such a law is not founded on the idea that the things in respect to which inspection is required, are dangerous or noxious in themselves, but is made to operate upon articles brought from another State so as to give to the purchaser public assurance that the article is in that condition and of that quality and quantity which makes it merchantable and fit for consumption, and to prevent imposition and fraud. They have been considered properly enacted to prevent fraud in the sale of coffee, of fertilizers, and of concentrated commercial feeding stuffs; to insure the safety and value of illuminating oils; * * * The right of an importer to sell goods in the original packages does not prevent the operation of an inspection law. Such laws, however, must not substantially burden or unreasonably regulate commerce. * * * Under the guise of inspection laws, a State cannot forbid or impede the introduction of products, and more particularly food products universally recognized as harmless. * * * It is not necessary to characterize a statute as an inspection law that it shall require an examination as to the quality of the goods, but the inspection may be as to the form, weight, etc., of the package."

The principles above announced are supported by numerous authorities which are cited in a foot note (page 525). We can not review all of these cases and the particular State statutes which were involved. It will suffice for the purpose of this opinion to review some of the leading ones. As early as 1824, Chief Justice John Marshall of the Supreme Court of the United States, in the case of *Gibbons vs. Ogden*, 9 *Wheaton*, 203, used this language:

"But the inspection laws are said to be regulations of commerce, and are certainly recognized in the Constitution as being passed in the exercise of a power remaining with the States.

"That inspection laws may have a remote and considerable influence on commerce will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to a general government; all which can be advantageously exercised by the States themselves."

The principles announced in that case were reaffirmed in the case of *Brown vs. Maryland*, 12 *Wheaton*, 438, and in the case of *Turner vs. Maryland*, 107 *U. S.*, 38, decided in 1882. The case of *Turner vs. Maryland* is the leading authority on the questions which we have under consideration. The opinion in that case is so full, complete and the discussion of the issues so thorough and well stated that an attempt to state in a brief way what was held in that case would be futile. We shall, therefore, quote the major portion of said opinion, which is as follows:

"The plaintiff in error contends that section 41 of the Act of 1864, as reenacted by the Act of 1870, violates the Constitution of the United States, because: (1) It is a regulation of interstate and foreign commerce, and a law levying a duty on exports, and does not fall within the class of laws known as

inspection laws, because the proviso enacts that the tobacco to which it refers need not be opened for inspection. (2) Said section, even though it is an inspection statute, discriminates against the non-resident buyer and manufacturer of leaf tobacco, and in favor of the State buyer and manufacturer, in imposing burdensome regulations on tobacco intended for export, and laying a tax of at least two dollars a hogshead on such tobacco when exported, while tobacco manufactured within the State is free from such regulations and such tax, and thus it discriminates against interstate and foreign commerce in tobacco, and in favor of local manufacturers and the internal trade of the State. (3) Said section discriminates between different classes of exporters of tobacco, in that it permits tobacco exported by persons who pack it in the county or neighborhood where it is grown, to be exported when marked with the full name and residence of the owner, without inspection other than the examination of the outsides of the hogsheads, while exporters of another class must have the contents of their hogsheads subjected to examination.

"The provisions of the Constitution of the United States alleged to be violated are Clause 2 of Section 10 of Article 1, before quoted, and that clause of Section 8 of Article 1, which provides that the Congress shall have power 'to regulate commerce with foreign nations and among the several States.'

"The Maryland court held that the charge of outage in this case was an inspection duty, within the meaning of the Constitution; that the State had the power to prescribe the dimensions of the hogshead in which tobacco raised in Maryland shall be packed, and to require such hogshead to be delivered at one of the State tobacco warehouses, in order that the inspectors may ascertain whether it conforms to the requirements of the law, and whether it is the true growth of the State and packed by the grower or purchaser in the county or neighborhood where it was grown; and that the charge of outage, to reimburse the State for the expenses thereby incurred, and in consideration of the storage of the hogshead, is in the nature of an inspection duty, within the meaning of the Constitution.

"The contention of the plaintiff in error is, that a law which otherwise would be an inspection law ceases to be such if no provision is made for opening the package containing the article and examining the quality of its contents. On this subject, the Maryland court held, that, in order to constitute an inspection law, an examination of the quality of the article itself is not necessary; but that to prepare the products of a State for exportation it may be necessary that such products should be put in packages of a certain form, and of certain prescribed dimensions, either on account of the nature and character of such products, or to enable the State to identify the products of its own growth, and to furnish the evidence of such identification in the markets to which they are exported. In opposition to these views, which appear to us to be sound, we are asked to hold that the provisions under consideration do not fall under the head of inspection laws, in a case where the question is presented without the finding of any facts to show that what *may* be thus necessary in regard to a product is not necessary in regard to tobacco, and with every presumption to the contrary arising out of the course of legislation as to the inspection of tobacco, by the State of Maryland. The legislature of the State of Maryland, from the earliest history of the colony and since the formation of the State Government, has made the inspection of tobacco raised in that State compulsory. That inspection has included many features, and has extended to the form, size, and weight of the packages containing the tobacco, as well as to the quality of the article. Fixing the identity and weight of tobacco alleged to have been grown in the State, and thus preserving the reputation of the article in markets outside of the State, is a legitimate part of inspection laws, and the means prescribed therefore in the statutes in question naturally conduce to that end. Such provisions, as parts of inspection laws, are as proper as provisions for inspecting quality; and it cannot be said that the absence of the latter provision, in respect to any particular class of tobacco, necessarily causes the laws containing the former provisions to cease to be inspection laws. It is easy to see that the use of the precaution of weighing and marking the weight on the hogshead and recording it in a book is to enable it to be determined at any time whether the contents have been diminished subsequently to the original packing,

by comparing a new weight with the original marked weight, or, if the marked weight be altered, with the weight entered in the warehouse book. The things required to be done in respect to the hogshead of tobacco in the present case, aside from any inspection of quality, are to be done to prepare and fit the hogshead, as a unit, containing the tobacco, for exportation, and for becoming an article of foreign commerce or commerce among the States, and are to be done before it becomes such an article. They are properly parts of inspection laws, within the definition given by this court in *Gibbons vs. Ogden*, 9 Wheat., 1. In a note to the argument of Mr. Emmet in that case, at page 119, are collected references to many statutes of the States, in the form of inspection laws, showing what features have been generally recognized as falling within the domain of those laws, such as the size of barrels or casks, and the number of hoops on them; what pieces of beef or pork, and what quantity and size of nails should be in one cask; the length, breadth, and thickness of staves and heading, lumber, boards, shingles, etc., and the branding of pot and pearl ashes, flour, fish and lumber, and the forfeiture of them, if unbranded. These were cited as instances of the exercise by States of the power to act upon an article grown or produced in a State, before it became an article of foreign or domestic commerce, or of commerce among the States, to prepare it for such purpose. It was in reference to laws of this character that it was said, in argument, in *Gibbons vs. Ogden*, that the enactments seemed arbitrary, and were not founded on the idea that the things, the exportation of which was thus prohibited or restrained, were dangerous or noxious, but had for their object to improve foreign trade and raise the character and reputation of the articles in a foreign market. It was in reference to such laws, among other inspection laws, that Chief Justice Marshall, in *Gibbons vs. Ogden*, p. 203, after remarking that a power to regulate commerce was not the source from which a right to pass inspection laws was derived, said: 'The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government; all which can be most advantageously exercised by the States themselves.' It was not suggested by the court that those particular laws were not valid exercises of the power of the State to fit the articles for exportation, or that in addition to, or even aside from, ascertaining the quality of the article produced in a State, the State could not define the form of the lawful package or its weight, and subject form and weight, with or without quality, to the supervision of inspector, to ascertain that the required conditions in respect to the articles were observed.

"In addition to the instances cited in *Gibbons vs. Ogden*, the diligence of the Attorney General of the State of Maryland has collected and presented to us, in argument, numerous instances showing, by the text of the inspection laws of the thirteen American Colonies and States, in force in 1787, when the Constitution of the United States was adopted, that the form, capacity, dimensions and weight of packages were objects of inspection irrespective of the quality of the contents of the packages. The instances embrace, among others, the dimensions of shingles, staves and hoops; the size of casks and barrels of fish, pork, beef, pitch, tar and turpentine, and the size of hogsheads of tobacco. In Maryland the dimensions of tobacco hogsheads were fixed by various statutes passed from the year 1658 to the year 1763. By the Act of 1763, Chapter 18, Section 18, it was enacted that all tobacco packed in hogsheads exceeding forty-eight inches in the length of the stave, and seventy inches in the whole diameters within the stave, at the croze and bulge, should be accounted unlawful tobacco and should not be passed or received. Like provisions, fixing the dimensions of hogsheads of tobacco have been in force in Maryland from 1789 till now. In view of such legislation existing at the time the Constitution of the United States was adopted and ratified by the original States, known to the framers of the Constitution, who came from the various States, and called 'inspection laws' in those States, it follows that the Constitution, in speaking of 'inspection laws,' included such laws, and intended to reserve to the States

the power of continuing to pass such laws, even though to carry them out and make them effective in preventing the exportation from the State of the various commodities, unless the provisions of the laws were observed, it became necessary to impose charges which amounted to duties or imposts on exports to an extent absolutely necessary to execute such laws. The general sense in which the power of the States in this respect has been understood since the adoption of the Constitution is shown by the legislation of the States since that time, as collected in like manner by the Attorney General of Maryland, covering the form, capacity, dimensions and weight of packages containing articles grown or produced in a State and intended for exportation. These laws are none the less inspection laws, because, as was said by this court in *Gibbons vs. Ogden*, they 'may have a remote and considerable influence on commerce.' It is a circumstance of weight that the laws referred to in the Constitution are by it made 'subject to the revision and control of the Congress.' Congress may, therefore, interpose, if at any time any statute, under the guise of an inspection law, goes beyond the limit prescribed by the Constitution, in imposing duties or imposts on imports or exports. These and kindred laws of Maryland have been in force for a long term of years, and there has been no such interposition.

"Objection has been made that the Maryland laws are not inspection laws, but are regulations of commerce, because they require every hogshead of tobacco to be brought to a State tobacco warehouse. But we are of the opinion that, it being lawful to require the article to be subjected to the prescribed examination by a public officer before it can be accounted a lawful subject of commerce, it is not foreign to the character of an inspection law to require that the article shall be brought to the officer instead of sending the officer to the article. It is a matter as to which the State has a reasonable discretion, and we are unable to see that such discretion has been exercised in any such manner as to carry the statutes beyond the scope of inspection laws.

"There is another view of the subject which has great force. Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions and weight of package, mode of putting up and marking and branding of various kinds, all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary, that all of these elements should coexist in order to make a valid inspection law. Quality alone may be the subject of inspection, without other requirement, or the inspection may be made to extend to all of the above matters. When all are prescribed, and then inspection as to quality is dropped out, leaving the rest in force, it cannot be said to be a necessary legal conclusion that the law has ceased to be an inspection law.

"As is suggested in *Neilson vs. Garza*, 2 Woods, 287, by Mr. Justice Bradley, it may be doubtful whether it is not exclusively the province of Congress, and not at all that of a court, to decide whether a charge or duty, under an inspection law, is or is not excessive. There is nothing in the record from which it can be inferred that the State of Maryland intended to make its tobacco inspection laws a mere cover for laying revenue duties upon exports. The case is not like that of *Jackson Mining Company vs. Auditor General*, 32 Mich., 488, where a State tax imposed on mineral ore exported from the State before being smelted was held to be a tax on interstate commerce, no such tax being imposed on like ore reduced within the State. The question of the right of Maryland, under the Constitution of the United States, to require that the dimensions and gross weight of a hogshead containing tobacco grown upon its soil shall be ascertained by its officers before the tobacco shall be exported is a question of law, because the question is as to whether such law is an inspection law. Moreover, the question as to whether the charges for such examination and its attendant duties are 'absolutely necessary,' was not before the State court, and was not passed upon by it, and cannot be considered by this court.

"It is urged, however, that the Maryland law is a regulation of commerce, and unconstitutional, because it discriminates between the State buyer and

manufacturer of leaf tobacco and the purchaser who buys for the purpose of transporting the tobacco to another State or to a foreign country. But the State, having the right to prescribe the form, dimensions and capacity of the packages in which its products shall be encased before they are brought to, or sold in, the public market, has enacted that no tobacco of the growth of the State shall be passed or accounted lawful tobacco unless it be packed in hogsheads of a specified size. Laws of 1872, Chapter 36, Section 26. This regulation covers all tobacco grown in the State and packed in hogsheads, without reference to the purpose for which it is packed. If the tobacco is to be dealt in within the limits of the State, the examination as to dimensions is properly left to the contracting parties, probably under the view that the seller for the home market will have a sufficient stimulus to observe the requirement of the law in a desire to maintain the reputation of his commodity. But, if the tobacco is to be exported as lawful tobacco, the State may, with equal propriety, prescribe and enforce an examination by an officer, within the State, of a hogshead containing tobacco grown in the State, and intended for shipment beyond the limits of the State, in order to ascertain, before the hogshead is carried out of the State and before it becomes an article of commerce, that it is of the dimensions prescribed as necessary to make it lawful tobacco. In *Cooley vs. The Board of Wardens*, 12 How., 299, a law of Pennsylvania provided that a vessel not taking a pilot should pay half pilotage, but that this should not apply to American vessels engaged in the Pennsylvania coal trade. It was held that the general regulation as to half pilotage was proper, and that the exemption was a fair exercise of legislative discretion acting upon the subject of the regulation of the pilotage of the port of Philadelphia. The court said that, in making pilotage regulations, the legislative discretion had been constantly exercised, in this and other countries, in making discriminations, founded on difference both in the character of the trade and in the tonnage of vessels engaged therein. Any discrimination appearing in the present case is of the same character as that in the pilotage case, and fairly within the discretion of the State. Such discretion reasonably extends to exempting from opening for internal inspection an article grown in the State, when it is marked with the name of an ascertained owner, and to requiring that an article grown in the State shall be opened for internal inspection when it is not intended to be put on the market on the credit of an ascertained owner, and is not identified by marks as owned by him. So, too, in the exercise of the same discretion, and of its power to prescribe the method in which its products shall be fitted for exportation, it may direct that a certain product, while it remains 'in the bosom of the country' and before it has become an article 'of foreign commerce or of commerce between the States,' shall be encased in such a package as appears best fitted to secure the safety of the package and to identify its contents as the growth of the State, and may direct that the weight of the package, and the name of the owner of its contents, shall be plainly marked on the package, and may also exempt the contents from inspection as to quality when the weight of the package and the name of the owner are duly ascertained to be marked thereon. Such a law is an inspection law, and may be executed by imposing a 'tax or duty of inspection,' which tax, so far as it acts upon articles for exportation, is an exception to the prohibition on the States against laying duties on exports, the exception being made because the tax would otherwise be within the prohibition. *Brown vs. State of Maryland*, 12 Wheat., 419, 438. At the same time we fully recognize the principle that any inspection law is subject to the paramount right of Congress to regulate commerce with foreign nations and among the several States.

"The general provision of the Maryland statute is that it shall not be lawful to carry out of the State, in hogsheads, any tobacco raised in the State, except in hogsheads which shall have been inspected, passed and marked agreeably to the provisions of the act. These provisions include the doing of many things in addition to an inspection of quality. If the tobacco is grown in the State and packed in the county or neighborhood where grown, it may be carried out of the State without having its quality inspected, if it be marked in the manner prescribed. But it still is necessary it should be inspected in all other particulars, and inspected also to ascertain that it was grown in the State and

packed where grown, and is marked as required. If it does not answer the latter requirements it is to be further inspected as to quality. The necessity thus existing for subjecting the hogshead to inspection under all circumstances, a charge of some kind was proper for outage, that is, a charge payable, on withdrawing the hogshead, for labor connected with receiving and handling it and doing the other things above mentioned. Such charge appears to be a charge for services properly rendered.

"The above views cover the objection made that the Maryland law discriminates between different classes of exporters of tobacco, and favors the person who packs it for exportation in the county or neighborhood where it is grown as against other exporters. Whatever discrimination in this respect or in respect of purchases for exportation, before referred to, results from any provisions of the law is a discrimination which, we think, the State has a right to make, resulting, as it does, wholly from regulations which affect the article before it has become an article of commerce, and which attach to it as and when it is grown and before it is packed or sold. The tobacco is grown with these regulations in force, and the State has a right to say what shall be lawful merchantable tobacco. This is really all that has been done in regard to the tobacco in question.

"In this case no inspection is involved except that of tobacco grown in Maryland, and we must not be understood as expressing any opinion as to any provisions of the Maryland laws which refer to the inspection of tobacco grown out of Maryland."

In the case of *Patapsco Guano vs. North Carolina*, 171 U. S., 354, 358, the Supreme Court of the United States reviewed its decision in several cases, in which it had considered the validity of several State inspection statutes, which had been up before it for judicial review. The resume of these cases reads:

"Inspection laws are not in themselves regulations of commerce, and while their object frequently is to improve the quality of articles produced by the labor of a country and fit them for exportation, yet they are quite as often aimed at fitting them or determining their fitness for domestic use, and in so doing protecting the citizen from fraud. Necessarily, in the latter aspect, such laws are applicable to articles imported into, as well as to articles produced within, a State.

"Clause two of Section 10 expressly allows the State to collect from imports as well as exports the amounts necessary for executing its inspection laws, and Chief Justice Marshall expressed the opinion in *Brown vs. Maryland* that imported as well as exported articles were subject to inspection.

"The observations of Mr. Justice Bradley, on circuit, in *Neilson vs. Garza*, are quite opposite on this and other points under discussion, and may profitably be quoted.

"That case involved the validity of a law of the State of Texas providing for the inspection of hides, and Mr. Justice Bradley said:

"If the State law of Texas, which is complained of, is really an inspection law, it is valid and binding unless it interferes with the power of Congress to regulate commerce, and if it does thus interfere it may still be valid and binding until revised and altered by Congress. *The right to make inspection laws is not granted to Congress, but is reserved to the States; but it is subject to the paramount right of Congress to regulate commerce with foreign nations, and among the several States; and if any State, as a means of carrying out and executing its inspection laws imposes any duty or impost on imports or exports, such impost or duty is void if it exceeds what is absolutely necessary for executing such inspection laws.* How the question, whether a duty is excessive or not, is to be decided, may be doubtful. As that question is passed upon by the State Legislature, when the duty is imposed, it would hardly be seemly to submit it to the consideration of a jury in every case that arises. This might give rise to great diversity of judgment, the result of which would be to make the law constitutional one day, and in one case, and unconstitutional another day in another case. As the article of the Constitution which pre-

scribes the limit goes on to provide that "all such laws shall be subject to the revision and control of Congress," it seems to me that Congress is the proper tribunal to decide the question whether a charge or duty is or is not excessive. If, therefore, the fee allowed in this case by the State law is to be regarded as in effect an impost or duty on imports or exports, still if the law is really an inspection law, the duty must stand until Congress shall see fit to alter it.

"Then we are brought back to the question whether the law is really an inspection law. If it is, we cannot interfere with it on account of supposed excessiveness of fees. If it is not, the exaction is clearly unconstitutional and void, being an unauthorized interference with the free importation of goods. The complainant contends that it is not an inspection law; that inspection laws only apply legitimately to the domestic products of the country, intended for exportation; and that no inspection is actually required in this particular case, but a mere examination to see if the hides are marked, and who imported them, etc., duties which belong to the entry of goods, and not their inspection.

"No doubt the primary and most usual object of inspection is to prepare goods for exportation in order to preserve the credit of our exports in foreign markets. Chief Justice Marshall, in *Gibbons vs. Ogden*, says: "*The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation, or, it may be, for domestic use.*" 9 Wheat., 203; Story on the Const., Sec. 1017. But in *Brown vs. Maryland* he adds, speaking of the time when inspection takes place: "*Inspection laws, so far as they act upon articles for exportation, are generally executed on land before the article is put on board a vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection is a tax which is frequently, if not always, paid for service performed on land.*" 12 Wheat., 419; Story on the Const., Sec. 1017. So that, according to Chief Justice Marshall, imported as well as exported goods may be subject to inspection; and they may be inspected as well to fit them for domestic use as for exportation.

"All housekeepers who are consumers of flour know what a protection it is to be able to rely on the inspection mark for a fine or superior article. Bouvier defines inspection as the examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce. Law Dict. *verb.* "Inspection." The removal or destruction of unsound articles is undoubtedly, says Chief Justice Marshall, an exercise of that power. *Brown vs. Maryland*, *supra*; Storey on the Const., Sec. 1024. "The object of the inspection laws," says Justice Sutherland, "is to protect the community, so far as they apply to domestic sales, from frauds and impositions; and in relation to articles designed for exportation, to preserve the character and reputation of the State in foreign markets." *Clintman vs. Northrop*, 8 Cowen, 46. It thus appears that the scope of inspection laws is very large, and is not confined to articles of domestic produce or manufacture, or to articles intended for exportation, but applies to articles imported, and to those intended for domestic use as well." 2 Woods, 287, 289.

"But in *Turner vs. Maryland*, 107 U. S., 38, which related only to the laws of Maryland so far as providing for the preparation for exportation of tobacco grown in the State, any opinion as to the provisions of those laws referring to the inspection of tobacco grown out of Maryland was expressly reserved.

"In *Voight vs. Wright*, 141 U. S., 62, 65, a statute of Virginia relating to the inspection of flour brought into that Commonwealth was held to be unconstitutional, because it required the inspection of flour from other States when no such inspection was required of flour manufactured in Virginia, an objection to which the act under consideration is not open, for the inspection and payment of its cost are required in respect of all fertilizers, whether manufactured in the State or out of it, and it is conceded that fertilizers are manufactured in North Carolina, as, indeed, their many laws incorporating companies for the purpose of so doing plainly indicate. Mr. Justice Bradley in that case remarked that the question was 'still open as to the mode and extent in which State inspection laws can constitutionally be applied to personal property imported from abroad or from another State—whether such laws can go beyond the identification and regulation of such things as are strictly injurious to the

health and lives of the people, and therefore not entitled to the protection of the commercial power of the government, as explained and distinguished in the case of *Crutcher vs. Kentucky*, ante, 47, just decided.

"Whenever inspection laws act on the subject before it becomes an article of commerce they are confessedly valid, and also when, although operating on articles brought from one State into another, they provide for inspection in the exercise of that power of self-protection commonly called the police power.

"No doubt can be entertained of this where the inspection is manifestly intended, and calculated in good faith, to protect the public health, the public morals or the public safety. *Minnesota vs. Barber*, 136 U. S., 313. And it has now been determined that this is so, if the object of the inspection is the prevention of imposition on the public generally.

"In *Plumley vs. Massachusetts*, 155 U. C., 461, it was decided that a statute of Massachusetts 'to prevent deception in the manufacture and sale of imitation butter,' in its application to the sale of oleomargarine artificially colored so as to cause it to look like yellow butter, and brought into Massachusetts, was not in conflict with the clause of the Constitution of the United States investing Congress with power to regulate commerce among the several States. That decision explicitly rests on the ground that the statute sought to prevent a fraud upon the general public. It is true that an article of food was involved, but the sole ground of the decision was that the State had the power to protect its citizens from being cheated in making their purchases, and that thereby the commercial power was not interfered with. *Schollenberger vs. Pennsylvania*, 171 U. S., 1.

"Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the State to intervene. Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures, the weighing of coal on public scales, and the like, are all competent exercises of that power, and it is not perceived why the prevention of deception in the adulteration of fertilizers does not fall within its scope."

Inspection laws may be properly divided into two classes. The Maryland statute, which is considered in *Turner vs. Maryland*, supra, is typical of the first of these classes. The purpose of this class of inspection statutes is, as was said in *Gibbons vs. Ogden*, 9 Wheat., 203:

"To improve the quality of articles produced by the labor of a country; to fit them for exportation * * *. They act upon the subject before it becomes an article of commerce."

It is this class of laws that the authorities are uniformly agreed to be confessedly valid. It is this character of legislation with which we are now concerned.

The other class of inspection laws embraces all of those inspection statutes which

"operate on articles brought from one State into another, and provided for inspection in the exercise of that power of self-protection commonly called the police power." *Patapsco Guano Co. vs. North Carolina*, supra.

Most of the inspection statutes of the several States which have been passed in recent years have fallen in the latter class, and consequently most of the recent court decisions have dealt with this class of statutes. The first class of inspection laws were in force at the time of the adoption of the Constitution of the United States, and were, perhaps, the only class of inspection laws that the framers of that famous document had in mind.

In considering the authority of a State to pass appropriate legislation under the first class, we must constantly keep before us that pro-

vision of the Federal Constitution heretofore quoted, which delegates the power to Congress

“to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.”

The right to charge an inspection tax, reserved by the States by Article 1, Section 10, of the Constitution of the United States, does not confer upon the States any authority to in any way burden interstate commerce or regulate the same. The power reserved by the States to lay such a tax is qualified and limited in its extent by the phrase, “except what may be absolutely necessary for executing its inspection laws.”

In *Turner vs. Maryland*, *supra*, the court, after having written at great length upon the validity of the State statute therein involved and after having sustained the same, said:

“At the same time we fully recognize the principle that any inspection law is subject to the paramount right of Congress to regulate commerce with foreign nations and among the several States.”

In the case of *Sligh vs. Kirkwood*, 237 U. S., 52, the Supreme Court of the United States sustained the validity of a statute of the State of Florida, which, among other things, made it a penal offense to deliver for shipment in interstate commerce, citrus fruits, then and there immature and unfit for consumption. The statute was sustained and held not to be unconstitutional as an attempt to regulate interstate commerce. This opinion is also an authority for the following propositions, to wit:

“(a) While Congress has exclusive power to regulate interstate commerce, and the State may not, when Congress has exerted that power, interfere therewith, even in the otherwise just exercise of its police power, the State may in such a case act until Congress does exert its authority, even though interstate commerce may be incidentally affected.

“(b) A State may protect its reputation in foreign markets by prohibiting the exportation of its products in such an improper form as would have a detrimental effect on its reputation.

“(c) The provisions in the Federal Food and Drugs Act relating to shipment in interstate commerce of fruit in filthy, decomposed or putrid condition, do not apply to fruit unfit for consumption because green or immature. Congress has not covered the latter field.”

In the case of *Texas Co. vs. Brown*, 42 Supreme Court Reporter, 375, the Supreme Court of the United States says:

“But a State may not, without the consent of Congress, impose this (inspection tax) or any other kind of taxation directly upon interstate commerce, and inspection fees made to apply to such commerce, exceeding so clearly and obviously the cost of inspection as to amount in effect to a revenue tariff, are to the extent of the excess a burden upon the commerce amounting to a regulation of it, and hence invalid because inconsistent with the exclusive authority of Congress over that subject.”

In the case of *Savage vs. Jones*, 225 U. S., 501, the court in passing upon the validity of an inspection statute of the State of Indiana, said:

“No State statute which even affects incidentally interstate commerce is valid if it is repugnant to the Federal Food and Drugs Act of June 30, 1906, the object of which is to prevent adulteration and misbranding and keep adulterated and misbranded articles out of interstate commerce.”

These several general rules of law relating to the power of the

States to pass inspection laws are summarized and well stated in the case of *Pure Oil Co. vs. Minnesota*, 248 U. S., 161, 162, as follows:

"In the exercise of its police power a State may enact inspection laws which are valid if they tend in a direct and substantial manner to promote the public safety and welfare or to protect the public from frauds and imposition when dealing in articles of general use as to which Congress has not made any conflicting regulation, and a fee reasonably sufficient to pay the cost of such inspection may constitutionally be charged, even though the property be moving in interstate commerce when inspected."

The above was said regarding a statute which belongs to the second class of inspection laws, as we have heretofore classified the same. These principles apply, in our opinion, to the first class of such laws; that is, to that class of laws which have for their purpose

"to improve the quality of articles produced by the labor of a country; to fit them for exportation."

Now as to the right of the State to adopt standards of grades, or quality, of its products, there can be no question of this authority as to such products as move in commerce wholly within the State. This it may do under its police power for the protection of the public and in behalf of the general welfare of its people. This power, which is an attribute of sovereignty, possessed by every sovereign state, and which power is inherent in the States of the American Union, is not derived from any written Constitution. It has always belonged to the States and was not surrendered by them to the general government, as was said in the case of *Patapsco Guano Co. vs. North Carolina*, supra:

"Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures, the weighing of coal on public scales, and the like, are all competent exercises of the police power."

But when Congress, which has the paramount authority to regulate interstate and foreign commerce, invades this field of legislation, its acts are supreme. Therefore, when Congress adopts standards of grades, or quality, these standards must govern as to interstate and foreign commerce. *Farmer's Grain Co. vs. Langer*, 273 Federal Reporter, 635.

In view of the several provisions of the Federal Constitution, quoted herein, and the interpretation thereof by the courts, as reflected by the various decisions cited, we have reached conclusions, as follows:

1. A State may adopt standard containers for the packaging of fruits and vegetables, grown within the State, and may prescribe the shape, size and cubical contents thereof and may enforce the exclusive use thereof by penal provisions as to such commerce moving wholly within the State, when Congress has not made any conflicting regulation.
2. A State may require the use of such containers in the packing and shipping of such produce moving in interstate and foreign commerce, when Congress has not made a conflicting regulation, and when such requirement is a part of an inspection statute designed to effect the several purposes stated in your letter.
3. A State may inhibit the manufacture of containers, not standard, within the State.

4. A State can not inhibit the importation of containers, not standard.

5. A State may inhibit the use of such containers so imported as to commerce moving wholly within the State; and may inhibit the use of such containers in interstate and foreign commerce, under the conditions set out above in subdivision "2."

6. A State may establish standards of grades, or quality, for produce, grown within the State, when such produce moves in commerce wholly within the State; and in interstate commerce when Congress has not made any conflicting regulation.

7. A State may pass an inspection law for the purposes set out in your letter, when such commerce moves wholly within the State; and as to commerce moving in interstate or foreign commerce when Congress has not made any conflicting regulation. In either event an inspection tax may be charged for carrying out the inspection, when such tax will not, clearly and obviously, exceed the cost of such inspection.

In this connection we call your attention to the fact that Congress has to some extent invaded all of these fields of legislation. It has passed a law establishing a standard barrel for fruits, vegetables, and other dry commodities, and has inhibited the use of any other standard barrel for such purposes. Acts of March 4, 1915, Ch. 158, 38 Stat. L., 1186.

It has established a standard barrel and standard grades for apples when packed in barrels. Act of August 3, 1912, Ch. 273, 37 Stat. L., 250.

It has passed legislation to establish grades of cotton. 35 Stat. L., 256.

It has passed what is commonly known as the United States Grain Standard Act. This act authorizes the Secretary of Agriculture to fix and establish standards of quality and condition for corn (maize), wheat, rye, oats, barley, flax seed, and such other grains, as in his judgment the usages of the trade may warrant and permit. This act, also, provides for official inspection by the government. Act of Aug. 11, 1916, Chap. 313, 39 Stat. L., 482.

Congress has also passed an act to fix the standards for climax baskets for grapes and other fruits and vegetables, and fixed standards for baskets and other containers for small fruits, berries and vegetables. Act of August 31, 1916, Ch. 426, 39 Stat. L., 673.

We have heretofore called your attention to the Pure Food and Drugs Act of June 30, 1906, the object of which is to prevent adulteration and misbranding and keep adulterated and misbranded articles out of interstate commerce.

Congress may have enacted other legislation along these lines. We have not attempted to collate all of such laws. Neither have we attempted to set out the provisions of such acts, in full, but content ourselves with citing you where they may be found. These laws are supreme to the extent of their operation and any State law must bow to their authority.

We regret that we have not had time to comply with your request to cite and comment upon all the decisions dealing with these questions,

but the field is so broad and the decisions too numerous for us to write more than we have. We hope we have discussed the propositions involved as fully as you may deem necessary, and that we have given you the information desired.

Yours very truly,

BRUCE W. BRYANT,
Assistant Attorney General.

MEDICAL PRACTICE ACT

Op. No. 2437, Bk. 57, P. 161.

MEDICAL PRACTICE ACT—RECIPROCITY—ALIENS—HYPOTHETICAL QUESTIONS.

The State Board of Medical Examiners of Texas has not the authority to grant a license, without examination, to a person authorized to practice medicine in another State unless it has a reciprocal arrangement with that State.

The Attorney General will not pass upon or give an opinion on a purely hypothetical question.

A resident alien may be licensed to practice medicine in this State.

Section 31, Article 16 of the Constitution of Texas; Chapter 55, General Laws, passed at the Regular Session of the Fifteenth Legislature; Chapter 12, General Laws, passed at the Regular Session of the Twenty-seventh Legislature; Chapter 123, General Laws, passed at the Regular Session of the Thirtieth Legislature.

Templar vs. Michigan State Board, 90 N. W., 1058.

AUSTIN, TEXAS, June 9, 1922.

Dr. Marquis E. Daniel, Chairman Reciprocity Committee, Texas State Board of Medical Examiners, Honey Grove, Texas.

DEAR DOCTOR: Your letter of February 3, 1922, addressed to the Attorney General has been received. We regret very much our inability to have answered your communication at an earlier date, but the multitudinous duties of this office have made it impossible for us to give that time and attention to your inquiry which the importance of the same demanded. We beg you to accept our apology for the delay. Your letter reads:

"There are conditions prevailing, with policies enforced by and questions pending, before the State Board of Medical Examiners for the State of Texas concerning which, as a member, I deem imperative that you be consulted to the end that you may render a carefully considered opinion for its future guidance.

"The paramount question at issue applies to the board's reciprocal policy in Medical Licensure.

"As many confuse 'acceptance' with 'reciprocity,' and that you may more promptly get the question well in hand as to the distinction between 'acceptance' and 'reciprocity' in Medical Licensure, your attention is respectfully directed to Section 8, Subdivision 4, of the 1901 Medical Practice Act, and Section 6 of the 1907 or present Medical Practice Act.

"Under the former law you will note that provision was made for the acceptance of applicants upon credentials from such States whose requirements were equal to those of Texas, whether said States accepted Texas licentiates in return or not. And it is a fact well remembered that Texas did not receive and license upon credentials many applicants from States whose requirements at that time exceeded those of Texas, and for that reason said States refused to receive and license licentiates of Texas. By this, we understand, is meant 'acceptance' in contradistinction of 'reciprocity.'

"Under the present law, Section 6, we find the following: 'This board may, at its discretion, *arrange for reciprocity* in license with the authorities of other States and Territories having requirements equal to those established by this act.' By this provision, we understand, the board is authorized to license applicants (but not until '*arrangements*' or contract have been made with '*author-*

ities' of a given State or Territory) who meet the requirements of the law upon reciprocity as contradistinguished from 'acceptance' as provided in the 1901 law.

"Question No. 1.—Under the law, is it not a fact that the meaning and intention of the words 'at its discretion' in above quotation is *limited strictly* to the question *as to whether or not* the board may *arrange* reciprocal relations at all with a given State or Territory, irrespective of its educational and college standard, the authority for the establishment and enforcement of which is fully set forth in Section 7.

"Question No. 2.—Is it not *first* necessary for the board to make reciprocal *arrangements* or contract with the *authorities* of other States and Territories for reciprocity in licensing applicants, without examination or upon credentials, to the end that our licentiates may be accepted upon equal terms *before* the board can legally accept applicants from such other States and Territories upon a reciprocity basis?

"Question No. 3.—If questions Nos. 1 and 2 are answered in the affirmative, then in such cases as the board may license or may have already licensed applicants upon credentials from other States and Territories without such reciprocal arrangements having *first* been made, and especially from such States as do not accept or recognize Texas licentiates, would such license be a legal license—would such a license be of any legal protection to the possessor thereof in the practice of medicine?

"Question No. 4.—Under the law—quotation above—is the board authorized to *arrange* reciprocal relations with foreign countries or foreign states or is such authority *limited* to the States and Territories of the United States of America?

"Question No. 5.—If question No. 4—first half—is answered in the negative, then in case the board has already and should continue to accept and license applicants from foreign countries or foreign states upon credentials issued by said foreign countries or foreign states, is such a license a legal license, and does it protect the applicant and authorize him to practice medicine in this State?

"Question No. 6.—Then if the board is not authorized, under the law, to *arrange* reciprocity with foreign countries or foreign states, can we admit said foreign applicants to our examinations provided their literary and medical attainment meets the requirements of our law and board? Is it not a fact that an applicant can be legally admitted to our examinations so long as said applicant complies with our educational standard, irrespective of residence, State or nation?

"Texas, Utah, Indiana, Wisconsin and other States have composite State examining medical boards upon which the four schools in medicine—Regular, Osteopathic, Homeopathic and Eclectic—are represented and their applicants legalized upon an equal basis, same literary prerequisites, same medical college requirements, same examination, same questions, all being examined at the same time—in same class—and all legalized to practice medicine in all its branches. But in Oklahoma, Missouri, Georgia, Michigan and other States the osteopathic school have independent State examining boards separate and apart from the State medical examining boards representing the other three schools in same State. The educational standard—literary and medical—required under the laws by which the said osteopathic boards exist is lower than the standard required and enforced under the laws by which the medical examining boards are governed in said States and below the standard exacted and enforced in Texas and other composite board States. The said osteopathic boards are authorized by law to issue only a *limited* license—a license to practice osteopathy is being declared in most of said laws 'not to be the practice of medicine,' and denied the privilege of administering drugs and to perform surgical operations with the knife.

"Question No. 7.—Is the board authorized to accept and license applicants upon credentials issued by said osteopathic State boards, even though the *individual applicant* possesses every necessary educational qualification to meet the standard of this board, when said osteopathic boards can only issue a limited legalization and cannot by law and does not enforce as high a standard

as that of this board as above set forth? Could Texas negotiate an equitable reciprocal contract with such a board?

"Question No. 8.—If question No. 7 should be answered in the negative, then if the board should accept such credentials and issue license thereon to the applicant, would such license be legal and a protection to the licensee?

"Trusting that it may be convenient to give premises early attention, and thanking you in advance for your every consideration, I am,"

We will attempt to answer the several questions propounded in the order submitted, but in order to answer these questions intelligently, it will be necessary for us to make at least a cursory review of the legislative history of the several acts of the Legislature relating to the subject under inquiry. Section 31, Article 16, of our Constitution reads:

"The Legislature may pass laws prescribing the qualifications of practitioners of medicine in this State and to punish persons for mal-practice, but no preference shall ever be given by law to any schools of medicine."

The Constitution of 1869 did not contain any provision relating to the subject. The Thirteenth Legislature, in May, 1873, acting under its police power, enacted a law regulating the practice of medicine within this State. This law was a valid and existing law at the time of the adoption of our present Constitution in 1876. This act authorized the county court of the several counties of the State to appoint a board of medical examiners for their respective counties composed of not less than three practicing physicians, and prescribed their qualifications. This board was required to meet twice each year for the purpose of conducting examinations of all applicants who desired to secure a license from said board authorizing them to practice medicine within this State. The act did not prescribe the subjects or branches in which the applicants were to be examined, but only provided for "thorough examination." It did not even require such applicants to have any kind of literary qualifications or even to be a graduate of a medical college. The board was authorized to:

"Adopt all necessary rules and regulations for their guidance and control in the examination of applicants for certificates of qualification."

Section 1 of this act provided:

"That no person shall be permitted to practice medicine in any of its branches or departments in this State, as a means of livelihood, without first having attended a regular course of study and lectures at some regularly established and well-credited medical college, and received the degree of 'Doctor of Medicine' or without having a certificate of qualification from some authorized board of medical examiners, as hereinafter provided."

It will be seen from the above provision that any physician who had attended a regular course of study at some well-established and graded medical college and received the degree of "Doctor of Medicine" could practice medicine within this State without examination before a board of medical examiners, provided he complied with the provisions of Section 2 of the act, which required all persons engaged in the practice of medicine in any of its branches or departments in this State to furnish to the clerk of the district court in which he practiced, resided or sojourned, his diploma or certificate of qualification, but applicants to the board were not required by the statute to have this qualification.

The act made no provision for reciprocity between this and other

States. In fact none was necessary. If a doctor had received his degree of "Doctor of Medicine" with the qualifications provided for in Section 1 of the act and recorded same with the district clerk as required in Section 2, he was entitled to practice medicine in the county in which he lived. Likewise, if he had secured a license from any of the county boards and had filed the same for record with the district clerk as provided for in the act, he could legally practice in the county of his residence.

Shortly after the adoption of our present Constitution the Legislature, in 1876, passed a new law regulating the practice of medicine within this State. (See Chapter 140, General Laws, passed at the Regular Session of the Fifteenth Legislature.) This act is carried in the Revised Civil Statutes of 1895 as Articles 3777 to 3789, inclusive, and in the Penal Code of 1895 as Articles 438 to 441, inclusive. In 1887, a slight amendment to the provision of the act which required physicians to register their authority for practicing medicine with the clerk of the district court was made, otherwise there was no amendment to the act at the time of the revision of the Civil and Criminal Statutes of 1895.

This Act of 1876 superseded the Act of 1873. One of the material changes made by this act in the then existing law was to change the manner of the creation of the Board of Medical Examiners. This act took the appointment of the board away from the county court and conferred the same upon the presiding judges of the district courts, who were authorized to appoint a board for their respective districts. This considerably lessened the number of boards within the State. The most material change in the act, and the one with which we are more concerned at this time, was the provisions which prescribed the qualification of all those persons who sought to engage in the practice of medicine in this State after the passage of the act. This provision reads:

"It shall be the duty of said Board of Medical Examiners to examine all applicants for certificates of qualification in any of its branches or departments in this State, whether such applicants are furnished with medical diplomas or not, upon the following named subjects, to-wit: Anatomy, physiology, pathological anatomy and pathology, surgery, obstetrics and chemistry; said examination to be thorough."

The act specifically exempted the physicians who had qualified under the Act of 1873 and those physicians who had practiced medicine in this State in any of its branches or departments for a period of five years prior to the first day of January, 1875.

These are the main changes made in the then existing law. That provision just above quoted made it necessary for a doctor who had received his degree of "Doctor of Medicine" to take the examination in certain enumerated subjects which were not required by the Act of 1873. This was the first important forward step made for the protection of the public against imposition by persons not qualified to practice medicine. There were as many boards of medical examiners as there were district courts in the State, and while the rule laid down for the guidance of all of them by the statutes was the same, the standard maintained could not have been the same by each and every board. Some might be very strict and some might be very lax in their examinations.

This act did not make any provisions for reciprocity between this State and the authorities of other States. It established and laid down the one general rule that all persons who wished to begin the practice of medicine in this State must take an examination before one of the several boards of medical examiners of the State in certain enumerated subjects, and if the board was satisfied as to the qualifications of said applicant he was issued a license which authorized him to practice medicine in any county in which he might reside, upon filing or furnishing to the district clerk of such county his certificate of authority for registration.

This act continued to be the law until the adoption of Chapter 12, General Laws, passed at the Regular Session of the Twenty-seventh Legislature. The Act of 1901 specifically repealed Articles 3777 to 3789, inclusive, of the Revised Statutes of 1895. By the provision of this act the district boards provided for in the Act of 1876 were repealed and three separate and distinct boards were created for the entire State. These boards were known as "The Board of Medical Examiners for the State of Texas," "The Board of Eclectic Examiners for the State of Texas," and "The Board of Homeopathic Medical Examiners for the State of Texas," and each board consisted of nine members. This act increased the number of branches or subjects in which applicants for license to practice medicine in this State were required to be examined. Its effect was to generally raise the standard of the profession in Texas, and *in it is found the first provision relating to the admission to the practice of medicine in this State of a physician licensed in another State.* This provision is found in Section 8 of the act which makes it unlawful for any person to practice medicine, surgery, or obstetrics in this State, after the passage of the act, with the exception of five different enumerated classes of people. It is unnecessary for the purpose of this opinion to refer to any of these classes except the fourth class, which reads as follows:

"All persons who may change their residence to the State of Texas, on filing a true copy of license granted by the Board of Medical Examiners of another State or Territory, certified by the affidavits of the president and secretary of said board, with satisfactory proof of the genuineness of the same, and showing that the standard of requirements of the medical laws of said State or Territory and that adopted by said Board of Medical Examiners, are equal to that provided for in this act, and who, on payment of the usual fee of fifteen dollars, may be registered and receive a license from the Board of Medical Examiners of Texas to practice in this State."

There was no provision in this act relating to reciprocity, but a physician coming from another State who met the requirement prescribed in that part of Section 8 just quoted above was entitled to receive his license from the board of medical examiners and entitled to practice his profession in this State, upon filing his license with the district clerk as provided for in the act.

We deem the above quoted provision of great importance when construed in the light of subsequent legislation authorizing the Texas State Board of Medical Examiners created by the Act of 1907 to, at its discretion, enter into reciprocal arrangements with other States, which provisions will be subsequently discussed in connection with this provision.

We will now pass to the consideration of the provisions of Chapter 123,

General Laws, passed at the Regular Session of the Thirtieth Legislature, and which, with slight amendment constitutes the present law defining and regulating the practice of medicine within this State. This act was intended and did supersede the Act of 1901. The Act of 1901 was a great improvement over the Acts of 1873 and 1876, but the Act of 1907 was a masterful and complete piece of legislation which has withstood repeated assaults made upon it from various sources, but the courts have uniformly sustained and upheld its validity and we now have a statute which is designed to and does protect the sick and afflicted from the pretensions of the ignorant, the unskilled, and the unscrupulous and promotes the welfare of the people of Texas and protects them from imposition and fraud. It seeks to and does prohibit and punish fraud, deception and quackery in the practice of healing, and brings the practice under such control that, as far as possible, the ignorant, the unscientific, the unskilled and the unscrupulous have been excluded. It stands as a monument to the statesmanship and wisdom of the Legislature which enacted the entire law and the Governor who permitted it to become a law.

This act made several radical changes in the law and abolished the three separate and distinct boards created by the Act of 1901, and in lieu thereof created one composite board consisting of eleven men learned in medicine, legal and active practitioners who had resided and practiced medicine in this State under a diploma from a legal and reputable college of medicine of the school to which said practitioner belonged for more than three years prior to their appointment, and provided that no one school should have a majority representation on said board. The two main sections of the act which pertain to the first two questions submitted by you are Sections 6 and 7, and read, respectively, as follows:

"Sec. 6. Within one year after the passage of this act all legal practitioners of medicine in this State, who, practicing under the provisions of previous laws or under diplomas of a reputable and legal college of medicine, have not already received license from a State Medical Examining Board of this State, shall present to the Board of Medical Examiners for the State of Texas documents, or legally certified transcripts of documents, sufficient to establish the existence and validity of such diplomas or of the valid and existing license heretofore issued by previous examining boards of this State, or exemption existing under any law, and shall receive from said board verification license, which shall be recorded in the district clerk's office in the county in which the licentiates may reside. Such verification license shall be issued for a fee of fifty cents to all practitioners who have not already received a license from the State Board of Medical Examiners of this State. It is especially provided that those whose claims to State licenses rest upon diplomas from medical colleges recorded from January 1, 1891, to July 9, 1901, shall present to the State Board of Medical Examiners satisfactory evidence that their diplomas were issued from bona fide medical colleges of reputable standing, which shall be decided by the Board of Medical Examiners before they are entitled to a certificate from said board. *This board may, at its discretion, arrange for reciprocity in license with the authorities of other States and Territories having requirements equal to those established by this act. License may be granted applicants for license under such reciprocity on payment of twenty dollars.*

"Sec. 7. All applicants for license to practice medicine in this State who are not licensed under the provisions of the previous section must successfully pass an examination before the Board of Medical Examiners established by this act. Applicants to be eligible for examination must present satisfactory evidence to the board that they are more than twenty-one years of age, of good moral character and graduates of bona fide, reputable medical schools. Such

schools shall be considered reputable within the meaning of this act whose entrance requirements and courses of instruction are as high as those adopted by the better class of medical schools of the United States, whose course of instruction shall embrace not less than four terms of five months each. 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 fifteen dollars; except when an applicant desires to practice obstetrics alone the fee shall be five dollars. Such applicants shall be given due notice of the date and place of examination. Applicants to practice obstetrics in the State of Texas, upon proper application, shall be examined by the board in obstetrics only, and upon satisfactory examination shall be licensed to practice that branch only; provided, this shall not apply to those who do not follow obstetrics as a profession, and who do not advertise themselves as obstetricians or midwives, or hold themselves out to the public as so practicing. In case any applicant, because of failure to pass examination, be refused a license, he or she shall, after one year, be permitted to take a second examination without an additional fee."

That part of Section 6 which is in italics constitutes Article 5738 of the Revised Civil Statutes of 1911, with the exception that by Chapter 63, General Laws, passed at the Regular Session of the Thirty-fourth Legislature, the word "twenty" was struck out and the word "fifty" inserted in lieu thereof.

These sections limit the class of persons who may legally practice medicine in this State. Section 6 provides a way whereby all those who engage in practice at the time the present law became effective could receive from the State Board of Medical Examiners a verification license, without examination, and continue the practice of their profession in this State. The last two sentences of this section and Section 7 provide the only ways whereby a person may legally *begin* the practice of medicine in this State. We will discuss these ways—there are two. Section 7 provides that:

"All applicants for license to practice in this State who are not licensed under the provisions of the previous section must successfully pass an examination before the State Board of Medical Examiners established by this act."

This section also prescribes the qualification of applicants for examination. Now, who is it that may be licensed under "the previous section," Section 6?

First: It is all those physicians that were legally practicing medicine in this State when this act became effective and who took out, or received from the State Board of Medical Examiners, created by the act, verification license within one year after the passage of the act. This provision does not apply because no one may now be licensed under it.

Second: All those who may receive license under the reciprocal provisions of said section.

This brings us to the consideration of said provision, Article 5738, Revised Statutes, 1911, as amended by Chapter 63, General Laws, passed at the Regular Session of the Thirty-fourth Legislature.

The question arises when may the Texas State Board of Medical Examiners issue a license under this provision? May it legally issue a license, without examination, to a physician of another State whose requirements are equal to, or greater, than ours, when the authorities of that State will not recognize the licentiates of this State? Or does this statute mean that our State Board of Medical Examiners may, at its discretion, enter into an agreement with another sister State or Ter-

ritory whose requirements are as high as ours, whereby both States agree and become obligated, at least morally so, to recognize the liabilities of the other?

It is a fundamental rule of statutory construction that the object of all construction is to ascertain the legislative intent when the language of the statute is such that its meaning is obscured or doubtful. In our opinion the language of Article 5738 is neither ambiguous nor doubtful. We think its meaning is very clear, but for the sake of argument we will treat it as being doubtful.

There are many well-established rules for the guidance of the courts in construing statutes. The Legislature of this State has prescribed some of these rules and in Section 6 of Article 5502 is found one that is pertinent here. It reads:

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

The word reciprocity is defined by the Standard Dictionary to mean:

"1. The state of being reciprocal, or that which is reciprocal, especially in obligation or right; equal mutual rights and benefits granted and enjoyed; mutual equality of rights and benefit; interchange of action or relation.

"2. Specifically, equality between the citizens of two countries with respect to the commercial privileges to be enjoyed by each within the domain of the other to the extent provided by treaty."

Another rule of construction laid down in Article 5502:

"The ordinary signification shall be applied to words, except words of art or words connected with a particular trade or subject matter, when they should have the signification attached to them by experts in such art or trade, or with reference to such subject matter."

Now, going back to Subdivision 4 of the Act of 1901, we find that either of the three State Boards of Examiners were authorized to issue a license to physicians moving their residence to this State from another State or Territory when the former had done the following:

"Filed a true copy of a license granted by the board of medical examiners of another State or Territory, certified by the affidavits of the president and secretary of said board, with satisfactory proof of the genuineness of the same, and showing that the standard of requirements of the medical laws of said State or Territory and that (the requirements and qualifications) adopted by said board of medical examiners are equal to that provided for in this act, and who, on payment of the usual fee of fifteen dollars, may be registered and receive license from the Board of Medical Examiners of Texas to practice in this State."

Under the provisions of that act it was not necessary for the Medical Board of this State to make a reciprocal agreement with the boards of any other State or Territory whose standard and requirements were as high as ours before they were authorized to license, without examination, the physicians coming from those States to practice medicine in this State. In other words, a doctor coming from another State where he had been licensed to practice medicine and the requirements of that State were as high as the requirements of this State, and he met all other requirements of this section, he could receive his license to practice medicine in this State.

The act, therefore, contained no reciprocal provision. The Thirtieth

Legislature evidently thought that this provision was not a wise one and did not bring it forward in the Act of 1907, but wrote into the law the provisions contained in Article 5738. It evidently thought it unfair to the physicians of Texas who moved to another State whose requirements for license were no higher than ours to be required to stand an examination before the board in that State, when, under our law, this State permitted a physician, coming from that State, to practice medicine in Texas without examination. It, therefore, delegated to the Board of Medical Examiners authority to use and exercise its discretion as to whether it would enter into reciprocal agreements or arrangements with another State and limited this discretion so that a reciprocal arrangement could only be made with another State or Territory only when that State or Territory had requirements equal to those established by the act, as contained in Sections 7 and 9. This is clearly a limitation on the authority of the board, which has no more power or authority than that conferred upon it by the Legislature. As heretofore stated, a physician to now have authority to begin the practice of medicine within this State must first do one of two things. He must have all the requirements and qualifications required by the act which entitles him to take the examination and must pass successfully the examination and receive his license from the State Board of Medical Examiners, or he must be licensed under the provision of Article 5738; and before he can be licensed under the provision of this article, we think, it is clear, from the plain language of the statute, that he must come from a State with which the State Board of Medical Examiners of Texas has a reciprocal arrangement and agreement whereby the proper authorities of that State will not only grant a license to our physicians who move to that State, but are obligated to do so by virtue of its agreement with the State of Texas and in consideration of our licensing physicians who move to this State from said State, and that this agreement and arrangement cannot be made unless the requirements of that State are as high as those of this State.

To give this language any other construction would, in our opinion, pervert the plain provisions of the statute and the manifest intention of the Legislature.

We, therefore, conclude that viewing Article 5738 in the light of the Act of 1901, and giving to the words thereof their ordinary signification, none of which are technical, and further taking into consideration the fact that the present law does not bring forward the provisions of Subdivision 4 of Section 8 of the Act of 1901, but substituted therefor the provisions contained in this article, that both your first and second inquiries should be answered in the affirmative.

Your third question is a hypothetical one, and this Department will not pass on such questions. The rule of law is that public officers are presumed to do their duty. We, therefore, presume that the State Board of Medical Examiners has not exceeded its authority by the issuance of such licenses, and that it will not hereafter do so.

In answer to your fourth inquiry, beg to advise that it is the opinion of this Department that the words "States and Territories" used in Article 5738 have reference only to the States and Territories of the United

States of America, and do not include other nations, States or foreign governments.

The conclusion we reached in answer to your third inquiry constitutes our answer to your fifth and eighth inquiries.

We answer the first part of your sixth inquiry in the negative and the last part thereof in the affirmative. See *Templar vs. State Board of Examiners of Barbers*, 90 N. W., 1058.

This brings us to consideration of your seventh inquiry, which we answer in the negative. As heretofore stated, that provision in Article 5738 which authorized the board, at its discretion, to arrange for reciprocity in license with the authorities of other States and Territories, is limited by the proviso that those States have requirements equal to those established by this State. The Board cannot enter into reciprocal arrangements with a State whose standard and requirements are not equal to ours.

We regret the great length of this opinion, but the importance of your inquiries has necessarily made it so. We hope we have given you the information desired.

Yours very truly,

BRUCE W. BRYANT,
Assistant Attorney General.

WAREHOUSES

Op. No. 2394, Bk. 56, P. 533.

WAREHOUSES—"UNIFORM WAREHOUSE RECEIPTS ACT."

It is a violation of the law for any person, firm, company or corporation to receive cotton, wheat, rye, oats, rice or any kind of produce, wares, merchandise or any description of personal property in store for hire, without first filing the bond required by Article 7820, Revised Statutes of 1911, and Section 56 of the "Uniform Warehouse Receipts Acts," and securing the certificate from the county clerk as is provided for in Article 7820.

It is unlawful for a warehouseman to store cotton for hire in any place other than a house, room or building which protects the same from damage from the action of the elements.

Sections 443, 447 and 448, Sutherland on Statutory Construction.

Lopez vs. Lasater, 217 S. W., 376.

Title 131, Revised Civil Statutes, 1911.

Articles 969, 977n, Penal Code, Complete Texas Statutes, 1920.

Chapter 37, General Laws, First Called Session, Thirty-third Legislature.

Chapter 54, General Laws, passed at Second Called Session, Thirty-sixth Legislature.

Chapters 3 and 5, Second Called Session, Thirty-third Legislature.

Chapter 145, General Laws, passed at Regular Session, Thirty-fourth Legislature.

Chapter 41, General Laws, passed at Regular Session, Thirty-fifth Legislature.

Chapter 126, General Laws, passed at Regular Session, Thirty-sixth Legislature.

AUSTIN, TEXAS, October 25, 1921.

Honorable A. J. Lewis, County Attorney, Cameron, Texas.

DEAR SIR: Your letter of August 20th, addressed to the Attorney General, has been received. It reads:

"Will you please advise me whether or not it is lawful for a person, firm, or corporation to engage in the businesses of a warehouseman for the purpose of storing cotton for hire, and issuing receipts therefor, without entering into a bond, etc., as required by Article 7827 $\frac{1}{2}$ xx or 7820, Vernon's Complete Texas Statutes. In other words, in view of the various amendments to the warehouse and marketing and public weighers' laws, and especially considering the repeal of Article 7827 by Section 2, Chapter 54, Second Called Session, Acts of 1919, which provided for private warehouses, and the enactment of Article 7827 $\frac{1}{2}$ by Section 57, Chapter 126, Acts of 1919, Regular Session, which gives supervision over 'private' warehouses to the commissioner, there seems to be a conflict in the laws as to whether there can be a 'private' warehouse in Texas for the storage of cotton and other products.

"Second. There is a contention made by warehousemen in this county who claim to have complied with the provisions of the warehouse law that they may receive and issue receipts for cotton for hire, and at the request of the owner of the cotton either place the cotton in the warehouse under shelter or on the ground without shelter. I think this contention is made under the following clause of Article 7821, Vernon's Complete Statutes, 'and when such receipt is for cotton, the receipt shall state whether the cotton therein described is exposed to the weather or is under shelter.' In this connection I call your attention to Article 7819, as amended by Section 1, Chapter 54, Second Called Session, Acts 1919, defining warehouses, thereby omitting the provision which permitted cotton to be stored in an open enclosure. The

effect of this plan of operation virtually enables warehousemen to run a cotton yard, and the duly elected public weigher has raised objection. Can these warehousemen legally follow this plan?

"I will very much appreciate your early advices as to the matters inquired about, especially as to the penal laws violated, if any."

We regret very much the delay occasioned in answering your communication, but at the time the same was received the Legislature was in session, and after its adjournment, the great amount of business which had accumulated in this Department made it impossible for us to give the same the consideration it was entitled to at an earlier date.

We again express our regrets to you for the delay and hope the same has not greatly inconvenienced you.

In order to intelligently discuss the subject of your inquiry, it will be necessary to review the legislative history of the several statutes and session acts dealing with the subject of warehouses. At the time of the adoption of the Revised Statutes of 1911 and the Penal Code of 1911, the only statutes dealing with this subject were Title 131 of the Revised Statutes of 1911 and Chapter 5, Title 14, of the Penal Code of 1911. Articles 7819 and 7820 of the Revised Statutes of 1911 read respectively as follows:

"Article 7819. Who and what are public warehousemen and warehouses.—All persons, firms, companies or corporations who shall receive cotton, tobacco, wheat, rye, oats, rice, oil or any kind of produce, wares, merchandise or any description of personal property in store for hire, under the provisions of this act, shall be deemed and taken to be public warehousemen; and all warehouses which shall be owned or controlled, conducted and managed in accordance with the provisions of this act shall be deemed and taken to be public warehouses; provided, that a public warehouse for the storage of cotton may, within the meaning of this chapter, include a lot or parcel of land enclosed with a lawful fence, the gates or entrances to which shall be kept securely locked at night. (Acts 1901, p. 251, Section 1.)

"Article 7820. Certificate and bond of public warehousemen.—The owner proprietor, lessee or manager of any public warehouse, whether an individual, firm or corporation, before transacting any business in such public warehouse, shall procure from the county clerk of the county in which the warehouse or warehouses are situated, a certificate that he is transacting business as a public warehouseman under the laws of the State of Texas; which certificate shall be issued by said clerk upon a written application, setting forth the location and name of such warehouse or warehouses, and the name of each person, individual or a member of the firm interested as owner or principal in the management of the same; or if the warehouse is owned or managed by a corporation, the names of the president, secretary and treasurer of such corporation shall be stated; which application shall be received and filed by such clerk and preserved in his office, and the said certificate shall give authority to carry on and conduct the business of a public warehouse within the meaning of this chapter, and shall be revocable only by the district court of the county in which the warehouse or warehouses are situated, upon a proceeding before the court, on complaint by written petition of any person, setting forth the particular violation of the law, and upon process, procedure and proof, as in other civil cases. The person receiving a certificate, as herein provided for, shall file with the county clerk granting same a bond payable to the State of Texas, with good and sufficient surety, to be approved by said clerk, in the penal sum of five thousand dollars, conditioned for the faithful performance of his duty as a public warehouseman; which said bond shall be filed and preserved in the office of such clerk."

By Chapter 37, General Laws, passed at the First Called Session of the Thirty-third Legislature, Title 131 of the Revised Statutes of 1911

consisting of Articles 7819 to 7827, inclusive, and Chapter 5, Title 14, of the Penal Code of 1911, consisting of Articles 969 to 977, inclusive, were amended.

By Chapter 54, General Laws, passed at the Second Called Session of the Thirty-sixth Legislature, Article 7827 was repealed and Article 7819 was amended, and made to read as follows:

"Article 7819. All persons, firms, companies or corporations who shall receive cotton, wheat, rye, oats, rice or any kind of produce, wares, merchandise, or any description of personal property in store for hire shall be deemed and taken to be public warehousemen.

"A warehouse, within the meaning of this act, shall be a house, building or room in which the above mentioned commodities are stored and are protected from damage thereto by the action of the elements."

Title 131, Revised Statutes of 1911, as amended by Chapter 37 and Chapter 54, aforesaid, now appears as Title 131, Complete Texas Civil Statutes, 1920, and in Articles 969 to 977, inclusive, Penal Code, Texas Complete Statutes, 1920, with the following exceptions, to-wit:

The codifiers of the statute changed Articles 7819 and 7827 of the Civil Statutes so as to show the amendment of the former and the repeal of the latter by Chapter 54, General Laws, passed at the Second Called Session of the Thirty-sixth Legislature, but failed to note the change in Articles 969 and 977 of the Penal Code. If this change had been made, then Article 969 of the Penal Code would be identical with Article 7819 as amended by Chapter 54, and Article 977 would be shown as having been repealed.

The Second Called Session of the Thirty-third Legislature, by Chapter 3 thereof, passed what is commonly known as the "Emergency Warehouse Act." This act was purely a temporary measure designed to give temporary relief to the cotton farmers of Texas because of the depressed market existing at that time for cotton occasioned by war in Europe, and by its provisions the life of the act was limited to August 31, 1915. Section 34 of the act reads:

"Nothing in this act shall be construed to repeal the law relating to public warehouses and private warehouses as provided in the act of the Thirty-third Legislature of Texas, Chapter 27, First Called Session. It being the purpose of this act to create and regulate State bonded warehouses, and to leave in force the law providing for and regulating public warehouses and private warehouses as provided in said act of the Thirty-third Legislature, Chapter 37, First Called Session."

This act in no way changed existing warehouse laws, and having expired by operation of law, there is no necessity to further consider it in this connection.

The Second Called Session of the Thirty-third Legislature also passed what is commonly known as the "Permanent Warehouse Act," Chapter 5. The purpose of the act is set out in Section 1 thereof, which reads as follows:

"The purpose of this act is to provide a system of State bonded warehouses, and to afford a method of co-operative marketing for those engaged in the production of farm and ranch products.

"The provisions of this act shall be administered by the Department of Insurance and Banking, and the Governor of this State, the Commissioner of Agriculture and the Commissioner of Insurance and Banking shall constitute a Board of Supervisors of Warehouses, who shall control the administration of

this act; and shall formulate and enforce necessary rules and regulations to effectuate the purposes and provisions of this act."

This was a special act providing for the incorporation of public bonded warehouses by not less than ten persons, sixty per cent of whom must be engaged in agriculture, horticulture or stock raising as a business. It did not in any way amend existing laws dealing with public or private warehouses, except the power conferred by Chapter 37, General Laws, passed by the First Called Session of the Thirty-third Legislature upon the Commissioner of Insurance and Banking was, by Section 43 of the act, conferred upon the Board of Supervisors of Warehouses, which board was composed of the Governor, Commissioner of Agriculture and the Commissioner of Insurance and Banking.

The next legislation upon the subject of warehouses is found in Chapter 145, General Laws passed at the Regular Session of the Thirty-fourth Legislature. The purpose of the act may best be obtained from its caption, which in part reads:

"An act to stimulate and preserve the credits of the people of the State of Texas and to prevent a sacrifice of the producers of cotton, grain and other agricultural products raised in the State of Texas, and to maintain the solvency of the banks chartered by the State of Texas, and to preserve the credit thereof, and to keep intact the Depositors' Guaranty Fund in said banks, and to maintain the credit of the industrial masses and to further facilitate the producers of cotton and grain, to store the same in bonded warehouses and elevators and obtain certificates therefor, and to enable the holders of said certificates to negotiate their promissory notes created and passed thereon and for other purposes."

While the reasons given by the Legislature for the passage of this act were laudable, the scheme was visionary and evidently impracticable, for no attempt has ever been made to put its provisions into actual operation. This act is carried in Complete Texas Statutes, 1920, as Articles 7827vv to 7827zzz, inclusive. The act carried no penal provisions. It in no way amends Title 131, Revised Statutes, 1911, as that title was amended by Chapter 37 of the First Called Session of the Thirty-third Legislature as further amended by Chapter 5 of the Second Called Session of the Thirty-third Legislature.

The Permanent Warehouse Act, Chapter 5, General Laws, passed at the Second Called Session of the Thirty-third Legislature, was amended and superseded by Chapter 41, General Laws, passed at the First Called Session of the Thirty-fifth Legislature. This amendment is carried in Complete Texas Statutes, 1920, as Articles 7827a to 7827v, inclusive, and its penal provisions are also carried in the same Penal Code of said statutes as Articles 977f to 977n, inclusive. This act amends the original Permanent Warehouse Act in several ways. It creates the office of Commissioner of Markets and Warehouses, prescribes his duties and confers upon him the power to prescribe the form of warehouse receipts, which authority was, by the original act, conferred upon the Board of Supervisors of Warehouses.

By Section 49 of this act, it was provided "all warehouses now or hereafter operating under an act passed by the Thirty-third Legislature of Texas and known as the 'Public Warehouse Act' are hereby placed under the management and control of the Commissioner." None of the other amendments have any direct bearing upon or in

any way amend Articles 7819 and 7820, Revised Statutes of 1911, in so far as these articles deal with warehouses and warehousemen in general, or the penalties prescribed in Articles 969 et seq. of the Penal Code. The act is, as was, the original act which it amends, a special one dealing with a particular class of warehouses and warehousemen.

At the Regular Session of the Thirty-sixth Legislature an act was passed commonly known and referred to as "The Uniform Warehouse Receipts Act," Chapter 126. The purpose of this act was, as its name indicates, to establish a uniform warehouse receipt. Section 1 of this act provides: "Warehouse receipts may be issued by any warehousemen." Section 2 provides that warehouse receipts need not be in any particular form, but that all such receipts must embody certain provisions which are set out in that section. The act is a very long and elaborate one. It is divided into six parts. Part I deals with the issuing of warehouse receipts. Part II deals with the subject of obligations and rights of warehousemen upon their receipts. Part III relates to the negotiation and transfer of receipts. Part IV defines certain offenses and prescribes penalties for violation thereof. Part V has this sub-head, "Who May Become Public Warehousemen." Part VI is an interpretation of this act and defines many words and phrases found in the act. Part V contains three sections, reading respectively as follows:

"Sec. 56. Any person, firm, corporation, partnership, or association of persons, may become a public warehouseman under the terms and provisions of this act by filing with the county clerk of the county in which he is located, and proposes to do business, a good and sufficient bond in the sum of five thousand dollars on the condition that he will conduct his business in accordance with the terms and provisions of this act.

"Upon the filing and approval of such bond with the county clerk, it shall be the duty of the county clerk to immediately certify such fact to the Commissioner of Markets and Warehouses, of the State of Texas. Any one injured by the violation of the terms of the bond, and the provisions of this act may recover damages to the extent of said bond; should said bond become impaired by recovery, or otherwise, the Commissioner of Markets and Warehouses may require such public warehouseman to file an additional bond, but in no event shall such additional bond be for a greater amount than five thousand dollars. The bond thereunder required shall be good for the term of one year from the date of filing and the right to continue as a public warehouseman shall be conditioned upon the renewal of said bond from year to year, according to the terms of this act. The form of the bond required hereunder shall be prescribed by the Commissioner of Markets and Warehouses, and the bond provided for herein may be made by any surety company authorized to do business under the laws of the State of Texas; or by two solvent sureties to be approved by the county clerk of the county in which such public warehouseman may desire to do business.

"Sec. 57. The Commissioner of Markets and Warehouses may exercise a general supervision over all private warehouses operating under the provisions of this act, and may, in his discretion, prescribe rules and regulations for the conduct of same not inconsistent with the terms and provisions of this act.

"Sec. 58. All laws and parts of laws in conflict with any of the provisions of this act are hereby repealed except that it is expressly provided for herein that this act shall not in any wise repeal or impair any part of the act of the First Called Session of the Thirty-fifth Legislature, approved May 26, 1917, and known as the Permanent Warehouse Act."

The information you desire may best be expressed by answers to the following questions:

First: Is it a violation of the law for any person, firm, company

or corporation, to receive cotton, wheat, rye, oats, rice or any other kind of product, wares, merchandise, or any description of personal property in store for hire, without first filing the bond required by Article 7820, Revised Statutes of 1911, and Section 56 of the "Uniform Warehouse Receipts Act," and securing the certificate from the county clerk as is provided for in Article 7820?

Second: May a warehouseman legally store cotton for hire in any place other than a "house, building or room in which the * * * commodities are stored, and are protected from damage thereto by the action of the elements?"

Title 131, Revised Statutes, 1911, was adopted by the Legislature in 1901. Article 7819 at that time defined a public warehouse for the storage of cotton in the following language:

"Public warehouse for the storage of cotton may, within the meaning of this chapter, include a lot or parcel of land enclosed with a lawful fence, the gates or entrances to which shall be kept securely locked at night."

Article 7821 prescribed the form of warehouse receipts and among other things contained this provision: "When such receipt is for cotton, the receipt shall state whether the cotton therein described is exposed to the weather or is under shelter."

Article 7827 read:

"Nothing in this chapter shall be construed to apply to private warehouses or to the issue of receipts by their owners or managers under existing laws, or to prohibit public warehousemen from issuing such receipts as are now issued by private warehousemen under existing laws; provided, that such private warehouse receipts issued by public warehousemen shall never be written on a form or blank indicating that it is issued from a public warehouse, but shall, on the contrary, bear on its face in large characters the words: 'Not a public warehouse receipt.'"

Several amendments to this title were made by Chapter 37, General Laws, passed at the First Called Session of the Thirty-third Legislature, but none of the above quoted provisions were changed.

It will be observed that by the provisions of Article 7827, quoted above, private warehouses were recognized and exempted from the operation of the law governing public warehouses, but with the repeal of this article, and the amendment of Article 7819 by Chapter 54, Second Called Session, Thirty-sixth Legislature, private warehouses were abolished and that part of Article 7821 which required receipts for cotton to contain the "weather clause" came to naught and while said provision still remains in the statute, it has no further significance.

What has been said above with respect to the "weather clause" required by Article 7821 may be said of Section 57 of the "Uniform Receipts Act," quoted above. Since the adoption of this act, Article 7827 has been repealed and there are no private warehouses for the Commissioner of Markets and Warehouses to exercise supervision over.

Section 58 of the "Uniform Warehouse Receipts Act" is the repealing clause. It specially provides that Chapter 41, General Laws, passed at the First Called Session, Thirty-fifth Legislature, is in no-wise repealed or impaired, but declares that "all other laws and parts of laws in conflict with any of the provisions of this act are hereby repealed."

This act does not in any other way refer to any existing laws, and does

not repeal any existing laws, unless by implication. This brings us to the construction of Section 56 and the effect, if any, its enactment had upon Article 7820. This article and Section 56 in a way deal with the same subject matter and are therefore in pari materia and must be construed together. As said above, if Section 56 in anywise repeals Article 7820, it must be by implication, as it does not refer to said article in any way. Article 7820 provides:

"The owner, proprietor, lessee or manager of any public warehouse, whether an individual, firm or corporation, before transacting any business in such public warehouse, shall procure from the county clerk of the county in which the warehouse or warehouses are situated, a certificate that he is transacting business as a public warehouseman under the laws of the State of Texas; which certificate shall be issued by said clerk upon a written application, setting forth the location and name of such warehouse or warehouses, and the name of each person, individual, or a member of the firm, interested as owner or principal in the management of the same; or, if the warehouse is owned or managed by a corporation, the names of the president, secretary and treasurer of such corporation shall be stated; which application shall be received and filed by such clerk and preserved in his office; and the said certificate shall give authority to carry on and conduct the business of a public warehouse within the meaning of this chapter, and shall be revocable only by the district court of the county in which the warehouse or warehouses are situated, upon a proceeding before the court, on complaint by written petition of any person, setting forth the particular violation of the law, and upon process, procedure and proof, as in other civil cases. The person receiving a certificate, as herein provided for, shall file with the county clerk granting same a bond payable to the State of Texas, with good and sufficient surety, to be approved by said clerk, in the penal sum of five thousand dollars, conditioned for the faithful performance of his duty as a public warehouseman; which said bond shall be filed and preserved in the office of such clerk."

For convenience in comparison, we again quote Section 56:

"Sec. 56. Any person, firm, corporation, partnership, or association of persons, may become a public warehouseman under the terms and provisions of this act by filing with the county clerk of the county in which he is located, and proposes to do business, a good and sufficient bond in the sum of five thousand dollars on the condition that he will conduct his business in accordance with the terms and provisions of this act.

"Upon the filing and approval of such bond with the county clerk, it shall be the duty of the county clerk to immediately certify such fact to the Commissioner of Markets and Warehouses, of the State of Texas. Any one injured by the violation of the terms of the bond, and the provisions of this act may recover damages to the extent of said bond; should said bond become impaired by recovery, or otherwise, the Commissioner of Markets and Warehouses may require such public warehouseman to file an additional bond, but in no extent shall such additional bond be for a greater amount than five thousand dollars. The bond thereunder required shall be good for the term of one year from the date of filing and the right to continue as a public warehouseman shall be conditioned upon the renewal of said bond from year to year, according to the terms of this act. The form of the bond required hereunder shall be prescribed by the Commissioner of Markets and Warehouses, and the bond provided for herein may be made by any surety company authorized to do business under the laws of the State of Texas; or by two solvent sureties to be approved by the county clerk of the county in which such public warehouseman may desire to do business."

Do the provisions of Section 56 conflict with those of Article 7820? If so, the provisions of Section 56, being the last expression of the Legislature, must control.

In construing these two provisions of the statute, we must keep in mind certain well-known principles of statutory construction:

"First. Statutes constituting a system should be so construed as to make that system consistent in all its parts and uniform in its operations. Where statutes are part of a general system relating to the same class of subjects and are based upon the same reason, they should be so construed, if possible, as to be uniform in their application and in the results which they accomplish. A statute must be construed with reference to the whole system of which it forms a part.

"Second. The Legislature is presumed to know existing statutes, and the state of the law, relating to the subjects with which they deal. Hence, that they would expressly abrogate any prior statutes which are intended to be repealed by new legislation. Where there is no express repeal, none is deemed to be intended, unless there is such an inconsistency as precludes this assumption; then it yields only to the extent of the conflict. Regard must be had to all the parts of a statute, and to the other concurrent legislation in *pari materia*; and the whole should, if possible, be made to harmonize; and if the sense be doubtful, such construction should be given, if it can be, as will not conflict with the general principles of law, which it may be assumed the legislature would not intend to disregard or change.

"Third. Where enactments separately made are read in *pari materia*, they are treated as having formed, in the minds of the enacting body, parts of a connected whole, though considered by such body at different dates, and under distinct and varied aspects of the common subject. Such a principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws, and connect them in a symmetrical system. Such statutes are taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. For the purpose of learning the intention all statutes relating to the same subject are to be compared, and so far as still in force brought into harmony, if possible, by interpretation, though they may not refer to each other, even after some of them have expired or been repealed." (Sutherland on Statutory Construction, Secs. 443, 447 and 448.)

As was said by Chief Justice Phillips in the case of *Lasater vs. Lopez*, 217 S. W., 376:

"The abrogation of an important public power of long existence and continued legislative sanction, whose lawful exercise will afford a public benefit, ought to rest upon surer ground than the mere construction of statutes. It ought to be found in clear legislative declaration. There is where we would ordinarily look for it, and there is where it should be expressed. Courts have nothing to do with the making of statutes, or the repeal of statutes. They violate their true powers and endanger their own authority whenever they undertake the legislative role. Legislation is for legislatures, not courts.

"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."

Keeping in mind the above principles of construction, we will examine the respective provisions of Article 7820 and Section 56.

Article 7820 requires all public warehousemen to file an application with the county clerk of the county in which the warehouse, or warehouses, are situated, for a certificate of authority to do business

as such warehouseman. The application for such certificate must contain certain facts. It authorizes the issuance by the county clerk of such certificate, and provides a method of procedure for its revocation. It also provides for the filing of a bond in the penal sum of five thousand dollars "with good and sufficient surety" with the county clerk, to be approved by him, which bond must be conditioned "for the faithful performance of his duties as a public warehouseman." Said bond is required to be filed and preserved in the office of said county clerk. A failure to do these things by any person doing business as a public warehouseman is made an offense and subjects the offender to the punishment prescribed in Article 976 of the Penal Code. This is especially true since the repeal of Article 7827.

Section 56 requires a public warehouseman to file with the county clerk in the county in which he is located and proposes to do business, a good and sufficient bond in the sum of five thousand dollars, conditioned "that he will conduct his business in accordance with the terms and provisions of this Act." It also provides "the form of the bond required hereunder shall be prescribed by the Commissioner of Markets and Warehouses and the bond provided for herein may be made by any surety company authorized to do business under the laws of the State of Texas; or by two solvent sureties to be approved by the county clerk of the county in which such public warehouseman may desire to do business." It further provides for the certification of the filing of the bond by the county clerk to the Commissioner of Markets and Warehouses. The rights of the public are further guarded by giving to the Commissioner of Markets and Warehouses the right to demand the filing of a new bond when the old one has become impaired, by recovery or otherwise, and the right of a public warehouseman to continue to do business is made dependent upon his filing and renewing said bond from year to year.

With the exception of that part of the first paragraph of Section 56, which provides a method whereby any person, etc., may become a public warehouseman, there is no material repugnancy between the provisions of this section and Article 7820. It is only the provisions referred to above as to how a public warehouseman may qualify under this act that gives us any concern. The act nowhere attempts to define the term "public warehouseman." The only definition of that term is found in Article 7819, as amended by the Second Called Session of the Thirty-sixth Legislature. At the time of the adoption of this section, private warehousemen were still recognized by the law as evidenced by the provisions of Section 57, providing for the supervision of private warehouses by the Commissioner of Markets and Warehouses, if he so desired, and Article 7827 had not been repealed except in so far as it was affected by this act. Section 1 of the act recognizes the right of any warehouseman, public or private, to issue receipts. Section 2 required all warehouse receipts, whether issued by a public or private warehouseman, to contain certain provisions. The entire act makes no distinction between a public and a private warehouseman. The rights and liabilities of all persons interested in the goods stored, as well as the warehousemen, were fixed by the act.

Apparently the only advantage a person could receive by qualify-

ing as a public warehouseman, under the act, would be the advantage he could offer the public over that of a private warehouseman of being bonded, while the private warehouseman was not; otherwise, the public and private warehousemen were on equal footing in so far as they were governed by this particular act. It will be observed that by the provisions of the first paragraph of Section 56 all that any person, firm, etc., had to do to become a public warehouseman "under the terms and provisions of this Act" was to file with the county clerk of the county in which he is located, and proposed to do business, a good and sufficient bond in the sum of five thousand dollars, conditioned "that he will conduct his business in accordance with the terms and provisions of this Act."

It appears to us that this provision, when considered alone, means but little, if anything, and in order to make its meaning intelligible we must look to Articles 7819 and 7820, and with the aid of these statutes, the intention of the Legislature is clarified and in our opinion there is no material conflict between the two acts.

We therefore conclude that when both the provisions of Articles 7819, 7820 and Section 56 are read each in the light of the other, that each may stand, the latter being supplemental to and in aid of the former.

In order for any person, firm, corporation or association of persons to legally conduct a public warehouse as that term is defined by Article 7819 as amended by Chapter 54 of the Second Called Session, Thirty-sixth Legislature, such person, firm, corporation or association of persons must comply with the provisions of Article 7820 and Section 56, by making application to the county clerk of the county wherein the warehouse or warehouses are situated, and in which said person may desire to do business as a public warehouseman, for a certificate of authority to conduct a public warehouse, and must accompany said application by a properly executed bond in the form prescribed by the Commissioner of Markets and Warehouses, payable to the State of Texas, in the sum of five thousand dollars, conditioned for the faithful performance of duty as a public warehouseman, and further conditioned that he will conduct his business in accordance with the terms and provisions of Chapter 126, General Laws passed at the Regular Session of the Thirty-sixth Legislature, and obtain said certificate. To engage in the business of a public warehouseman without first having fully complied with these provisions would subject such persons to the penalties prescribed in Article 976 of the Penal Code, which reads:

"Any public warehouseman who violates any of the provisions of this law shall be deemed guilty of criminal offense, and, upon indictment and conviction thereof, shall be punished by fine in any sum not exceeding five thousand dollars, or imprisonment in the State penitentiary not exceeding two years, or by both such fine and imprisonment."

This brings us to the consideration of your second question as to whether a public warehouseman may legally store cotton in any place other than a house, room or building.

We have already discussed at some length the provisions of Articles 7819, 7821 and 7827, and Section 57, of the "Uniform Warehouse

Receipts Act," which partly controls this question, and to which provisions you have directed our attention. Article 7819 originally provided "that a public warehouse for the storage of cotton may, within the meaning of this Chapter, include a lot or parcel of land enclosed by a lawful fence, the gates or entrances to which shall be kept securely locked at night." This provision of said article was eliminated by the amendment passed at the Second Called Session of the Thirty-sixth Legislature, and a warehouse is therein defined to be "a house, building or room in which * * * commodities are stored and are protected from damage thereto by the action of the elements."

The last above quoted provision was adopted subsequent to the passage of the "Uniform Warehouse Receipts Act," as well as all other legislation upon the subject, and is the last expression of the Legislature relating to warehouses.

The intention of the Legislature in making this change is readily apparent. It was to abolish the open cotton yard as a public warehouse for the storage of cotton, and the "private warehouse" as that term is used and understood in old Article 7827.

It is the opinion of this Department, and you are so advised, that it is unlawful for a warehouseman to store cotton for hire in any place other than a house, room or building which protects the same from damage from the action of the elements.

We hope we have given you the information desired.

Very truly yours,

BRUCE W. BRYANT,
Assistant Attorney General.

CENSUS—POPULATION

Op. No. 2249, Bk. 54, P. 431.

CENSUS—POPULATION—SHERIFF—TAX COLLECTOR—COUNTY CLERK—
DISTRICT CLERK—NOMINEES.

AUSTIN, TEXAS, September 11, 1920.

Peyton B. Randolph, Plainview, Texas; Nellie G. Robertson, Granbury, Texas; Olive B. Chambers, Granbury, Texas; A. F. Larned, Granbury, Texas.

DEAR SIR: The Attorney General is in receipt of an inquiry from Peyton B. Randolph, under date of August 5, 1920, which is as follows:

"I write you as chairman of the county executive committee for Hale county, Texas, and as such, if I am entitled to a ruling from your Department regarding the election laws, would be pleased to have you advise me as soon as possible on the following question:

"Since the ballots for the last Democratic Primary were printed and sent out to the several election boxes, the government announced the population of Hale county, Texas, as being over 10,000 people. This automatically separates the offices of district and county clerk and that of the sheriff and tax collector. The aspirants for those offices, having been elected at the last primary for county and district clerk, and for sheriff and tax collector, now insist that they shall have the right to choose which office they shall hold, and party nominated for sheriff and tax collector demands that his name goes on the ticket for that of tax collector only and the one elected for district and county clerk demands his name to go on the ticket as offering for county clerk."

He is also in receipt of an inquiry from Nellie G. Robertson, under date of August 25, 1920, which is as follows:

"The census report in the *Dallas News* gives Hood county's population as 8759. The 1910 census gave Hood county something over 10,000.

"Under Article 7607, Revised Statutes, the sheriff becomes the tax collector of a county having under 10,000 population. In 1910, the two offices of sheriff and tax collector were separated. This year in the July primary, we nominated both a sheriff and a collector. As yet the census enumerator has not certified to the county clerk any official figures.

"The tax collector has asked me to inform him when this law or merger will take effect. If the enumerator does not certify his figures to the clerk before the November election will it be two years before the sheriff becomes the tax collector?"

He is also in receipt of an inquiry from Olive B. Chambers, under date of September 1, 1920, which reads as follows:

"We have a problem in our county relative to the collector's office. It seems that the statute says that there must be 10,000 in the county before the office of sheriff and collector is separate. This last census brought us down to around 9000. Now the question is, will the office of collector be separate the coming term or will it be after this coming term, in other words, will our present nominee for collector have a job, or will the sheriff's office take over the collecting after November?"

He is also in receipt of an inquiry from A. F. Larned, under date

of September 6, 1920, through Hon. M. L. Wiginton, Comptroller, which reads as follows:

"I am writing you again in regard to the sheriff and tax collector's office. In 1910, when these offices were separated, it was found out before the primary election and two men ran for the separate offices. Now after the primary election we find our county has decreased in population and we don't have the desired 10,000. I ran in the primary election and was nominated for tax collector, which is the same in this county as being elected. We also nominated a sheriff, and when he ran and was nominated, he had no idea that the sheriff and tax collector would ever go back together. I paid my money and give my time in trying to get this office and want to hold it if possible for two more years. What I want you to find out from the Attorney General, if possible, if this office will go back now or wait for the two years and then go together when the people can select a sheriff and tax collector of their choice. I can, if I had a chance to run on the Democratic ticket, defeat the present sheriff for the office of sheriff and tax collector.

"I can also get up a petition with at least 8 per cent of the taxpayers asking that the office be not separated for the next two years. Now, what I want you to do if you can, is to ascertain from the Attorney General exactly what course to pursue."

These inquiries are so related and involve the construction of such similar provision of our Constitution and statutes that we are answering them in one opinion.

Section 23 of Article 5, and Section 16 of Article 8, of our State Constitution, and Articles 7119, 7120, 7605, 7606 and 7607 of our Revised Civil Statutes of 1911, read as follows:

"There shall be elected by the qualified voters of each county a sheriff, who shall hold his office for the term of two years, whose duties, and perquisites, and fees of office, shall be prescribed by the Legislature, and vacancies in whose office shall be filled by the commissioners court until the next general election for county or State officers." Sec. 23, Art. 5, Const.

"The sheriff of each county, in addition to his other duties, shall be the collector of taxes therefor. But in counties having ten thousand inhabitants, to be determined by the last preceding census of the United States, a collector of taxes shall be elected to hold office for two years and until his successor shall be elected and qualified." Sec. 16, Art. 8, Const.

"There shall be elected by the qualified voters of each county one sheriff, who shall hold his office for two years, and until his successor shall be elected and qualified." Art. 7119, Revised Civil Statutes, 1911.

"Should a vacancy occur in the office of sheriff the commissioners court of the county shall fill such vacancy by appointment; and the person appointed, after qualifying in the manner prescribed by law for persons to be elected to said office, shall discharge the duties of sheriff for the unexpired term and until the election and qualification of his successor." Art. 7120, Revised Civil Statutes, 1911.

"In each county having ten thousand inhabitants, to be determined by the last preceding census of the United States, there shall be elected by the qualified voters, at the same time and under the same law regulating the election of State and county officers, a collector of taxes, who shall hold his office for two years and until his successor is elected and qualified." Art. 7605, Revised Civil Statutes, 1911.

"Should the office of collector of taxes from any cause become vacant before the expiration of said term, it shall be the duty of the commissioners court in the county in which such vacancy shall occur, to appoint a collector of taxes, who shall be qualified in the same manner and subject to like bonds as the collector of taxes elected; and the collector of taxes so appointed shall hold his office for and during the unexpired term of his predecessor and until his successor shall have been qualified; and the collector of taxes so appointed shall

have all the rights and perform all the duties required by law of the collector of taxes elected." Art. 7606, Revised Civil Statutes, 1911.

"In each county having less than ten thousand inhabitants, the sheriff of such county shall be the collector of taxes, and shall have and exercise all the rights, powers and privileges, be subject to all the requirements and restrictions, and perform all the duties imposed by law upon collectors; and he shall also give the same bonds required of a collector of taxes elected." Art. 7607, Revised Civil Statutes, 1911.

Primarily, and presumably, the sheriff of a county is *prima facie* "the collector of taxes therefor," and one claiming to the contrary has the burden of showing that such county comes within the exception provided for by the latter part of said Section 16 of Article 8 of our State Constitution. This is expressly so decided in *Nelson vs. Edwards*, 55 T., 389; and this Department has held that the failure of a sheriff to execute the bonds required of the tax collector of a county shown by the United States census next preceding the last general election to have less than ten thousand inhabitants would have the effect of creating a vacancy in the office of sheriff of such county; that the office of sheriff and tax collector of such county is dual and inseparable, and that one has not the right to hold or exercise the functions of either without qualifying as, and being charged with the duties and responsibilities of, both. Rep. and Op. Atty. Gen., 1916-1918, p. 399.

Does the fact that another United States census, coming during the period of time intervening between two general elections, shows such county to have ten thousand inhabitants, terminates the right and duty of the sheriff of such county to be the collector of taxes therefor, or create or bring into existence the office of tax collector of such county as separate from the office of sheriff, as of the date of such census, or at any time before the general election next succeeding such latter census? We think not. The term of office of such sheriff is fixed at two years. It is as such sheriff that he is the tax collector of such county. The office, as to the person holding it, is one and indivisible, is one office and not two. This being true, it would seem to us that his functions as tax collector remain and continue as incident to the office during his whole term of office as sheriff. If it be argued that as tax collector of such county the sheriff is holding and discharging the duties of an office separate from that of sheriff it would nevertheless remain that his term of office as such tax collector is fixed at two years, if not by those provisions of our Constitution and statutes hereinbefore quoted, then by Section 30 of Article 16 of our Constitution. If it be said that these provisions of our Constitution and statutes merely devolve additional duties upon the sheriff of such county and do not constitute him, so far as his function as collector of taxes is concerned, an officer as separate from his office as sheriff, it still remains that such functions must be performed by him until abolished or placed elsewhere. That such duties are not abolished or placed elsewhere. That such duties are not abolished by reason of such latter census is quite evident. Does such latter census, at any time prior to the next general election which it precedes, have the effect, by reason of any of the provisions of our Constitution and statutes, of placing such duties elsewhere? We think not. The only provisions of our Constitution and statutes upon this ques-

tion are those hereinbefore quoted. Said Section 16 of Article 8 provides, or requires, that in counties having ten thousand inhabitants as shown by such census, a collector of taxes shall be *elected*. Said Article 7605 expressly states that, as to such county, "There shall be elected by the qualified voters, *at the same time and under the same law regulating the election of State and county officers, a collector of taxes.*" There is no provision in our Constitution or statutes for the *election* of a tax collector otherwise than at a general election. We cannot see that these, or any other provisions of our Constitution or statutes can reasonably be construed as creating or bringing into existence the office of tax collector, or as terminating the right and duty of the sheriff to be the tax collector of such county, as of the date of such latter census. On the contrary, we think it sufficiently clear that it was intended the sheriff in such case should remain the collector of taxes for such county until that Article 7606 provides for the appointment by the commissioners court of a tax collector when there is a vacancy in that office, but we do not understand that this article applies as to the question here raised. Before such an appointment is authorized there must be a vacancy, and before there can be a vacancy there must be an office, and to hold that a vacancy exists by reason of such a census would be equivalent to holding that such a census was intended to have and does have the effect, not only of terminating the right and duty of the sheriff of such county to be the collector of taxes therefor, but of creating the office of tax collector for such county, as a separate office, as of the date of such census. We do not understand this to be the intent or effect of these provisions of our law. In our opinion the sheriff in such case remains the collector of taxes for such county for the full term of two years, that is, until the next succeeding general election.

We are also of the opinion that the fact that a United States census, coming after a general election at which a tax collector was elected, but before the next succeeding general election, shows a county to have less than ten thousand inhabitants, where the census next preceding the former election showed such county to have ten thousand inhabitants, does not have the effect of abolishing the office of tax collector of such county and making the sheriff the collector of taxes therefor as of the date of such census. The term of office of the tax collector is fixed at two years from the election at which he was elected. We do not understand that it was intended that such a census should abolish the office of tax collector of such county, or terminate the term of office of such tax collector, as of the date of such census. Otherwise, by reason of such census, the sheriff of such county would become the collector of taxes therefor automatically and involuntarily, without having been a candidate therefor or having been elected or appointed as such, and in the event he was unwilling or unable to make the bond required of him as such collector he would be obliged to resign his office as sheriff or else, by reason of what we have already seen, his office would be taken away from him by operation of law. In our opinion, no such result or effect was contemplated or intended by the framers either of our Constitution or statutes. Our opinion is that the tax collector in such case re-

mains the collector of taxes for such county for the full term of two years, that is, until the next general election.

3. What we have said with respect to the office, or offices, of sheriff and tax collector is also applicable, by analogy, to the office, or offices, of county and district clerk, except that the number of inhabitants as to county and district clerks is fixed at eight thousand instead of ten thousand. Where the United States census next preceding a general election shows a county to have less than eight thousand inhabitants the clerk of the county court elected at such election, or one appointed to fill out his unexpired term, is and remains the clerk of the district court of such county for the full term of two years, that is, until the next succeeding general election even though another census, following the prior election but preceding the latter, should show such county to have eight thousand inhabitants.

4. Also, where the United States census next preceding a general election shows a county to have eight thousand inhabitants the clerk of the district court of such county elected at such election, or one appointed to fill out his unexpired term, is and remains the clerk of the district court of such county for the full term of two years, that is, until the next succeeding general election even though another such census, following such prior election but preceding the latter, should show such county to have less than eight thousand inhabitants.

The provisions of our Constitution and statutes applicable to county and district clerks on this question read as follows:

"There shall be a clerk for the district court of each county, who shall be elected by the qualified voters for the State and county officers, and who shall hold his office for two years, subject to removal by information, or by indictment of a grand jury, and conviction by a petit jury. In case of vacancy, the judge of the district court shall have the power to appoint a clerk, who shall hold until the office can be filled by an election." Sec. 9, Art. 5, Const.

"There shall be elected for each county, by the qualified voters, a county clerk, who shall hold his office for two years, who shall be clerk of the county and commissioners courts and recorder of the county, whose duties, perquisites and fees of office shall be prescribed by the Legislature, and a vacancy in whose office shall be filled by the commissioners court, until the next general election for county and State officers; provided, that in counties having a population of less than eight thousand persons there may be an election of a single clerk, who shall perform the duties of district and county clerks." Sec. 20, Art. 5, Const.

"There shall be a clerk for the district court of each county, who shall be elected at a general election for members of the Legislature by the qualified voters of such county, who shall hold his office for two years, and until his successor shall have duly qualified." Art. 1685, Revised Civil Statutes, 1911.

"Whenever a vacancy may, from any cause, occur in the office of the clerk of the district court, the same shall be filled by the judge of the district court of such county; and the clerk so appointed shall give bond and qualify in the same manner as if he had been elected, and shall hold his office until the next general election, and until his successor shall have duly qualified. Where such vacancy occurs in a county having two district courts, the same shall be filled by the judges of such courts; and in such case the Governor, upon the certificate of such district judges, shall order a special election to fill such vacancy." Art. 1686, Revised Civil Statutes, 1911.

"There shall be a clerk of the county court for each county, who shall be elected at a general election for members of the Legislature, by the qualified voters of such county, who shall hold his office for two years, and until his successor shall have duly qualified." Art. 1743, Revised Civil Statutes, 1911.

"Whenever a vacancy may, from any cause, occur in the office of clerk of

the county court, the same shall be filled by the commissioners court of the county, and the clerk so appointed shall give and qualify in the same manner as if he had been elected, and shall hold his office until the next general election, and until his successor shall have duly qualified." Art. 1744, Revised Civil Statutes, 1911.

"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. He shall take the oath and give the bond required of clerks of both the district and county courts, and shall have all the powers and perform the duties of such clerks, respectively. In determining 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." Art. 1703, Revised Civil Statutes, 1911.

These provisions are substantially the same, as to the respective questions presented, as those relating to sheriff and tax collector. We do not deem it necessary to discuss them. To do so would be a virtual repetition of what has already been said with respect to the sheriff and tax collector.

To our minds it is reasonably clear that these provisions of our law sufficiently indicate the intent that these respective offices, that is, of sheriff and tax collector, and clerk of the county and district courts, were intended to be, and should be, separated or combined, as the case may be, as of the date of the first general election next succeeding a United States census showing the county to have ten thousand inhabitants, or less, as the case may be, as to the former, and eight thousand inhabitants, or less, as the case may be, as to the latter, and not that such offices, respectively, were intended to be, or should be, separated or combined, as the case may be, as of the date of such census.

In this connection attention is called to the case of *Brooks vs. Dulancy*, 100 T., 86 (93 S. W., 997), wherein it is held that the latter part of said Article 1703 providing that, "In determining 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," is held unconstitutional, and wherein it is held that the population as shown by the United States census next preceding a general election should govern on this question and not the rule here prescribed.

In passing we might suggest the well-known practice of both the United States Congress and the Legislature of our State in the matter of the number of members constituting the lower branches of these bodies. The number of members constituting the House of Representatives of both of these bodies is required to be based on population as shown by each succeeding United States census, the State being divided into districts according to the number of inhabitants shown by such census, a given number of inhabitants being required in each district, but it has never been considered that an increase in the population of a district, as shown by a succeeding census, would or does, of itself, as of the date of and by reason of such latter census, entitle such district to an additional representative at a time prior to the general election next succeeding such latter census, and, as to our State Legislature, both as to the House and Senate, not until a subsequent apportionment or re-districting of the

State into representative and senatorial districts; and this is true even though the inhabitants of a district may have more than doubled, as shown by such latter census, the number fixed as the basis of representation. (Message of the Governor, General and Special Laws, First Called Session, Thirty-second Legislature, pp. 199-200.)

The provisions of our statutes relating to the nomination of candidates for county offices by political parties, the printing of the names of the candidates for such nominations on the official ballots for a primary election for that purpose, and the printing of the names of the nominees of such parties, and the names of independent or non-partisan candidates, on the official ballot to be used at the general election next succeeding such nominations, are numerous and we do not set them out. Special reference is made to Articles 2966, 2967, 2968, 2969, 2970, 3013, 3084, 3085, 3095, 3101, 3103, 3159, 3164, 3168, 3169, 3172 and 3173 of the Revised Civil Statutes of 1911, and Chapter 88 (p. 139), General Laws, Regular Session, Thirty-sixth Legislature.

Political parties entitled to make nominations may nominate a candidate for any county office but only where it appears at the time of such nomination that the voters of the county are entitled to fill such office by election at the next succeeding general election, and in such case, and in such case only, a candidate for such nomination, being eligible to hold such office, and having complied with the law with respect to such nomination, is entitled to have his name printed on the official ballot of the party to which he belongs as a candidate for such office. These propositions, we take it, will not be questioned.

5. This being true, it follows, in view of the conclusions we have already reached as to the office of *sheriff and tax collector*, that where the United States census next preceding the primary election shows a county to have less than ten thousand inhabitants one person, and one only, may be nominated for the office of *sheriff and tax collector* of such county. What, then, is the status of one so nominated as a candidate for *sheriff and tax collector* of such county if, after such nomination, but before the ensuing general election, there is another United States census which shows such county to have ten thousand inhabitants?

It is our view that such person is the nominee of such party as a candidate for sheriff, and sheriff only, and that the name of such candidate, if printed on the official ballot to be used at the ensuing general election as the nominee of such party at such primary, must be printed on such ballot as the nominee of such party as its candidate for sheriff only, and not as its candidate for *sheriff and tax collector*, nor as its candidate for the office of *tax collector*. Primarily such person is the nominee as a candidate for sheriff. The tax collecting feature of the office is solely a question of law. Whether the sheriff is or is not the collector of taxes is a matter of law irrespective of whether he may have been nominated, or elected, simply as *sheriff* or as *sheriff and tax collector*. Whether or not the words *and tax collector* are placed on the ballot following the word *sheriff* is wholly immaterial. If the words *and tax collector* were omitted from the ballot entirely the result would be the same. In such case there would

not be, of course, any nominee for the office of tax collector. In what way, then, in such case, if at all, may a nomination for tax collector be made so that the name of such nominee may be printed on the official ballot to be used at the next ensuing general election?

The party executive committee is authorized to make a nomination only in the event a nominee dies or declines the nomination. Where no nomination has been made at the preceding primary such executive committee is without authority to make one. Articles 3172, 3173, 2968, 3013 and 3096, R. C. S., 1911; *Gilmore vs. Wapples*, 188 S. W., 1037. Under such circumstances the party executive committee would be without authority to make a nomination for tax collector. Furthermore, we do not find where the holding of a special primary to select a nominee in such case is anywhere provided for. A special primary election may be held where at the regular primary election no one candidate for a particular office received a majority of all the votes cast thereat for such office, and also for the nomination of a candidate to be voted for at a special election (Art. 3086, R. C. S., 1911), but we find no authority for holding a primary election for the nomination of a candidate for tax collector under a condition such as is here suggested. It is our view, therefore, that no nomination can be made for the office of tax collector under such circumstances. Inasmuch, however, as such office should be filled by election at the next succeeding general election, and although there be no nominee for such office, the title of such office should nevertheless be printed on the official ballot of such party to be used at such general election, but without the name of a nominee therefor, in the manner provided for by Article 2969 of the Revised Civil Statutes of 1911.

Where the United States census next preceding primary election shows a county to have ten thousand inhabitants separate persons should, of course, be nominated for sheriff and tax collector of the county. In such case what is the status of these nominees with respect to the next succeeding general election in the event there is another such census preceding such general election which shows such county to have less than ten thousand inhabitants?

In such case, it is our opinion, since no person can be elected at such general election as tax collector of such county other than the one elected as sheriff, that the nominee for sheriff becomes, by reason of being the nominee for sheriff, the nominee as tax collector, that is, by being the nominee for sheriff, he is by operation of law, by force of the law, the nominee for *sheriff and tax collector*; that the name of such nominee should be printed on the official ballot of his party to be used at the succeeding general election as the nominee of the party for *sheriff and tax collector*, and that neither the title of the office of tax collector, as such, nor the name of the nominee therefor, should be printed on such ballot. As to such county, there being no such office as that of tax collector, as such, to be filled by election at the ensuing general election, there cannot be, of course, a nominee for such office. If the name of such nominee can be printed on the official ballot of such party to be used at the ensuing general election, and in our opinion this should not be done, it would have to be so printed as the candidate of such party for the office of tax col-

lector, he having been nominated for that office and no other, and if such nominee should receive a majority of the votes cast for such office, it would avail nothing for the very patent reason that the office of tax collector, as such, would not exist, and could not exist, in such county, from and after such election. There being no such office to be filled by election the name of no person should appear upon any ballot to be used at such election as a candidate for such office. Of course, such nominee would not be entitled to have his name printed on the general election ballot of his party as the nominee of such party for the office of sheriff for the two very evident reasons, first, that he is not the nominee of his party for the office of sheriff, and, second, there is another person who is the nominee of such party for sheriff.

On the other hand, there being a nominee for sheriff, and the law requiring that the sheriff shall be the collector of taxes for such county, such nominee for sheriff becomes the nominee for sheriff *and tax collector* and is entitled to have his name printed on the official ballot of his party at the ensuing general election as such candidate; or, if not, he is at least entitled to have his name printed on such ballot as the nominee for sheriff, and if he is elected sheriff he becomes by operation of law the collector of taxes for such county, provided, of course, he is eligible to such office and gives the bonds, and otherwise qualifies both as sheriff and as tax collector, in accordance with law. Our reasons for this view are sufficiently apparent from the foregoing cited articles of our statutes and from what we have already said with respect to these offices.

What we have said with respect to nominations and nominees for the office, or offices, of sheriff and tax collector is also applicable, by analogy, to nominations, or nominees, for the office, or offices, of county and district clerks, except that the number of inhabitants as to county and district clerks is fixed at eight thousand instead of ten thousand. Where the United States census next preceding a primary election shows a county to have less than eight thousand inhabitants, a political party cannot legally nominate two persons as clerks of the county and district courts, respectively, of such county, but would be authorized to nominate one, and only one, person as a candidate for the office of clerk of both of these courts. As to such counties, no nomination could be legally made of a candidate for county clerk separate from that of district clerk, and none as district clerk separate from that of county clerk. If after such nomination, but before the ensuing general election, there is another census that shows such county to have eight thousand inhabitants such nominee for county clerk, or, as generally expressed on the ballot, county and district clerk, becomes, or, rather, remains, the nominee of such party as its candidate for county clerk only, and the name of such nominee should so appear on the official ballot of his party to be used at the ensuing general election. The office of county clerk is the primary office. It is by reason of being county clerk that one is entitled to be, in fact must be, clerk of the district court, and not by being clerk of the district court that one is entitled to or required to be clerk of the county court. Also, in such case, there will not be, and

cannot be, a nominee for the office of clerk of the district court of such county, no such nomination having been made at the primary and there being no provision for making such nomination otherwise. The title of the office of clerk of the district court in such case, however, should appear on the ballot of the party to be used in the ensuing general election as required by said Article 2969, but without the name of a candidate for such office printed thereunder.

On the other hand, where, at the time of making nominations for county offices the next preceding United States census shows a county to have eight thousand inhabitants, separate nominations should be made for the office of clerk of the county court and clerk of the district court, respectively. If, however, a United States census following such nominations, but preceding the next ensuing general election, shows the county to have less than eight thousand inhabitants, the nominee for county clerk in such case becomes, and is the nominee for county *and district* clerk, and the nomination and nominee for district clerk must fall. Each county is required to have a county clerk irrespective of what a census may show the number of inhabitants of such county to be, but where the census next preceding a general election shows a county to have less than eight thousand inhabitants the clerk of the county court is, and must be, from and after such election, also clerk of the district court, and such county cannot, at and from such election, legally elect or have a person as clerk of its district court other than the one who is clerk of its county court. Thus being required to elect only one person as clerk of both these courts, that is, being required to elect a clerk of the county court, who, by reason of being clerk of such court, becomes by operation of law also clerk of the district court, and there being a party nominee for the office of county clerk, such nominee has the right to have his name printed on the official ballot of his party as its nominee at the ensuing general election for the office of county *and district* clerk; or, if not, he has the right to have his name printed on such ballot as the party nominee for the office of county clerk, and if elected to that office he becomes and is, by force of law, also clerk of the district court of such county, being eligible and having qualified as the law requires. In such case, neither the title of the office of district clerk, nor the name of the nominee of the party for that office should be printed on the party ballot to be used at such ensuing general election. There being no such office to be filled by election at such election, there can be no nominee or candidate for such office. Such person would not be entitled to have his name printed on his party ballot at the ensuing general election as its candidate for county clerk for the further reasons, first, that he is not in fact such nominee, and, second, his party in fact has a nominee for that office.

From the foregoing it will be apparent that we do not regard it as material on the questions here presented as to when a census becomes effective as such, or becomes a census in law. This point, however, was passed on in an opinion rendered by this Department August 14, 1920, to Hon. F. M. Scott, in the matter of compensation to which county commissioners may be entitled under Chapter 29, General Laws, Fourth Called Session, Thirty-fifth Legislature. In that opinion we

held that a United States census becomes a census in fact, as well as in law, "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."

The only reported case other than those hereinbefore cited that we have been able to find that touch on any of the questions here presented are *Nelson vs. Edwards* (Sup. Ct. Tex.), 55 T., 389, and *Childers vs. Duvall* (Sup. Ct. Ark.), 63 S. W., 802. In the case of *Nelson vs. Edwards*, Nelson was elected tax collector and Edwards was elected sheriff of Titus County. Just prior to the election at which they were so elected a United States census, by certificate of the enumerator filed with the county clerk, as the census law then required, showed the county to have less than ten thousand inhabitants, whereas the next preceding census showed the county to have ten thousand inhabitants, and Edwards brought suit to establish his claim that he, being sheriff, was also the tax collector of that county. The court sustained this contention on the part of Edwards, subject to his executing the bonds required of him as such collector. It will be noted, however, that this proceeding was not brought until after the general election next following the census that showed the county to have less than ten thousand inhabitants, and so the question as to whether or not such a census in such a case would have the effect of terminating the term of office of the tax collector elected as such at the election next succeeding such latter census, and of casting such duties upon the sheriff of such county, as of the date of such latter census, was not in the case.

From the report of the Arkansas case it appears that Childers was elected clerk of the circuit court, and Duvall was elected clerk of the county court, of Lawrence County, at a general election held September 3, 1900, that the census next preceding that election showed that county was not entitled to separate clerks of these courts, but was required to have one person as clerk of both, that shortly after that election another census showed the county to be entitled to separate clerks of these courts, that after this latter census the Governor of the State appointed Duvall clerk of the county court of that county "to fill a vacancy occasioned by the last Federal census, showing that the inhabitants of that county exceeded fifteen thousand," that Duvall qualified under and by virtue of such appointment. Childers brought suit on the ground that he, having been elected clerk of the circuit court at a time when the United States census, next preceding the election at which he was elected, showed that county to have less than fifteen thousand inhabitants, he was entitled to be, and in law was, the clerk of the county court of that county. Duvall contended that the effect of such latter census was to create, as to that county, the office of county clerk as separate from that of clerk of the circuit court, that such office being thus created and not being filled was vacant, that such vacancy had been filled by his appointment to the office, and that he was, therefore, legally the clerk of such county court and entitled to hold that office. Section 19 of Article 7 of the Constitution of Arkansas, at that time, read as follows:

"The clerks of the circuit court shall be elected by the qualified electors of the several counties, for the term of two years, and shall be ex-officio clerks of the county and probate courts and recorder; provided, that in any county having a population exceeding fifteen thousand inhabitants, as shown by the last Federal census, there shall be elected a county clerk, in like manner as clerk of the circuit court, who shall be ex-officio clerk of the probate court of said county."

Section 1 of Article 22 of the Constitution of that State provided at that time that in case of a vacancy in any county office the same should be filled by appointment by the Governor of the State. The court held that under the facts there existing a vacancy had been properly filled by the appointment of Duvall, and that Duvall was entitled to be appointed as, and in law, was, the clerk of such court.

Since the foregoing provisions of the Constitution of Arkansas with respect to the clerk, or clerks, of these courts is so very similar to those of our Constitution with respect to sheriff and tax collector, and clerks of our district and county courts, it might fairly be said that the conclusions we have reached are in direct conflict with this opinion of the Supreme Court of Arkansas. That court, however, cites no authorities and presents no reasoning, if it can be said that it presents any at all, that would indicate to our minds that the conclusions we have reached are not well within the intent and purpose of our Constitution and statutes.

It is true that this Department has held that where the last preceding census shows a county to have less than ten thousand inhabitants and it is contemplated that before primary election day another census may show such county to have ten thousand inhabitants, a candidate may make application in the alternative to have his name printed on the primary ballot of his party, either as a candidate for sheriff and tax collector, or as a candidate for tax collector, the former if such latter census should, before primary election day, show the county to have less than ten thousand inhabitants, but the latter if such census should, before primary election day, show such county to have ten thousand inhabitants (Rep. and Op. of Atty. Gen., 1908-1910, p. 220), but that is quite a different question from any here presented. Even if one might have the right to make such alternative application for having his name printed on the primary election ballot, it does not follow that a similar right would exist with respect to the printing of the names of party nominees on the party ballot to be used in general election. Only one who is a party nominee has the right to have his name printed on the official party ballot to be used at a general election, and then only for the particular office for which he has been so nominated. The name of such nominee must go on his party ballot for the general election as a candidate for the particular office for which he was nominated, and no other, if he is eligible to such office, has not died, or has not declined the nomination in the manner provided by law, unless such office has ceased to exist by operation of law.

It is our opinion, therefore, and you are advised:

First. That where the United States census next preceding a general election shows a county to have less than ten thousand inhabitants, even though there may be another such census following such

election but preceding the next succeeding general election which shows such county to have ten thousand inhabitants, the sheriff of such county must nevertheless be and remain the collector of taxes of such county must have as its tax collector, from and after such latter election, a person other than the one who is sheriff of such county.

Second. When the United States census next preceding a general election shows a county to have ten thousand inhabitants, even though there may be another such census following such election but preceding the next succeeding general election which shows such county to have less than ten thousand inhabitants, the tax collector of such county must nevertheless be and remain the tax collector of such county until such latter election. In such case, however, such county must have one and the same person as its sheriff and tax collector from and after such latter election.

Third. Where the United States census next preceding a general election shows a county to have less than eight thousand inhabitants, even though there may be another census following such election but preceding the next succeeding general election, which shows such county to have eight thousand inhabitants, the clerk of the county court of such county must nevertheless be and remain the clerk of the district court of such county until such latter election. In such case, however, such county must have as clerk of its district court, from and after such latter election, a person other than the one who is clerk of its county court.

Fourth. Where the United States census next preceding a general election shows a county to have eight thousand inhabitants, even though there may be another such census following such election but preceding the next succeeding general election which shows such county to have less than eight thousand inhabitants, the clerk of the district court of such county must nevertheless be and remain the clerk of such district court until such latter election. In such case, however, such county must have one and the same person as clerk of its district and county courts from and after such latter election.

Fifth. Where the United States census next preceding the nomination by a political party of a candidate for the office of sheriff, or, as it is usually expressed, sheriff and tax collector, shows such county to have less than ten thousand inhabitants, and there is another such census following such nomination but preceding the next succeeding general election which shows such county to have ten thousand inhabitants, the person so nominated becomes, and is, the nominee of such party for the office of sheriff only, but not its nominee for tax collector, and the name of such nominee, and no other, must be printed on the official ballot of the party making such nomination as its nominee for the office of sheriff of such county at the succeeding general election, if eligible to hold such office, unless such nominee has died, or has declined such nomination in the manner provided by law. In such case, although the election of a person as tax collector of such county other than the one elected as sheriff is required at such succeeding general election, such political party is without, and cannot have, a nominee for the office of tax collector and no provision is made in such case for printing the name of any person on the offi-

cial ballot of a political party to be used at the next succeeding general election as the candidate of such party for such office. The title of the office of tax collector, however, should be printed on such ballot but without the name of any person printed thereon as the nominee of such party for such office.

Sixth. Where the United States census next preceding the nomination by a political party of candidates for the offices of sheriff and tax collector of a county shows such county to have ten thousand inhabitants, and there is another such census following such nominations but preceding the next succeeding general election which shows such county to have less than ten thousand inhabitants, the person so nominated for the office of sheriff becomes, and is, the nominee of such party for the office of sheriff and tax collector, and the name of the person so nominated, and no other, must be printed on the official ballot of the party making such nomination as its candidate for the office of sheriff and tax collector of such county at the succeeding general election, if eligible to hold such office, unless such nominee has died, or has declined such nomination in the manner prescribed by law; or, if not, such nominee remains and is the nominee of such party as its candidate for the office of sheriff of such county and the name of such person so nominated, and no other, must be printed on the official ballot of the party making such nomination as its candidate for the office of sheriff of such county at the succeeding general election, if eligible to hold such office, unless such nominee has died, or has declined such nomination in the manner prescribed by law, and if elected to such office such nominee becomes and is, by operation of law, also the collector of taxes of such county, he first having qualified as sheriff and as tax collector in the manner required by law. In such case the person so nominated as tax collector is not entitled to have his name printed on the official ballot to be used at the next succeeding general election as the candidate of such party for such office, there being no such office to be filled by election at such succeeding general election, and is not entitled to have his name printed on such ballot as the nominee of such party as its candidate for sheriff, he not being such nominee, and in such case neither the title of the office of tax collector, nor the name of any person as a candidate for such office, should be printed on the official ballot to be used at the next succeeding general election.

Seventh. Where the United States census next preceding a nomination by a political party of a candidate for the office of county clerk, or, as it is usually expressed, county and district clerk, of a county, shows such county to have less than eight thousand inhabitants, and there is another such census following such nomination but preceding the next succeeding general election which shows such county to have eight thousand inhabitants, the person so nominated becomes, and is, the nominee of such party for the office of county clerk only, but not for district clerk, and the name of the person so nominated, and no other, must be printed on the official ballot of the party making such nomination as its candidate for the office of county clerk of such county at the next succeeding general election, if eligible to hold such office, unless such nominee has died, or has de-

clined such nomination in the manner prescribed by law. In such case, although the election of a person as district clerk of such county other than the one elected as county clerk is required at such succeeding general election, such political party is without, and cannot have, a nominee for the office of district clerk, and no provision is made in such case for printing the name of any person on the official ballot of a political party to be used at the succeeding general election as the candidate of such party for such office. The title of the office of clerk of the district court, however, should be printed on such ballot, but without the name of any person printed thereon as the nominee of such party for such office.

Eighth. Where the United States census next preceding the nomination by a political party of candidates for the offices of county clerk and district clerk, shows such county to have eight thousand inhabitants, and there is another such census following such nominations but preceding the next succeeding general election which shows such county to have less than eight thousand inhabitants, the person so nominated for the office of county clerk becomes, and is, the nominee of such party for the office of county and district clerk, and the name of the person so nominated, and no other, must be printed on the official ballot of the party making such nomination as its candidate for the office of county and district clerk of such county at the succeeding general election, if eligible to hold such office, unless such nominee has died, or has declined such nomination in the manner prescribed by law; or, if not, such nominee remains and is the nominee of such party as its candidate for the office of county clerk, and the name of such person so nominated, and no other, must be printed on the official ballot of the party making such nomination as its candidate for the office of county clerk of such county at the next succeeding general election, if eligible to hold such office, unless such nominee has died, or has declined such nomination in the manner prescribed by law, and if elected to such office such nominee becomes and is, by operation of law, also clerk of the district court of such county, he first having qualified both as county clerk and district clerk in the manner prescribed by law. In such case the person so nominated as district clerk is not entitled to have his name printed on the official ballot to be used at the next succeeding general election as the candidate of such party for the office of district clerk, there being no such office to be filled by election at such succeeding general election, and he is not entitled to have his name printed on such ballot as the nominee of such party as its candidate for the office of county clerk, he not being such nominee; and in such case, neither the title of the office of district clerk, nor the name of any person as a candidate for such office, should be printed on the official ballot to be used at the next succeeding general election.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

INTOXICATING LIQUORS

Op. No. 2399, Bk. 56, P. 227.

**INTOXICATING LIQUORS—CORPORATIONS—LIQUOR DISPENSARIES—
DRUG STORE AND PHARMACIES.**

1. The Comptroller is without authority to issue a permit authorizing the sale of intoxicating liquors on physicians' prescriptions to anyone other than bona fide retail druggists or pharmacists, and would not be authorized to issue such a permit to any person, firm or corporation intending to operate an exclusive liquor dispensary and sell nothing but intoxicating liquors.

2. The Secretary of State is not authorized to file a charter of a proposed corporation organized for the purpose of operating a liquor dispensary and selling intoxicating liquors exclusively as described in paragraph 1 above.

3. The Secretary of State would be authorized and it would be his duty to refuse to file a charter of a proposed corporation whose purpose is stated in the charter to be the purchase and sale of goods, wares and merchandise, if he has knowledge that it is the purpose and intention of the incorporators to purchase and sell nothing but intoxicating liquors upon physicians' prescriptions, and it would be his duty to make inquiry into the facts and refuse to file a charter under such circumstances.

4. A holding company cannot be chartered for the purpose of holding stock in a corporation such as the one described in Paragraph 3, above.

5. The Dean Law governs in this State with respect to the sale of intoxicating liquors upon physicians' prescriptions, and as to the amount of intoxicating liquors that may be prescribed, and this irrespective of the provisions of the Federal statutes or the rulings of the Federal authorities. It is unlawful for a physician to prescribe more than a pint of intoxicating liquor to any person at a time, and this, of course, means that not more than a pint of beer containing as much as one per cent alcohol can be prescribed to any person at one time, and neither can more than a pint of beer or other liquor which is in fact intoxicating be prescribed to any person at one time.

AUSTIN, TEXAS, November 10 1921,

Honorable Lon A. Smith, Comptroller of Public Accounts, Capitol.

DEAR SIR: We have communications from you and the Secretary of State, propounding certain inquiries relative to the laws of this State prohibiting the sale of intoxicating liquors for beverage purposes, and for convenience have embodied our answers in one opinion.

The questions submitted may be stated as follows:

I. Is there any authority for the Comptroller to issue a permit authorizing the sale of intoxicating liquors at retail on physicians' prescriptions to anyone other than a bona fide retail druggist or pharmacist? In other words, may such a permit be issued to a person, firm or corporation intending to operate a liquor dispensary and sell nothing but intoxicating liquor?

II. May a corporation be chartered to sell liquor at retail on physicians' prescriptions?

III. May the Secretary of State refuse to file the charter of a proposed corporation, the stated purpose in the charter being the purchase and sale of goods, wares and merchandise, when he has knowledge that the corporation is being organized only to sell liquors on prescriptions?

IV. May a holding company be chartered to hold stock in a company such as is described in question III above?

V. Does the Dean Law govern with respect to the sale of intoxicating liquor on physicians' prescriptions and as to the amount that may be prescribed, irrespective of the provisions of the Federal laws and irrespective of the rulings of the Federal authorities thereunder?

Answering these questions in the order set forth above, we beg to advise as follows:

I.

We are advised that application has recently been made by persons not in the drug business for a permit to sell intoxicating liquor at retail upon physicians' prescriptions. The persons making the application are licensed pharmacists, but it was their desire to operate a "liquor dispensary" to handle intoxicating liquor exclusively on physicians' prescriptions, unconnected with a retail drug business as that term is ordinarily understood.

The Constitution of the State of Texas prohibits "the manufacture, sale, barter and exchange in the State of Texas of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication or any other intoxicant whatever, except for medicinal, mechanical, scientific or sacramental purposes," and provides that "the Legislature shall enact laws to enforce this section," and that "the Legislature shall have the power to pass any additional prohibitory law or laws in aid thereof which it may deem advisable." Section 30, Article 16, Constitution of Texas.

Pursuant to this constitutional provision, the Legislature has enacted laws in substance making unlawful the manufacture, sale, barter, exchange, transportation, export, receipt, delivery, solicitation, taking orders for, furnishing or possessing, (1) of intoxicating liquors; (2) of any liquor containing in excess of one per cent of alcohol by volume, except for medicinal, mechanical, scientific or sacramental purposes. Chapter 78, General Laws, Second Called Session, Thirty-sixth Legislature, as amended.

The manner of sale for the permitted purposes is minutely prescribed by the statute, and any sale, etc., of intoxicating liquor even for a permitted purpose in any other manner than as is prescribed by the law would constitute a violation. One lawful method of sale is upon the prescription of a physician having a permit from the State Comptroller, which may be filled by a retail druggist or pharmacist who also has a permit from the Comptroller, provided the physician writing the prescription has no financial interest in the drug store or pharmacy. A careful reading of the entire Act will disclose beyond doubt that prescriptions may be filled by none other than retail druggists or pharmacists having permits from the Comptroller. Section 7 of the Act provides that alcohol (and the term "alcohol" as used in this part of the Act means intoxicating liquor) for non-beverage purposes and wine for sacramental purposes may be manufactured and sold as follows:

"The Comptroller of Public Accounts may issue permits to persons to manufacture and sell equipment for the manufacture of liquor not prohibited herein; to manufacture alcohol and wine; to manufacture alcoholic, patent or pro-

prietary medicine, flavoring extracts and culinary preparations and other non-beverage alcoholic preparations; to wholesale and *retail druggists or pharmacists* and to persons permitted to possess alcohol and wine for authorized purposes. Such permits shall not be in conflict with the prohibitions contained herein."

We here call attention to some of the provisions of the Act indicating that only retail druggists or pharmacists may sell at retail upon prescriptions. Section 12 provides that it shall be unlawful for a *retail druggist or pharmacist* to sell any liquor except alcohol for non-beverage purposes, or wine for sacramental purposes, and that *druggists or pharmacists* shall keep a record giving the name of the doctor issuing the prescriptions containing alcohol, the amount, date of sales, the name and signature of the purchaser, the person making the sale and a copy of the prescription. Section 15 requires the physician, among other things, to make a record of the name of the *druggist* to whom the prescription is addressed. Section 14 provides that no prescription shall be filled at any *pharmacy or drug store* in which the physician has any financial interest.

As will be noted above, the Act authorizes permits to be issued to "retail druggists or pharmacists," and we hold that a person handling nothing but intoxicating liquor is not a retail druggist or pharmacist within the contemplation of the Act. The words "retail druggists or pharmacists" would include only bona fide druggists or pharmacists, those who are in the general retail drug business. This view is consistent with the general purpose and intent of the Act, which is to restrict the sale of intoxicants to actual cases of necessity, to limit it to the regular legitimate channels so that the opportunity to abuse the privilege to sell for legitimate purposes would be minimized. It was never contemplated in the passage of this law the dispensaries for the exclusive sale of intoxicating liquors should be operated or granted permits.

In an early Massachusetts case, the question arose as to whether a merchant handling nothing but alcohol was a druggist. *Mills v. Perkins*, 120 Mass., 41. A statute of the State of Massachusetts provided that "druggists may sell for medicinal purposes only, pure alcohol to other druggists, apothecaries and physicians known to be such." The court held that a commission merchant dealing principally in alcohol was not authorized to sell alcohol to a wholesale druggist under this Act, since such commission merchant was not a druggist. The court said:

"A druggist, in the popular acceptance of the word, is one who deals in medicines, or in the materials that are used in the preparation of medicines; the term 'medicines' being taken in its largest signification. The Statutes of 1869, Chapter 415, Section 26, which was in force at the date of the sale in this case, evidently uses the word in this sense. Alcohol undoubtedly enters into the composition of some medicines, but it also has other and more frequent uses less innocent, and not under the protection of the law. Like any other intoxicating liquor, it may be used medicinally, and when so used it may properly be described as a drug. But a commission merchant, dealing principally in alcohol, cannot properly be described as a druggist, in the sense in which that word is used in the statute, merely because the article in which he deals is susceptible of use in the preparation of medicines, or admits of medical use."

We conclude, therefore, that a permit to sell on prescription cannot be

issued to anyone except a bona fide retail druggist or pharmacist, and that such a permit cannot be issued to a person, firm or corporation handling or proposing to handle nothing but intoxicating liquors.

II.

The next question is whether a corporation may be chartered in this State to operate a liquor dispensary, that is, to purchase and sell at retail on prescription, nothing but intoxicating liquors.

Assuming the correctness of our first proposition, that is, that a permit cannot be issued to sell on prescription intoxicating liquors exclusively, it necessarily follows that a corporation cannot be chartered for the purpose mentioned; for it is fundamental that an authority to incorporate for a general purpose will not authorize the doing of acts which would otherwise be permissible under the general authority, which acts are specifically inhibited by the laws of the State. This Department has recently had occasion to rule upon this point in an opinion of date April 23, 1921, addressed to Honorable C. W. Payne, Chief Clerk to the Secretary of State, and to be found at page 431 of Opinion Record No. 55. The authorities cited in that opinion are here referred to to support the above stated proposition.

Without further discussion, we hold that a corporation cannot be chartered in this State for the purpose mentioned.

III.

The next question propounded is whether the Secretary of State would be authorized to refuse to file a charter where the stated purpose is the purchase and sale of goods, wares and merchandise, but where in truth and in fact the intention is to sell at retail nothing but intoxicating liquors on prescription.

It will be conceded that ordinarily mandamus will lie to compel the Secretary of State to file a charter where it appears from the charter that the purpose is a lawful one for which corporations may be chartered. If, however, in fact, the charter is being procured to effect an unlawful purpose or to carry out an unlawful design, the court will not compel the Secretary of State by mandamus to assist in carrying out the unlawful acts and purposes by filing the charter. It being unlawful to sell intoxicating liquors without a permit from the Comptroller, and a liquor dispensary not being entitled to a permit, it follows that a corporation chartered for the purchase and sale of goods, wares and merchandise would be subject to suit in warrants to forfeit its charter, because it would be doing acts contrary to law and beyond its charter powers. If the charter could be taken away from the corporation for these acts, would a court mandamus the Secretary of State and compel him to go through the formality of chartering the company, knowing that the incorporators intended to violate the law, knowing in advance that suit would or should be filed to cancel its charter?

The courts have on several occasions refused to mandamus public officials to do ministerial acts where to do so would further illegal acts or purposes, and this even where there has been a literal compliance with the statutes by the person asking for the writ of mandamus. Thus,

in *Westerman v. Mims*, 227 S. W., 178, the Supreme Court of this State refused to mandamus the Secretary of State to certify the name of a candidate nominated as an independent candidate for district judge, even though Articles 3164-3166, R. C. S., 1911, had been complied with, it appearing, however, that the nominated candidate was ineligible under the provisions of the general laws. The court in deciding the case, among other things, said:

"It is not the law that the writ of mandamus must be granted in every case upon a showing by relators that Articles 3164, 3165 and 3166 of the Revised Statutes have been complied with. If the court were under any such compulsion, then the writ would have to be awarded, though the candidate named were confessedly ineligible to hold the designated office. It is elementary that a mandamus will not be issued to compel the doing of that which the law forbids, and Chapter 13 of the General Laws of the Thirty-sixth Legislature, p. 17, expressly forbids the placing of the name of an ineligible person on the ballot at a primary or general election. Manifestly one who seeks relief through this extraordinary proceeding must show himself entitled thereto under all applicable law, no matter where embodied."

In the case of *People v. Power*, 219 Ill., 76 N. E., 42, the Supreme Court of Illinois held that mandamus would not lie to compel the Secretary of State to issue a certificate of incorporation under a name, the use of which could be enjoined by an existing company which had established its business under that name. The theory upon which the court refused the writ was that the "mandamus is not granted as a matter of absolute right, and that where it can be seen that it cannot accomplish any good purpose or that it will fail to have a beneficial effect it will be denied"; that an injunction would lie against the company if chartered under the proposed name to prevent it from using the name so similar to that of another company, and that therefore the company could not show a right to be incorporated under that name and hence mandamus would not be granted against the Secretary of State. The court used the following language:

"It being true, then, that the old company would be entitled to file a bill of chancery to enjoin the new corporation, proposed to be organized, from doing business under the same name as the old company, the writ of mandamus will not issue to compel the Secretary of State to issue a certificate of organization to the new company. The writ of mandamus will not be issued, if its issuance would fail to accomplish a good purpose or to have a beneficial effect."

In *People vs. State Board of Canvassers*, 129 N. Y., 360, 29 N. E., 345, 14 L. R. A., 646, it was held that one who is by the Constitution rendered ineligible to hold an office will not be granted a writ of mandamus to compel the canvassing board to issue him a certificate of election, although it was the plain ministerial duty of said board to do so. The court discusses the matter at length, citing many authorities, and we quote from the opinion as follows:

"So we come to the important question underlying this case—ought the court to grant a mandamus to compel the issuing of a certificate of election to one who has no right under the Constitution to the office? Can the relator come into a court of law and ask its aid in his violation of the Constitution and his proposed intrusion into the office of Senator? Suppose he came into court a confessed alien or non-resident of the State; would the court look merely at the duty of the State canvassers under the law, stretch out his strong arm to help him? Well-established principles of law and a strong current of authority require those questions to be answered in the negative.

A party can demand a mandamus only to secure or protect a clear legal right, never to accomplish a wrong. In High's Extraordinary Legal Remedies, Section 40, it is said: 'The writ of mandamus is never granted for the purpose of compelling the performance of an unlawful act, or of aiding in carrying out an unlawful proceeding'; and in Section 11, 'It is a fundamental principle of the law of mandamus that the writ will never be granted in cases where, if issued, it would prove unavailing'; and in Section 6: 'It is important that a person seeking the aid of a mandamus for the enforcement of his rights should come into court with clean hands.' I do not attribute to the relator any actual wrong motive or intent in anything he has heretofore done. I simply mean to characterize his acts as they are measured by the Constitution and the laws. In *Peters vs. State Board of Canvassers*, 17 Kan., 365, it was held that a mandamus would not be issued against the Board of State Canvassers to compel it to canvass the votes and to issue to the relator a certificate of election where he had been elected a judge at a time when no election could properly be held. See also *Rose vs. Knox County Commissioners*, 50 Mo., 243; *Sheburne vs. Horn*, 45 Mich., 160, and *State vs. Whittemore*, 11 Nev., 175. In *State vs. Albin*, 44 Mo., 346, an election for judge was held, which was not preceded by a registration of voters, as required by law; and it was held that the election was invalid, and that the court would not by mandamus compel the county court to issue a commission to a judge who claimed to be elected although the functions of the county court were purely ministerial. The court said: 'This court will not issue a peremptory writ of mandamus unless the relator shows that he has a good title or a perfect right to the remedy he demands. He can derive no right from an illegal or invalid election.' In *State vs. Stevens*, 23 Kan., 456, it appeared that at an election held in the County of Harper for county officer and for the location of the county seat the returns made to the canvassing board showed a vote of 2,947, while there were in fact only about 800 legal voters in the county. An application was made for a mandamus to compel the board to canvass these returns and declare the result, and it was held that, notwithstanding the fact that the duties of the board were mainly ministerial, and that it was not charged with the duty of inquiring into the reception of illegal or the rejection of legal votes or fraudulent practices at the election, the court would, in the exercise of a sound discretion, not even apparently sanction so gross an outrage on the purity of the ballot box by issuing a mandamus to compel, in the name of a technical compliance with duty, the canvass of the returns under such circumstances. In *State vs. Newman*, 91 Mo., 445, 8 West Rep., 727, the relator was a candidate for mayor of Pierce City at the April election of 1886, and the respondents were the aldermen of that city. An ordinance of the city made it the duty of the aldermen, on a designated day after each election, to canvass the returns, to determine who had been elected to the various offices, and to direct the clerk to issue certificates of election to the persons declared elected. In that case the aldermen determined that the relator had received the highest number of votes, but declined to direct the clerk to issue a certificate of election to him, and he sought by the writ of mandamus to compel him to do so. The law declared that no person should be mayor of a city of the fourth class unless he was an inhabitant of the city for one year next before his election. On the pleadings it was admitted that the relator did not possess that qualification, and the court said: 'A peremptory writ of mandamus will not be issued unless the relator shows a clear right to the remedy which he asks. The election of a person to an office who does not possess the requisite qualifications, gives him no right to hold the office. As, by reason of his disqualifications, the relator was not entitled to hold the office, surely he has no right, at the hand of the court, to be armed with a certificate of election—evidence of title to that to which he has no right.' And the writ of mandamus was denied.

'Inspectors of elections are mere ministerial officers, and, if an applicant to be registered makes the proper statement and the oath or affirmation, his name must be added to the list of voters, and the inspectors have no discretion or right to refuse to add it. The law makes it their duty to do so; and yet, if a person who has been refused should apply to the court for a mandamus against the inspectors, and it should there appear that he had no right to be registered,

and was not in fact a qualified voter, would the court compel the inspectors to register him, and thus place him in a position where he might cast an illegal vote? Would it listen to his claim that he ought to be registered, and thus clothed with the apparent right to vote, so that he could present his vote on the day of election, and thus test his right to vote. So, when a voter at an election offers his vote to the inspectors, and if challenged, takes the preliminary oath, and, after answering fully the questions touching his right to vote, offers to take the general oath, it is the absolute duty of the inspectors to receive his vote. *People vs. Pease*, 27 N. Y., 45; *Gootcheus vs. Matthewson*, 61 N. Y., 420; *People vs. Bell*, 119 N. Y., 175. If, in such a case, the inspectors refused to take his vote, and he is a legal voter, he can compel them to take it by mandamus. But suppose, upon his application for a mandamus, it should appear, upon facts not disputed, that he was not a qualified voter, would the court still compel the inspectors to take his vote, and thus permit the voter to commit a crime, for the sole reason that the law made it their duty to take the vote?

"See also *Hodges vs. Dawdy*, 149 S. W., 655.

"*State vs. Shippers, etc., Co.*, 95 Texas, 603."

The proposition seems perfectly sound and reasonable that mandamus will not issue to compel the Secretary of State to grant a charter in furtherance of wrong or in violation of law, even where there is a formal compliance with the law in so far as the stated purpose is concerned; and hence, we respectfully advise that the Secretary of State would be authorized and it would be his duty to refuse to file a charter for the purpose mentioned, if he has knowledge of the unlawful intention of the incorporators, and that it would be his duty to make inquiry into these facts and refuse to file a charter under such circumstances.

Similar advice was given the Secretary of State in the opinion above referred to of date April 23, 1921, in connection with the chartering of companies under Section 56 of Article 1121 of the R. C. S., 1911. We quote the following excerpt from said opinion:

"You are therefore advised that any corporation organized for the purpose of or which may have the probable effect of lessening the competition in any line of business when formed for that purpose, would constitute a violation of the anti-trust laws, and would itself be void, and you would be within your rights in rejecting any such charter when offered to you to be filed; it being a question of fact as to what is proposed to be done and accomplished by the corporation, it would be your duty to ascertain as fully as you can just what is to be done and accomplished by the corporation, and if as stated, it is formed for the purpose of destroying any element of competition in the sale of any commodity, you should decline to file the charter. You should examine carefully every charter offered to see whether or not it is being formed for the purpose of or as a convenient means or vehicle through which the anti-trust laws could be violated, and when convinced that it is organized for such purpose, you should decline to file the charter."

IV.

The question numbered IV above is also answered in the negative. If a corporation cannot be chartered whose purpose is to purchase and sell at retail intoxicating liquors only, it necessarily follows that a holding company such as is mentioned could not be chartered, and the Secretary of State would be authorized and it would be his duty to refuse to file the charter of such proposed corporation.

V.

The last question is whether the ruling of Federal authorities relative to the quantity of beer or other intoxicants that may be prescribed

affects one way or the other our State laws on this subject or controls in any way in the enforcement of our State Liquor Laws.

We answer that the provisions of our Dean Law relative to prescriptions and the amount of intoxicating liquor that may be prescribed govern and control in this State, and this without regard to what the provisions of the Federal Statutes may be on this subject and irrespective of the rulings of Federal authorities under Federal laws. We say this without any intention to cast any reflection upon anyone who has made a ruling under Federal laws and without expressing any opinion as to the correctness or incorrectness of any such ruling. There was evidently no intention on the part of Federal authorities to construe State laws. What we do hold is that our Dean Law governs with respect to the sale, etc., of intoxicating liquors in this State, and the fact that there may be different laws on this same subject passed by Congress does not affect the validity of our State laws.

The Eighteenth Amendment to the Constitution of the United States reads as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquor within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

By this amendment, Congress and the several States are granted concurrent power to enforce this article by appropriate legislation. By this it was not intended that the State laws must conform to the United States laws. So long as the State laws are in furtherance of prohibition of the liquor traffic, they will be upheld, in so far as this amendment is concerned. There is no inconsistency in the State possessing this power and exercising same contemporaneously with the exercise of it by the Federal Government. The great object in adopting the Eighteenth Amendment was the prohibition of the liquor traffic, and while neither Congress nor a State legislature would have any authority whatever to legalize the sale of liquors that are in fact intoxicating (as any laws having this effect would conflict with the Eighteenth Amendment), still either has authority to use its own method of enforcement and to pass laws to that end. Our Court of Criminal Appeals has so held in the recent case of *Ex parte Gilmore*, 228 S. W., 199, and the opinion, which was prepared by Presiding Judge Morrow, is so complete and well considered as to leave little or nothing to be said upon this subject. The Supreme Court of the United States, so far as we are advised, has not held to the contrary of this decision of our Court of Criminal Appeals, and until it does so we are justified in following it. It is not believed by the writer that the United States Supreme Court will hold against this decision. We quote the following from the court's opinion in *Ex parte Gilmore*:

"The framers of the amendment, having selected language specifically conferring upon the States concurrent power to enforce the prohibition by 'appropriate legislation,' in our opinion did not intend that the State's legislation should be identical with that of Congress, nor that it should be confined to the enforcement of the laws of Congress."

You are, therefore, advised that the provisions of the Dean Law with

respect to prescriptions and the amount of liquor which may be prescribed is the law in this State.

The Dean Law makes it unlawful for a physician to prescribe more than a pint of intoxicating liquor to any person at a time. Section 14 of the Act reads as follows:

"Sec. 14. That a physician who issues prescriptions must be in active practice, in good standing with his profession, not addicted to the use of any narcotic, drug, and have a permit as provided herein for issuing prescriptions. Such physician, before issuing any prescriptions, must make a careful personal, physical examination of the person to whom the alcohol is prescribed, and in no case issue such prescription to any person whom he has reason to believe will use alcohol for beverage purposes, nor prescribe *more than a pint of alcohol to any person at a time*. Nor shall such prescriptions be filled at any *pharmacy* or drug store, in which the physician has any financial interest. For any shift or device by which intoxicating liquors may be improperly prescribed, or for any violation of this section, in addition to the penalty prescribed, for the first offense under this act, the Comptroller of Public Accounts may suspend the permit of such physician *to issue prescriptions for alcohol* for a period of one year, and for the second offense, in addition to the punishment prescribed herein, the permit of such physician shall be deemed revoked forthwith. The revocation of such permit, if revoked by the court, shall be sent to the authority granting the permit and shall act as a ban to the granting of any further permit to such physician to issue prescriptions."

As hereinbefore stated, this Department rules that the word "alcohol" as here used means any intoxicating liquor and would include beer.

It is, therefore, unlawful for a physician to prescribe more than a pint of beer or other intoxicating liquor or liquor containing more than one per cent of alcohol to any person at a time, and by beer is meant beer containing more than one per cent of alcohol by volume or beer which is in fact intoxicating.

Very truly yours,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2364, Bk. 56, P. 282.

INTOXICATING LIQUOR—COMMON CARRIERS—TRANSPORTATION OF
SAMPLES FOR THE PURPOSE OF ANALYSIS.

1. An express company or other common carrier in this State would not violate the law in transporting samples of food or drugs at the instance of the State Health Officer procured by the latter in the performance of his duties under the Food and Drug Laws of this State even though the alcoholic content of such samples renders them intoxicating.

2. An express company or other common carrier in this State would not violate the law in transporting for the purpose of analysis samples of intoxicating liquors shipped by a prosecuting official whose duty it is to bring criminal actions for violations of the liquor prohibition laws of this State.

AUSTIN, TEXAS, June 29, 1921.

Mr. E. H. Golaz, Chemist in Charge, Food and Drug Bureau, State Board of Health, Capitol.

DEAR SIR: Your inquiry of the 28th instant involves two questions, to-wit:

1. Whether an express company or a common carrier has lawful authority to transport samples procured by the State Health Officer for the purpose of analysis under the Food and Drug Laws of this State, when such samples by reason of alcoholic content are intoxicating.

2. Whether an express company or other common carrier is inhibited by law from transporting samples of intoxicating liquor shipped by a prosecuting official whose duty it is to bring prosecutions for violations of the prohibition laws of this State, for the purpose of having such samples analyzed to ascertain the alcoholic content thereof.

Under its police power the State of Texas has enacted certain regulatory measures with a view of preventing the sale of impure, unwholesome or adulterated food and drugs. As a necessary incident and an appropriate means to this end, the State Health Officer (formerly the Dairy and Food Commissioner) is clothed with authority to take samples and analyze the same to discover whether they are adulterated, misbranded, impure or unwholesome in violation of the law. After the enactment of these Food and Drug Laws, our Liquor Prohibition Laws were passed, also under the police power. So that we have two separate and distinct police regulations both of which it is made the duty of certain officers to enforce. Each was derived from the same source, to-wit: the police power of the State, and the enforcement of the one is enjoined upon the law enforcing officers no more forcibly or unequivocally than is the other. It will not be presumed lightly, therefore, that in the passage of the second police measure it was intended to repeal or cripple the first. Nowhere in the liquor prohibition laws is there any express repeal of the food and drug statutes, or any part thereof, and it is reasonable to suppose that there was no intention to repeal the same or any part thereof by implication since purpose and intent of the two are in nowise conflicting.

We hold, therefore, that the liquor statutes do not repeal the pure food and drug statutes in the particular inquired about. Since the latter make it the duty of the State Health Officer to take and analyze samples, the fact that the sample may contain alcohol sufficient to make the same intoxicating will not prevent the taking and analyzing of such samples, and the right to take and analyze includes the right to transport for the purpose of analysis. The State Health Officer having the right to transport these samples for such purpose, he would have the right to call upon an express company or other common carrier to transport the same for him, and the express company or other common carrier could lawfully transport such sample for such purpose. We must read this exception into the prohibition laws from the fact that the Legislature has made it the duty of the Health Officer to take and analyze samples of food and drugs in the enforcement of the law in no way conflicting in purpose and intent with the prohibition statutes and which has not been repealed. This holding in no way interferes with the purpose and intent of the prohibition statutes; that is, the inhibition of traffic in intoxicating liquors for beverage purposes.

The second inquiry is more simple, if possible, than the first. It is the duty, under the law, of certain officials to institute criminal actions for violations of the liquor prohibition laws. It is obviously impossible to perform this duty without knowing whether the liquor sold is intoxi-

cating liquor or not. A well recognized and necessary method of ascertaining this fact by chemical analysis. Being reasonably proper and necessary in order to perform a duty expressly imposed by law, it must be lawful. It would be a narrow interpretation, indeed, to hold that an officer in the performance of official duty has the right to analyze an article to ascertain its true nature and then say he is without authority to transport the same to a certain place where such analysis can be performed. We cannot presume that the Legislature intended to impose a duty and in the same breath make it unlawful to do things reasonably necessary in the performance of that duty. If it were to be held that a prosecuting official is without authority to transport or have transported samples of intoxicants for the purpose of analysis because the prohibition statutes inhibit the transportation of intoxicating liquors, it could with equal plausibility be said that he is without power or authority to have such intoxicants in his possession because the same laws make it unlawful to possess intoxicants. Such an absurdity was never intended.

You are, therefore, advised:

1. That an express company or other common carrier in this State would not violate the law in transporting samples of food or drugs at the instance of the State Health Officer procured by the latter in the performance of official duty under the Food and Drug Laws of this State, even though such samples may contain sufficient alcohol to render them intoxicating.

2. That an express company or other common carrier in this State would not violate the law in transporting samples of intoxicating liquors shipped for the purpose of analysis by a prosecuting official whose duty it is to bring criminal actions for violations of our State laws inhibiting the manufacture, sale, transportation, etc., of intoxicating liquors.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2409.

PROCEDURE AND FORMS IN CONNECTION WITH SEARCH AND SEIZURE
OF INTOXICATING LIQUOR—FORM OF INDICTMENT—IN-
JUNCTION, ETC.

AUSTIN, TEXAS, January 24, 1921.

Honorable W. K. Jones, County Attorney, Del Rio, Texas.

DEAR SIR: I have yours of the 9th inst., addressed to the Attorney General, reading as follows:

"Since the recent ruling of Federal Judge West in regard to requirements of search warrants, it will be much more difficult to make arrests under search warrants, or to search suspected places.

"I believe that we should make a greater effort to enforce the prohibition amendment to the Constitution than we have been doing, and to that end it is very important that we be supplied with proper complaints and search warrants. I do not believe that more than a reasonable belief is necessary in order to warrant the issue of the search warrant on complaint so framed, and therefore

suggest that your department prepare the necessary forms to be used. By 'we,' I mean State officials."

The writer has just prepared an outline of procedure for the seizure and destruction of intoxicating liquor under the laws of the State of Texas, together with the following forms:

1. Complaint before justice of the peace or county judge for warrant of search, seizure and arrest.
2. Warrant of search, seizure and arrest.
3. Return of officer executing said warrant.
4. Schedule of liquor and property seized.
5. Return of warrant not executed.
6. Order of magistrate after finding that there is sufficient evidence to hold intoxicating liquors, etc.
7. Petition in district court to abate the nuisance and destroy intoxicating liquors, containers, etc., and for injunction.
8. Judgment of the district court.
9. Writ of injunction.
10. Officer's return on writ of injunction.
11. Bond of person whose place is ordered closed for one year, etc.
12. Form of indictment.
13. Petition for injunction.

I enclose herewith one copy of each of these forms, which have the approval of this Department and which I trust will be of some service to you.

I note your remarks to the effect that in your opinion a greater effort should be made to enforce our prohibition laws. We agree with you in this, and beg to assure you that the prosecuting officials in the State will have the co-operation and assistance, so far as possible, of this Department along this line.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

The proper procedure for the search and seizure of intoxicating liquors, containers, utensils and instrumentalities possessed, etc., in violation of the State laws, has been worked out by the Attorney General's Department and forms prepared.

Under the Dean Law there is ample authority to search for, seize and destroy any intoxicating liquor possessed, sold, or to be sold or transported, or manufactured in violation of State law. A search warrant may issue in accordance as nearly as may be with Title 6 of the Code of Criminal Procedure of this State for the purpose of searching for, seizing and destroying such liquor, or any containers or instrumentalities for the manufacture or transportation, or used or to be used in the unlawful possession, sale, manufacture or transportation of intoxicating liquors. Warrants may issue for the search of any room, house, building, boat, structure or place, or any person, where there is probable cause to believe there is intoxicating liquor, etc., in violation of our State laws. No warrant, however, may be issued to search a private dwelling occupied as such unless some part of it is used as a store, shop, hotel or boarding house, or for some purpose other than a private residence, or unless affidavits of two credible per-

sons show that such residence is a place where intoxicating liquor is sold or manufactured in violation of the Dean Law.

The application for the issuance of and the execution of any such search warrant and all proceedings relative thereto shall conform as near as may be to the provisions of Title 6 of the Code of Criminal Procedure of this State except where otherwise provided by the Dean Law. In the event any such liquor or utensils, containers or instrumentalities referred to in the Dean Law are found the officer executing the warrant shall seize the same. The liquor and articles so seized shall not be taken from the custody of the officer by writ of replevin or other process, but shall be held by the officer to await the final judgment in the proceedings.

Upon proper search warrant being issued the officer will search the premises and if he finds therein the intoxicating liquors, etc., designated in the warrant, he seizes them and carries the same before the magistrate issuing the warrant. It seems that the officer executing the same shall within fifteen days make due return thereof to the county judge or justice of the peace issuing the same; and where seizure has been made thereunder he shall within five days after said seizure make said return, etc.

Thereupon, the magistrate will proceed "to try the questions arising upon the same and shall take testimony as in other examinations before him, and be governed by like rules." Article 379, C. C. P. If upon examination the magistrate finds that there is sufficient evidence to hold the intoxicating liquors, etc., he will issue his order commanding the officer to hold the liquors, containers, etc., to await the final judgment in the proceedings to dispose of same according to law. He also makes proper disposition of the person arrested, found to be in charge of the place and the liquors.

The district or county attorney or the Attorney General then has authority to file proceedings in the district court to declare the liquors, etc., a common nuisance and to have the same destroyed.

In the same proceeding the nuisance may be abated and perpetually enjoined and the intoxicating liquors, containers, utensils and instrumentalities used in the maintenance of such nuisance ordered by the court to be destroyed. The court shall also order that the place where said nuisance is kept or maintained be closed for one year or until the owner, lessee, tenant or occupant thereof shall file bond with sufficient sureties to be approved by the court making the order in the penal sum of one thousand dollars payable to the State of Texas, at Austin, Texas, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, stored, transported to or from or given away in violation of law. In all cases where any person has been convicted of a violation of the provisions of the Dean Law, or amendments thereto, for acts done in keeping or maintaining the nuisance defined in Section 33 thereof, and such conviction has been final, then a certified copy of such judgment of conviction shall be considered as prima facie evidence of the existence of such nuisance in any action to abate the same.

Those interested are respectfully referred to Title 6 of the Code of Criminal Procedure for further information as to procedure.

Forms have been prepared as will presently appear.

The form prepared is for search of any room, house, building, boat, structure or place. Of course, the form can be adapted to the search of an automobile or other vehicle and also to the search of a person unlawfully possessing, transporting, etc., intoxicating liquors.

In these forms, in view of the decision of the Supreme Court in *Dupree vs. State*, 102 Texas, 455, 119 S. W., 301, it will be noted that provision is made for the description as nearly as may be of the intoxicating liquor, etc. If no accurate description is known, the term "intoxicating liquors" and "property, containers, utensils and instrumentalities" may be used with the statement that a better description is unknown. If a proper description of the place is not available, or the person in charge or the owner of the liquor be unknown, such fact should be stated.

COMPLAINT FOR WARRANT OF SEARCH, SEIZURE AND ARREST.

The State of Texas,
County of.....

I solemnly swear that there is situated in said county and State a certain room, house, building, boat, structure or place (omit any words not applicable to the place to be searched) described as follows, to wit: (here describe the room, house, building, boat, structure or place as near as may be) which said room, house, building, boat, structure or place (as the case may be) I have good reason to believe and do believe one.....has charge of; that I have good reason to believe and do believe that there is in said room, house, building, boat, structure or place (as the case may be) kept, possessed, sold, manufactured, bartered and given away, or to be transported to, or transported from said room, house, building, boat, structure or place (as the case may be) intoxicating liquors in violation of law, of the following description, to wit: (here describe the intoxicating liquors as near as may be; if no better description is known, simply state "intoxicating liquors" and add "a better description of the same being to affiant unknown") and also certain property, containers, utensils and instrumentalities kept in and used in maintaining said room, house, building, boat, structure or place (as the case may be) in violation of law, of the following description, to wit: (here describe the property as near as may be; if no better description be known, simply state as above, and state "a better description of the same being to affiant unknown") and that the owner of said intoxicating liquors and property, containers, utensils and instrumentalities is..... (or if the owner is unknown so state) and I,....., do solemnly swear that I have good reason to believe, and do believe that the said..... (naming the person supposed to have charge of said place) on the.....day of....., A. D. 19...., in said county and State, did keep and was interested in keeping said above described premises, building, room, boat, or place to be used for the purpose of storing, manufacturing, selling, transporting, receiving and delivering, bartering and giving away intoxicating liquors in violation of law.

Wherefore, I ask that a warrant to search the above described place and seize said intoxicating liquors and said property, containers, utensils and instrumentalities kept in and used in maintaining such room, house, building, boat, structure or place (as the case may be) and to arrest the said.....be forthwith issued in accordance with the law in such cases provided.

.....
Affiant.

Sworn to and subscribed before me by.....on this the.....
day of....., A. D. 19.....

.....
Justice of the Peace (or County Judge).

Note.—If the warrant is to search a private dwelling the complaint must be

subscribed and sworn to by two credible persons, and must show that such residence is a place where intoxicating liquor is sold or manufactured in violation of the terms of the statute. No search warrant to search a private dwelling, occupied as such, can be issued in any other manner unless some part of it is used as a store, shop, hotel or boarding house, or for some purpose other than a private residence. See Sec. 35 of the Dean Law.

WARRANT OF SEARCH, SEIZURE AND ARREST.

The State of Texas.

To the Sheriff or any Constable of.....County, Said State, Greeting:

Whereas, complaint in writing under oath has been made before me by.....alleging he has good reason to believe and does believe that there is situated in said county and State a certain room, house, building, boat, structure or place (omit any words not applicable to the place to be searched) described as follows, towit: (here describe the room, house, building, boat, structure or place as near as may be), which said room, house, building, boat, structure or place (as the case may be) he has reason to believe and does believe one.....has charge of; that he has good reason to believe and does believe that there is in said room, house, building, boat, structure or place (as the case may be) kept, possessed, sold, manufactured, bartered and given away, or to be transported to, or transported from, said room, house, building, boat, structure or place (as the case may be) intoxicating liquors in violation of law, of the following description, towit: (here describe the intoxicating liquors as near as may be; if no better description is known, simply state "intoxicating liquors" and add "a better description of the same being to affiant unknown") and also certain property, containers, utensils and instrumentalities kept in and used in maintaining said room, house, building, boat, structure or place (as the case may be) in violation of law, of the following description, towit: (here describe the property as near as may be; if no better description be known, simply state as above, and state "a better description of the same being to affiant unknown") and that the owner of said intoxicating liquors and property, containers, utensils and instrumentalities is.....(or if the owner is unknown so state), and that he has good reason to believe and does believe that the said.....(naming the person supposed to have charge of said place), on the.....day of....., A. D. 19... in said county and State, did keep and was interested in keeping said above described premises, building, room, boat, or place to be used for the purpose of storing, manufacturing, selling, transporting, receiving and delivering, bartering and giving away intoxicating liquors in violation of law, and upon examination, a proper showing having been made, that there is probable cause for the issuance of the warrant of search, seizure and arrest as prayed for in said complaint.

You are therefore commanded to forthwith search the room, house, building, boat, structure or place (as the case may be) above named and described, and if you find there said intoxicating liquors, or said property, containers, utensils or instrumentalities, or any portion thereof, you will seize the same, and bring same before me at.....in said county, on the.....day of....., A. D. 19... (naming a time not later than five days from the date of the writ); and you will also arrest and bring before me at said place and time the said....., accused of keeping and being interested in keeping said above described premises, building, room, boat, structure and place to be used for the purpose of storing, manufacturing, selling, transporting, receiving and delivering, bartering and giving away intoxicating liquors in violation of law, on said date.

Herein fail not, and due return make hereof to me at the place and time above named.

Witness my signature on this the.....day of....., A. D. 19...

Justice of the Peace (or County Judge.)

RETURN OF OFFICER EXECUTING SEARCH AND SEIZURE WARRANT.

Came to hand on the same day issued, and executed on the....day of
....., A. D. 19..., by searching the place named and described therein,
and seizing and taking before the magistrate who issued the within warrant,
the following described intoxicating liquors and property, containers, utensils
and instrumentalities, towit: (here list and describe the same, article by arti-
cle, as near as may be), all of which I found at (here describe the room, house,
building, boat, structure or place (as near as may be) in charge of.....
(naming the person in whose charge it was found); and by arresting the within
named....., and taking him forthwith before.....,
the magistrate who issued the within warrant and before whom the said war-
rant is returnable, to be dealt with by said magistrate according to law.

(Official title of the officer executing the same.)

Note.—The statute provides that "The officer executing the search warrant
for the search of premises for intoxicating liquor shall, within fifteen days,
make due return thereof, to the county judge or the justice of the peace issuing
the same; and where a seizure has been made thereunder, he shall, within five
days after said seizure, make said return," etc. See Art. 368, C. C. P.

SCHEDULE OF LIQUOR AND PROPERTY SEIZED.

The State of Texas,
County of.....

I certify that the following is a true, correct, and full inventory and schedule
of the intoxicating liquors and property, containers, utensils and instrumentali-
ties seized by me on the....day of....., A. D. 19..., under and
by virtue of a search and seizure warrant issued by (naming the magistrate and
his official position properly) on the...day of....., A. D. 19...,
and which said warrant, together with said intoxicating liquors and property,
containers, utensils and instrumentalities, I have this day returned and deliver-
ed to said magistrate, towit: (here name each article and describe the same
as near as may be; also give estimated value).

Witness my signature on this the....day of....., A. D. 19...

(Signature and official title of officer who executed
the writ.)

RETURN, NOT EXECUTED.

Came to hand on the same day issued, and returned on this....day of
....., A. D. 19.., not executed because (here state the cause
of failure to execute the warrant and the diligence used by the officer to exe-
cute it).

(Signature and official title of officer making the
return.)

ORDER OF THE MAGISTRATE AFTER FINDING THAT THERE IS SUF-
FICIENT EVIDENCE TO HOLD THE INTOXICATING LIQUOR, ETC.

(Date of the order.)

The State of Texas
vs.
.....

The court having fully completed the examination of this cause and heard
and considered the evidence, finds that the evidence is sufficient to require the
sheriff (or constable, as the case may be) to hold the intoxicating liquors and
property, containers, utensils and instrumentalities kept in and used in main-
taining the place described in the complaint in this cause, to be disposed of
according to law in such case provided, and to require the said.....

(naming the person found to be in charge thereof) to answer before the District Court of.....County, Texas, for the offense of keeping, and being interested in keeping, the premises, building, room, boat or place described in the complaint herein to be used for the purpose of storing, manufacturing, selling, transporting, receiving and delivering, bartering and giving away intoxicating liquors in violation of law.

It is therefore ordered by the court that the sheriff (or constable) hold the said intoxicating liquors and property, containers, utensils and instrumentalities to await the final judgment in the proceedings to dispose of same according to law; and that said offense being a bailable one it is ordered by the court that the said defendant be admitted to bail in the sum of \$....., and appear and answer before said court for said offense; and that upon his giving bail bond for said amount in the manner and form required by law he be discharged from custody; but in default of giving such bail bond he shall be committed to the jail of.....County, Texas, and there safely kept to answer for said offense before said court.

PETITION IN DISTRICT COURT TO ABATE THE NUISANCE AND DESTROY INTOXICATING LIQUORS, CONTAINERS, ETC.

The State of Texas,
County of.....

In the District Court,County, Texas,.....Judicial District.
To the Honorable....., Judge of Said Court:

Now comes the State of Texas by.....District Attorney of the
.....Judicial District (or County Attorney of.....County, as the case may be), and complaining of....., defendant herein, for cause of action respectfully represents:

I.

That the defendant herein resides in.....County, Texas.

II.

That there was on the.....day of....., A. D. 19..., situated in said county and State a certain room, house, building, boat, structure or place (omit any words not applicable to the place involved) described as follows, to wit: (here describe the room, house, building, boat, structure or place as near as may be), which said room, house, building, boat, structure or place (as the case may be) on said date the defendant herein had charge of; that on said date there was with the knowledge and consent of the said defendant in said room, house, building, boat, structure or place (as the case may be) kept, possessed, sold, manufactured, bartered and given away or to be transported to or transported from said room, house, building, boat, structure or place (as the case may be) intoxicating liquors in violation of law of the following description, to wit: (here describe the intoxicating liquors as near as may be), and also certain property, containers, utensils and instrumentalities kept in and used in maintaining said room, house, building, boat, structure or place (as the case may be) in violation of law of the following description, to wit: (here describe the property, containers, etc., as near as may be), all constituting a common nuisance in violation of the laws of the State of Texas; and that the saidon said date maintained and assisted in maintaining said common nuisance in violation of law.

III.

That on the.....day of....., A. D. 19..., pursuant to sworn complaint and affidavit, lawfully made, a search and seizure warrant was issued by....., Justice of the Peace (or County Judge) of said county, commanding the sheriff or any constable of.....County, Texas, to forthwith search the above named and described room, house, building, boat, structure or place (as the case may be) and commanding such officer, if he should find at said place said intoxicating liquors or said property, containers,

utensils or instrumentalities, or any portion thereof, to seize the same and bring the same before said magistrate at.....in said county on the.....day of....., A. D. 19..., and to arrest and bring before said magistrate at said time and place the said....., who was alleged in said complaint to be on said date in charge of said above described place; and keeping and being interested in keeping said place to be used for the purpose of storing, manufacturing, selling, transporting, receiving and delivering, bartering and giving away intoxicating liquors in violation of law; that on the.....day of....., A. D. 19..., the Honorable....., Sheriff (or Constable) of said county, executed said warrant by searching the place named and described therein and seizing and taking before the magistrate who issued said warrant the above described intoxicating liquors and property, containers, utensils and instrumentalities, all of which he found at said place in charge of the said....., and by arresting the said..... and taking him forthwith before said magistrate to be dealt with by said magistrate according to law; that after an examination by said magistrate and a hearing and consideration of the evidence the said magistrate found that there was sufficient evidence to require the Sheriff (or Constable) to hold the intoxicating liquors and property, containers, utensils and instrumentalities above described to be disposed of according to law and to require the said..... (naming the person found to be in charge thereof) to answer before the..... Court of.....County, Texas, for the offense charged against him in said complaint; and said magistrate thereupon ordered that the Sheriff (or Constable) hold the said intoxicating liquors and property, containers, utensils and instrumentalities to await the final judgment in the proceedings to dispose of same according to law and that the said.....be admitted to bail in the sum of \$....., and appear and answer before the District Court for said offense.

IV.

That the said Sheriff (or Constable) is now in possession of the said intoxicating liquors and property, containers, utensils and instrumentalities, and that the same constitute a common nuisance in violation of the laws of the State of Texas. Said complaint and the warrant issued by said magistrate, together with the return of the officer executing the same, the schedule of the intoxicating liquors and other property seized, and the order of the magistrate commanding the officer to hold the same, all duly certified to, are hereto attached and made a part hereof.

V.

Wherefore, premises considered, plaintiff prays that the defendant be cited to appear and answer this petition and that upon final hearing the plaintiff have judgment, decreeing that said intoxicating liquors and property, containers, utensils and instrumentalities constitute a common nuisance and ordering the same abated, and that said intoxicating liquors, property, containers, utensils and instrumentalities be ordered by the court to be destroyed according to law; and plaintiff further prays that the court also order that the said place where said nuisance was kept and maintained be closed for one year or until the owner, lessee, tenant or occupant thereof shall file bond with sufficient sureties, to be approved by the court making the order, in the penal sum of one thousand dollars, payable to the State of Texas, at Austin, Texas, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, stored, transported to or from or given away at said place in violation of law; and also prays that this court grant and issue its writ of injunction perpetually enjoining the said....., defendant herein, from maintaining such nuisance at said place; and for costs and general and special relief.

.....
 District Attorney of the.....Judicial District of
 Texas (or County Attorney of.....County,
 Texas), Attorney for Plaintiff, the State of Texas.

JUDGMENT OF THE DISTRICT COURT.

No..... day of.....

The State of Texas, vs.

This day came on to be heard the above entitled cause, and came the parties by their attorneys, and thereupon a jury of good and lawful men were duly impaneled and sworn, and after hearing the evidence and argument of counsel, and after being instructed as to the law by the court, upon their oaths, returned the following verdict: (Here set out the verdict.)

It is therefore considered and ordered by the court that the intoxicating liquors and property, containers, utensils and instrumentalities described in said verdict constituted and now constitute a common nuisance in violation of law, and that said place was on said date in charge of....., and that the said..... maintained said common nuisance on said date; and it is ordered that said nuisance be abated and the officer who seized said intoxicating liquors, property, containers, utensils and instrumentalities will destroy the same in the manner most appropriate to the nature thereof, and a certified copy of this judgment will be his authority to comply herewith; and it is further ordered and decreed that said place where said nuisance was kept and maintained be closed for one year or until the owner, lessee, tenant or occupant thereof shall file bond with sufficient sureties to be approved by this court in the penal sum of one thousand dollars, payable to the State of Texas, at Austin, Texas, and conditioned that intoxicating liquor will not hereafter be manufactured, sold, bartered, stored, transported to or from or given away at said place in violation of law; and it is further ordered that the said..... is and shall be perpetually enjoined from maintaining such a nuisance at said place, and the clerk of this court is ordered to issue writ of injunction accordingly to be served on the said.....; and it is ordered that the plaintiff herein do have and recover of and from the defendant herein all costs, for which execution may issue.

Note.—If the case is tried before the court only, the judgment will read: "This day came the parties by their attorneys and submit the matter in controversy, as well of fact as of law, to the court, and the evidence and the argument of counsel having been heard and considered, it is considered and ordered by the court," etc.

WRIT OF INJUNCTION.

The State of Texas, vs.

No.....

In the District Court, County, Texas, Judicial District. To....., Greeting:

Whereas, the plaintiff in the above styled cause filed its petition alleging that on the.....day of....., A. D. 19..., there were situated at..... (here describe the place involved) the following described liquors, property, containers, utensils and instrumentalities, which place was alleged to be in your charge on said date, to wit: (here describe the intoxicating liquors, property, containers, utensils and instrumentalities, as described in the petition) which it was alleged in said petition constituted a common nuisance of violation of law, and that on said date you maintained said common nuisance in violation of law; and, whereas, the said intoxicating liquors, property, containers, utensils and instrumentalities are now in possession of....., the Sheriff of this county (or Constable, as the case may be), having been seized by him in accordance with law; and, whereas, after proper hearing and trial in this court the following judgment was on the.....day of....., A. D. 19..., entered in said cause. (Here copy the judgment.)

Now, therefore, this is to command that you desist and refrain from maintaining at said place such a nuisance, and desist and refrain from at said place keeping, possessing, selling, manufacturing, bartering or giving away, or to be transported to or transported from, said place, any intoxicating liquors or prop-

erty, containers, utensils and instrumentalities in connection therewith, in violation of law.

And you are ordered to close said place where said nuisance was so kept and maintained and keep the same closed for one year from the date of the above judgment or until you shall file with the District Court of.....County a bond with sufficient sureties to be approved by said court in the penal sum of one thousand dollars, payable to the State of Texas, at Austin, Texas, and conditioned that intoxicating liquor will not hereafter be manufactured, sold, bartered, stored, transported to or from or given away in violation of law at said place.

Given under my hand and seal of said court at office in....., this the.....day of....., A. D. 19...

(Seal.)

..... Clerk of the District Court of.....County.

OFFICER'S RETURN ON WRIT OF INJUNCTION.

Came to hand this the...day of....., A. D. 19..., at...o'clock ...m.; executed on the same day at.....o'clock...m., by delivering a true copy of this writ to the within named defendant.

..... Sheriff of.....County, Texas.

BOND.

The State of Texas, County of.....

Whereas, on the....day of.....the following judgment was entered in the District Court of.....County, Texas, Judicial District, in Cause No....., The State of Texas vs.: (Here copy the judgment in full.)

And, whereas, writ of injunction has issued in accordance with said judgment and has been served on the said....., defendant in said cause.

Now, therefore, we,, as principal, and.....and..... sureties, are held and firmly bound unto the State of Texas in the penal sum of one thousand dollars for the payment of which, at Austin, Texas, we hereby bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Signed with our hands and dated this the....day of.....A. D. 19...

The condition of the above obligation is such that, whereas, the above boundedhas been ordered and enjoined by the District Court of..... county in said cause to close the place described in the above quoted judgment and keep the same closed for one year from the date of said judgment, or until the said.....shall file with the District Court of.....county a bond with sufficient sureties to be approved by said court in the penal sum of one thousand dollars, payable to the State of Texas, at Austin, Texas, and conditioned that intoxicating liquor will not hereafter be manufactured, sold, bartered, stored, transported to or from or given away in violation of law at said place.

Now, therefore, if intoxicating liquor shall not hereafter be manufactured, sold, bartered or stored at said place or transported to or from, or given away, at said place, in violation of law, then this obligation shall be void; otherwise to remain in full force and effect.

In testimony whereof, witness our hands.

.....
.....
.....

FORM OF INDICTMENT.

In the Name and by the Authority of the State of Texas.

The grand jurors for the County of....., State aforesaid, duly selected, organized and impaneled as such at the.....term, A. D. 19... , of the District Court of said county, upon their oaths in and to said court present that....., on or about the.....day of....., A. D. 19... , and anterior to the presentment of this indictment, in the County of....., and State of Texas, did then and there unlawfully *manufacture* spirituous, vinous and malt liquors capable of producing intoxication.

And the grand jurors aforesaid upon their oaths aforesaid in and to said court, do further present that....., on or about the.....day of..... A. D. 19... , and anterior to the presentment of this indictment, in the County of....., and State of Texas, did then and there unlawfully *manufacture* spirituous, vinous and malt liquors containing in excess of one per cent of alcohol by volume.

And the grand jurors aforesaid, upon their oaths aforesaid in and to said court, do further present that....., on or about the.....day of....., A. D. 19... , and anterior to the presentment of this indictment, in the County of ... , and State of Texas, did then and there unlawfully *sell* to..... spirituous, vinous and malt liquors capable of producing intoxication.

And the grand jurors aforesaid, upon their oaths aforesaid in and to said court, do further present that....., on or about the.....day of....., A. D. 19... , and anterior to the presentment of this indictment, in the County of....., and State of Texas, did then and there unlawfully *sell* to..... spirituous, vinous and malt liquors containing in excess of one per cent of alcohol by volume.

And the grand jurors aforesaid, upon their oaths aforesaid in and to said court, do further present that....., on or about the.....day of....., A. D. 19... , and anterior to the presentment of this indictment, in the County of....., and State of Texas, did then and there unlawfully *possess for the purpose* of sale, spirituous, vinous and malt liquors capable of producing intoxication.

And the grand jurors aforesaid, upon their oaths aforesaid in and to said court, do further present that....., on or about the.....day of....., A. D. 19... , and anterior to the presentment of this indictment, in the County of....., and State of Texas, did then and there unlawfully *possess for the purpose* of sale, spirituous, vinous and malt liquors containing in excess of one per cent of alcohol by volume.

And the grand jurors aforesaid, upon their oaths aforesaid in and to said court, do further present that....., on or about the.....day of....., A. D. 19... , and anterior to the presentment of this indictment, in the County of....., and State of Texas, did then and there unlawfully *transport* spirituous, vinous and malt liquors capable of producing intoxication.

And the grand jurors aforesaid, upon their oaths aforesaid in and to said court, do further present that....., on or about the.....day of....., A. D. 19... , and anterior to the presentment of this indictment, in the County of....., and State of Texas, did then and there unlawfully *transport* spirituous, vinous and malt liquors containing in excess of one per cent of alcohol by volume.

And the grand jurors aforesaid, upon their oaths aforesaid in and to said court, do further present that....., on or about the.....day of....., A. D. 19... , and anterior to the presentment of this indictment, in the County of....., and State of Texas, did then and there unlawfully and knowingly keep and was interested in keeping certain premises, building, room, boat and place to be used for the purpose of storing, manufacturing, selling, transporting, receiving, delivering, bartering and giving away spirituous, vinous and malt liquors capable of producing intoxication, to-wit: (here describe the premises, etc., as nearly as may be), a better description of the same being to the grand jury unknown.

And the grand jurors aforesaid, upon their oaths aforesaid in and to said

court, do further present that....., on or about the.....day of, A. D. 19..., and anterior to the presentment of this indictment, in the County of....., and State of Texas, did then and there unlawfully and knowingly keep and was interested in keeping certain premises, building, room, boat and place to be used for the purpose of storing, manufacturing, selling, transporting, receiving, delivering, bartering and giving away spirituous, vinous and malt liquors containing in excess of one per cent of alcohol by volume. towit: (here describe the premises, etc., as nearly as may be) a better description of the same being to the grand jury unknown.

Against the peace and dignity of the State.

.....
Foreman of the Grand Jury.

Note.—In the last two counts of the indictment the words “premises, building, room, boat and place” are used. The prosecutor may not find it necessary to use all these words, but only such as the facts justify. Likewise, the words “storing, manufacturing, selling, transporting, receiving, delivering, bartering and giving away” may not all be needed under particular facts. But in each of these instances if all the quoted words are used probably no harm will result. Better allege too much than too little.

No attempt has been made to include in this indictment all the offenses under our liquor statute; just the principal ones to serve as a model to go by. The different offenses are included as different counts in the same indictment. Omit those counts not applicable to the facts.

PETITION TO ENJOIN THE SALE, ETC., OF INTOXICATING LIQUORS.

The State of Texas,
County of.....

In the District Court of.....County, Texas, Judicial District.
To the Honorable....., Judge of..... Judicial District of Texas:

Comes now the State of Texas, plaintiff herein, represented by....., District Attorney of said Judicial District (or County Attorney of..... County, Texas), complaining of....., defendant, and respectfully represents and alleges as follows:

I.

That the defendant,, resides in..... County, Texas.

II.

That the defendant, the said....., on or prior to the.....day of, A. D. 19..., at..... (here describe the room, house, building, boat, structure or place as nearly as may be), in..... County, in the State of Texas, kept at said place and sold to..... and divers other persons, spirituous, vinous and malt liquors capable of producing intoxication (or containing in excess of one per cent of alcohol by volume) in violation of the laws of the State of Texas.

III.

That the said defendant will continue to unlawfully keep intoxicating liquors at said place and unlawfully sell the same and will have transported to and receive at said place intoxicating liquors in violation of law, unless restrained by your Honor's most gracious writ of injunction.

IV.

Wherefore, plaintiff prays for the immediate granting and issuing of a temporary writ of injunction restraining and enjoining said defendant and his agents, servants and employes from unlawfully selling any spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, and any such liquors containing in excess of one per cent of alcohol by volume anywhere in the State of Texas, and from having transported or delivered to him unlawfully, and from unlawfully receiving from any person or common or other carrier, and

from bringing into said place of business any intoxicating liquor in violation of the law; and that upon final hearing such injunction be made perpetual; and that the State of Texas do have and recover of and from the said defendant all costs of suit; and for such other relief, general and special, legal and equitable, to which plaintiff may be entitled in the premises.

.....
District Attorney of.....Judicial District
of the State of Texas (or County Attorney
of.....County, Texas).

In chambers,day of....., A. D. 19...

On showing made plaintiff's application for temporary injunction granted as prayed for, and the clerk of this court is hereby directed to forthwith issue a temporary injunction, enjoining and restraining the defendant herein, as prayed for, until the further orders of this court herein made and entered.

.....
District Judge of.....Judicial District of Texas.

Note.—The form immediately preceding is only a general form for petition for injunction, to be adapted to any violation of the State liquor laws. Any section of the Dean Law may be enforced by injunction. See Sec. 38.

MISCELLANEOUS SUBJECTS

Op. No. 2311, Bk. 55, P. 264.

EIGHT HOUR LAW—CONVICT GUARDS.

Chapter 68, page 127, General Laws, Regular Session, Thirty-third Legislature, approved March 31, 1913, commonly known as the Eight-hour Law, does not apply to convict guards.

Chapter 68, page 127, General Laws, Regular Session, Thirty-third Legislature.

Articles 5246e, 5246f, 5246g, Vernon Sayles' Texas Civil Statutes, 1914.

Articles 1451a, 1451b, 1451c, 1451d, Vernon's Criminal Statutes, 1916; same articles Complete Texas Statutes, 1920.

AUSTIN, TEXAS, March 7, 1921.

Senator Charles Murphy, Senate Chamber, Capitol.

DEAR SENATOR: Yours of the 13th instant, addressed to the Attorney General, has been referred to the writer for attention. You desire to know "Whether or not the Eight Hour Law extends to convict guards," and enclose a letter addressed to you by Mr. G. C. Baker, Jr., under date of March 1, 1921, presenting the same question and referring specifically to Chapter 68, page 127, General Laws, Regular Session, Thirty-third Legislature, which has been inserted as Article 5246e et seq. of Vernon's Sayles' Texas Civil Statutes of 1914.

The act referred to constitutes the present law of this State on this subject. Section 1 of this act reads as follows:

"Section 1. Eight hours shall constitute a day's work for all laborers, workmen or mechanics now employed or who may hereafter be employed by or on behalf of the State of Texas, or by or on behalf of any county, municipality, or political subdivision of the State, county or municipality in any one calendar day, where such employment, contract or work is for the purpose of constructing, repairing or improving buildings, bridges, roads, highways, streams, levees, or other work of a similar character, requiring the service of laborers, workmen or mechanics."

It will be noted that this act applies in specific terms to "laborers, workmen or mechanics" employed "for the purpose of constructing, repairing or improving buildings, bridges, roads, highways, streams, levees, or other work of a similar character, requiring the services of laborers, workmen or mechanics."

Without discussing it we take it as a matter of common knowledge that the contract of employment and the duties assigned to and devolving upon convict guards are those of guarding and caring for State convicts, enforcing certain prison rules and regulations, directing convicts in the performance of whatever labor or duties may be assigned to them, and the performance generally of such like services and duties as may devolve upon such guards under the law and the directions and regulations of the Board of Prison Commissioners and that none of their duties require them to engage in "constructing, repairing, or improving buildings, bridges, roads, highways, streams, levees or other work of a similar character." This being true, it follows that convict guards are not included in this act.

We are of the opinion, therefore, and you are so advised, that the act here referred to does not apply to those employed as convict guards and that there is no law in this State prohibiting convict guards from being required to continue as such for a longer period of time than eight hours in any one calendar day.

We note the provisions of Chapter 56, page 105, General Laws, Regular Session, Thirty-fourth Legislature, regulating the hours for the employment of women and it will be understood that the foregoing opinion is not to be taken as constituting any ruling by the Attorney General as to the provisions of that act.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2284, Bk. 55, P. 149.

WATER AND WATER RIGHTS—PERMIT FOR DIFFERENT OR ADDITIONAL
USE—BOARD OF WATER ENGINEERS—AUTHORITY AND PROCEDURE.

1. The Board of Water Engineers has not the express but has the implied power to receive and hear application for use of water different from or in addition to that specified in original permit.

2. In each case the procedure before and by the board should be the same as upon original application for original permit.

3. Chapter 88, page 211, General Laws passed by the Regular Session of the Thirty-fifth Legislature.

AUSTIN, TEXAS, February 10, 1921.

Board of Water Engineers, Austin, Texas.

GENTLEMEN: The Attorney General is in receipt of yours of the 17th ult., which is as follows:

"The Board of Water Engineers granted a permit to appropriate, by diversion, a certain quantity of water for irrigation and mining; the permittee now comes and seeks the right to use a portion of that certain quantity already granted for municipal use, but does not desire the right to increase his appropriation of the State's water.

"The board respectfully requests the opinion of your Department as to the procedure it should follow in this case. Should this application be treated as an original one, requiring advertisement, public hearing, etc. or has the board authority to include the right to divert for this additional purpose in the permit already granted, on the payment of the statutory fee for this use?"

Your inquiry relates to the matter of procedure only but it raises the greater question as to your power and authority to receive and hear at all, whether after notice or otherwise, an application for a change in the use of water from that specified in the original application and permit, or to a use in addition to that stated in the original application and permit. No such power is expressly vested by law in your board.

Without discussing the question here, however, we have reached the conclusion, although not without difficulty, that the exercise of this power by you is implied by the broad terms and purposes of the law, or is vested in you as an incident to the exercise of the powers vested by law in the board. We hold, therefore, that in our opinion,

you have the power to receive and hear an application of the nature stated by you, and to take appropriate action thereon.

We are of the opinion, however, that your procedure on such an application should be the same as in the case of an original application, which procedure, of course, you are familiar with. This procedure should be followed for the obvious reasons that a state of facts might be easily conceived by reason of which the grant of a permit for, the change of an existing one to, a use different from, or in addition to that specified in the application and permit, and the appropriation of such water to such different or additional use, might be regarded as conflicting with the existing water rights, or as impairing existing water rights, or vested riparian rights.

You are advised, therefore, that in our opinion the application referred to by you should be treated as an original one, requiring advertisement, public hearing, etc., in like manner as if it were an original application for an original permit.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2378, Bk. 56, P. 552.

BOARD OF WATER ENGINEERS—RATE FIXED BY—APPEAL FROM—SUPERSEDEAS BONDS.

Section 62 of Chapter 88, General Laws, Regular Session, Thirty-fifth Legislature, does not authorize an appeal to the courts from a decision of the Board of Water Engineers in a proceeding had by it under Section 61a of Chapter 55, General Laws, Fourth Called Session, Thirty-fifth Legislature, and the right to execute a supersedeas bond, and the authority and duty of the Board of Water Engineers to fix the amount of such bond, as provided by said Section 62, does not exist in such a case.

AUSTIN, TEXAS, September 8, 1921.

Board of Water Engineers, Austin, Texas.

GENTLEMEN: The Attorney General is in receipt of yours of the 3rd instant, which is as follows:

"On January 3, 1921, the American Rio Grande Land and Irrigation Company, a corporation organized and existing under the laws of Texas for irrigation purposes, and owning and operating an irrigation system, located in Hidalgo and Cameron Counties, Texas, filed its petition in due form before this board under and in pursuance of the provisions of Article 5002-hh, also known as Section 61a of Chapter 55, pages 129-30, Acts Fourth Called Session, Thirty-fifth Legislature, invoking the powers of this board, and requesting it to fix reasonable rates for the furnishing of water by said company by means of its said irrigation system. On January 6, 1921, the land owners and farmers under said irrigation system, in due form, filed their application to this board joining in said request of said company, and in its application for the fixing of rates as above stated.

"The proceeding is entitled on the docket of the board 'American Rio Grande Land and Irrigation Company vs. F. G. Karle et al.' This board took jurisdiction of said applications, and proceeded to give notice and hold hearing thereon, and in due course on towit, July 30, 1921, duly made, entered and issued its final order fixing reasonable rates in said proceeding for said purposes.

"The respondents, F. G. Karle et al., had notified this board of their dissatisfaction with the said rates and determinations, as thus made by this board, and have notified the board of their intention to institute a suit or proceeding in a

district court of Travis County, Texas, to review same, and in this connection had made formal application to this board to fix and approve a supersedeas bond to have the effect to suspend the rates and orders of said board pending the final disposition of said suit or proceeding to be had in the district court of Travis County, Texas.

"This board now respectfully requests an opinion from your Department, advising this board whether, under the law this board has the power and authority, and is under the duty, to comply with such request of respondents to fix and approve a supersedeas bond."

The Board of Water Engineers of this State is not expressly created by the Constitution, nor does the Constitution prescribe its power, authority or jurisdiction, but it is purely a creature of the statutes, and we must look to the statutes for the extent and limit of its jurisdiction and powers, and for the rules prescribing and governing its procedure, and the effect to be given to its findings and decisions.

The answer to the question here presented depends upon whether or not Section 62 of Chapter 88, of the General Laws passed by the Regular Session of the Thirty-fifth Legislature, authorizes an appeal to the courts from a decision of the Board of Water Engineers in a proceeding had by it under Section 61a of Chapter 55 of the General Laws passed by the Fourth Called Session of the Thirty-fifth Legislature.

If such an appeal is so authorized, then the party so appealing would have the right to execute a supersedeas bond and it would be the duty of the Board of Water Engineers to fix the amount of same. If such an appeal is not so authorized, then the right to execute a supersedeas bond, and the authority and duty of the Board of Water Engineers to fix the amount of same does not exist. Said Sections 62 and 61a read as follows:

"Section 61a. The said board shall have power and authority and it shall be its duty to fix reasonable rates for the furnishing of water for the purposes or any purposes mentioned in this chapter.

"Section 62. Appeal from such decision of the board may be taken within the time and in the manner as herein provided for other appeals from the decision of such board. The decision may be superseded by the filing of a supersedeas bond, in the same manner as now provided in other civil cases; provided that the board shall fix the amount of the bond necessary to stay the execution of any such order."

If said Section 61a be inserted between Sections 61 and 62 of said Chapter 88, and same be in this way read into said Chapter 88, it would seem that said Section 62 would authorize an appeal from a decision of the Board of Water Engineers in a proceeding had under said Section 61a, but the contrary seems clearly to have been held by our Court of Civil Appeals for the Fourth Supreme Judicial District sitting at San Antonio, in an opinion rendered May 12, 1920, in the case of Kohler et al. vs. United Irrigation Company, 222 S. W., 337. The facts in that case, and the issue involved, were substantially the same as the facts and issues here presented.

In that case, at the instance of certain water users, the Board of Water Engineers, in a proceeding had by it under said Section 61a, had determined what constituted a reasonable rate to be charged for water furnished and used for irrigation purposes. The water users

were dissatisfied with this rate and appealed from this decision of the Board of Water Engineers to the district court of Hidalgo County. A plea of abatement and motion to dismiss the appeal was made on the ground that the court was without jurisdiction, for the reason that the appeal should have been made to a district court of Travis County. This contention was sustained and a judgment of dismissal was entered. The water users appealed and the judgment of dismissal was affirmed.

With respect to said Chapter 55, after discussing said Section 62 and other pertinent provisions of said Chapter 88, and in passing upon the action of the trial court in dismissing the appeal, the Court of Civil Appeals, by Judge Moursund, said:

"This act specifically conferred the power and authority upon the Board of Water Engineers to fix reasonable rates, and provided that any person at interest may file a petition in a district court of Travis County against the board as defendants, setting forth the objections to the decision made or rule or rate promulgated by the board. In drawing the bill the language of Revised Statutes, 1911, Articles 6657, 6658, relating to attacks upon rates and rules of the Railroad Commission, was used in so far as it could be made applicable to the fixing of water rates, rules, etc. Under the terms of the act the burden is placed upon the plaintiff to show, by clear and satisfactory evidence, that the rates, regulations, or orders complained of are unreasonable and unjust to him. By inserting in the Act of 1917 (Chapter 88) the provisions of said act passed at the special session, at the places where by reason of section number they naturally belong, some doubt is created whether the provision for an appeal contained in Section 62 was made applicable to a decision establishing rates made under the provision inserted as Section 61a. However, it is inconceivable that the Legislature actually intended to make the right of appeal provided for in Section 62 apply to a decision under Section 61a, for if it did so a peculiar situation would be brought about. By appealing, instead of suing the board in the district court of Travis County, the provision concerning the burden of proof could be evaded. We have arrived at the conclusion, from a consideration of the several statutes, that the Legislature intended to make the rates and rules promulgated by the Board of Water Engineers conclusive unless set aside in an action brought in a district court of Travis County, and that the statutes can, and therefore must, be construed so as to effectuate such intention."

It has been suggested that the only issue in that case was the question of the right of appeal to the district court of Hidalgo County, and that the statement by the Court of Civil Appeals that "the Legislature intended to make the rates and rules promulgated by the Board of Water Commissioners conclusive, unless set aside in an action brought in a district court of Travis County, and that the statutes can, and therefore must, be construed so as to effectuate such intention" is dicta. We do not think so. The very theory upon which that case was dismissed by the district court was that "the appeal must be taken to the district court of Travis County." It is true that the Court of Civil Appeals holds that the rates and rules promulgated by the Board of Water Engineers are conclusive "unless set aside *in an action* brought in a district court of Travis County," while the plea was that an *appeal* should have been taken to the district court of Travis County, but this difference between the issue raised by the plea and the law as stated by the court, if in fact there is any difference, is not such a difference as would render this statement of the law by the court dicta. It was perfectly proper and clearly in point for the court to state the procedure provided by law

as one of the reasons for denying the right of appeal to the district court of Hidalgo County. The appeal was to the district court of Hidalgo County. It was insisted that appeal should have been made to the district court of Travis County. The court holds that neither contention was right and that the proper procedure should have been an action brought in the district court of Travis County.

We conclude, therefore, that said Section 62 does not authorize an appeal to the courts as such, in any legal sense, from a decision of the Board of Water Engineers in a proceeding had under said Section 61a. This being true, the right to execute a supersedeas bond, and the authority and duty of the Board of Water Engineers to fix the amount of such bond, as authorized and provided for by said Section 62, does not exist in such a case.

We are not passing upon the question as to whether or not an appeal to the courts from a decision of the Board of Water Engineers in a proper case is authorized. We are only holding that said Section 62 does not authorize such an appeal from a decision of the Board of Water Engineers in a proceeding had under said Section 61a, and that for this reason the right to execute a supersedeas bond and the authority and duty of the Board of Water Engineers to fix the amount of such bond, in such cases, does not exist.

We, therefore, answer your question in the negative.

Yours very truly,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2441, Bk. 57, P. 295.

REWARDS—BOARD OF PRISON COMMISSIONERS—ESCAPED CONVICTS.

A reward offered by the Board of Prison Commissioners, with the approval of the Governor, for the arrest and delivery of an escaped convict to the penitentiary authorities, or to any jail in the United States, after his being identified, may be paid by the Board of Prison Commissioners to the widow of a sheriff who, acting upon such offer, is killed by such convict in an attempt by such sheriff to apprehend such convict although such convict is killed by such sheriff in his effort to effect such apprehension.

AUSTIN, TEXAS, June 28, 1922.

Board of Prison Commissioners, Huntsville, Texas.

GENTLEMEN: The Attorney General is in receipt of yours of the 24th inst., making inquiry of him as to your authority to pay a reward offered by you in connection with an escaped convict. The facts disclosed by your letter and enclosures are as follows:

Nestor Galindo, convict No. 40961, was a convict in the penitentiary of this State on October 9, 1920, and on that day escaped from the Clemens State Farm. Thereafter the Board of Prison Commissioners offered a reward of \$25 "for the arrest and delivery of said escaped convict to the penitentiary authorities, or to any jail in the United States after his being identified." On June 3, 1922, a sheriff in the State of Mexico, Mr. George W. Batton, in attempting to effect the apprehension of this convict, not only killed the convict but was

himself killed by said convict. The convict was not delivered in any jail in the United States nor turned over to the prison authorities for the reason that he was killed in the effort being made to apprehend him.

Under these facts you desire to know whether or not you would be authorized to pay this reward to the surviving widow of this sheriff.

Article 6229 of the Revised Civil Statutes of 1911 authorizes the Board of Prison Commissioners, with the approval of the Governor, to offer such reward for the apprehension of an escaped prisoner as may be fixed by the Prison Commission, same to be paid as directed by the Prison Commission. The only question, therefore, presented by your inquiry is whether or not the fact that this convict was killed and was not actually delivered to the penitentiary authorities, nor actually placed in any jail in the United States for such delivery, would preclude you from paying this reward.

We do not find where this exact question has been passed upon either by this Department or by any of the courts of this State. The case of *Mosley vs. Stone*, 56 S. W., 965, decided by the Court of Appeals of Kentucky on May 16, 1900, involved a very similar state of facts. The facts of that case as disclosed by the opinion of the court show that the Governor of Kentucky offered a reward of \$150 for the arrest of Howard Clark, who was charged with murder and who at the time was a fugitive from justice, and directed that Clark should be delivered to the jailer of Jefferson County in that State. Mosley, acting upon such offer, came upon Clark while searching for him. Clark opened fire upon Mosley whereupon Mosley, in his necessary defense, fired and fatally wounded Clark. Clark lived for a time but before he could be delivered to the jailer of Jefferson County he died, and his remains were delivered to his family and buried near Louisville. The Auditor of Public Accounts refused to issue to Mosley a voucher for the reward offered and Mosley instituted mandamus proceedings to require the issuance of such voucher. The trial court refused the writ and Mosley appealed. The Court of Appeals held that the voucher should be issued and remanded the case to the trial court with instructions that this be done. In passing upon this question the Court of Appeals said:

"Clark's death prevented the appellant from delivering him to the jailer of Jefferson County. The question here is, was the reward earned? The appellant performed the hazardous duty of apprehending the fugitive, which placed him in a position where, had Clark remained alive, he could have delivered him to the jailer of Jefferson County. The object of rewards is to secure the apprehension of persons charged with public offenses, thus protecting society, so far as possible, from the criminal conduct of such fugitives. It is usually a laborious act to find, and a hazardous one to apprehend, a fugitive. Here the appellant had performed both, and, except for the death of Clark, he would have complied with the Governor's offer according to the letter of the statute. In our opinion, he complied substantially with the Governor's proclamation and the statute. Having done this, the reward offered has been earned."

If Sheriff Batton in his attempt to arrest this convict knew at that time that this reward had been offered by you and was acting upon it in an attempt to arrest this convict for the purpose of having him delivered to the penitentiary authorities or to a jail in the United States with the view of his delivery and return to our penitentiary

in accordance with your offer, and in such attempt killed such convict in the necessary defense of his own life against an attack then being made upon him by such convict, and if the person so killed by the sheriff was in fact the escaped convict for the apprehension of whom this reward was offered by you, it is our opinion that you would be authorized to pay this reward to the surviving widow of this sheriff.

Yours very truly,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2286, Bk. 55, P. 123.

CONTRACTS—BOARD OF MANAGERS.

The Board of Managers or Trustees of the Southwestern Insane Asylum had the express power to make a contract with the San Antonio Water Supply Company at any time during their term of office, and such contract is not contrary to public policy, and is binding upon all incoming boards of managers or trustees or their successors in office, although the time specified in the contract extends beyond their term of office.

AUSTIN, TEXAS, February 4, 1921.

Honorable S. B. Cowell, Chairman, State Board of Control, Capitol.

DEAR SIR: Your letter addressed to the Honorable W. A. Keeling, Acting Attorney General, together with an attached copy of a contract, setting forth an agreement made and entered into on the 9th day of December, A. D. 1915, by and between San Antonio Water Supply Company, party of the first part, and the Board of Managers of the Southwestern Insane Asylum, San Antonio, Texas, party of the second part, whereby said party of the first part agrees to furnish the said Asylum its water supply for a period of ten years beginning December 1, 1915. You further state in your letter that the water company is seeking to terminate this agreement upon the theory that the Board of Managers of the Southwestern Insane Asylum exceeded their authority when they executed a contract covering a period extending beyond their terms of office, hence the question to be passed upon by this Department is whether or not the Board of Managers of the Southwestern Insane Asylum had authority to make a contract extending beyond their terms of office.

The Board of Managers of the Southwestern Insane Asylum and other similar institutions of this State are the creatures of the Constitution and statutes of this State, and vested with and possessed of just such powers, rights and privileges as are conferred upon it by our constitutional and statutory provisions that pertain to the control, operation, management and government of such institutions, and such others as are clearly and necessarily implied to enable it to carry out and accomplish the objects and purposes of its creation.

It first becomes necessary to ascertain if the Board of Managers of the Southwestern Insane Asylum had the power and authority to make the contract in question.

Article 175, Revised Statutes, gives to the Board of Managers of

the Southwestern Insane Asylum the power and authority *to make all contracts*, and further, to make necessary arrangements for the erection of any buildings, or the making of any improvements upon the ground of the asylum. Article 117 specifically gives to the Board of Managers of the Southwestern Insane Asylum situated at San Antonio, Texas, the power and authority to sell, lease or dispose of water belonging to the State and flowing from any of the artesian wells on the ground of said asylum, for such price and upon such terms as said board may deem to the best interest of the State, provided that such board shall not make a contract to exceed ten years.

Article 2402a prohibits the Board of Managers of the Southwestern Insane Asylum from contracting or providing for the erection or repair of any building or any other improvement, or the purchase of equipment or supplies of any kind whatsoever for any such institution not authorized by specific legislation, 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.

Article 2402b provides "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."

Article 2402c provides "that all laws, and parts of laws in conflict herewith be, and the same are, in all things, repealed." Therefore, since this specific provision does not conflict with the provisions of Articles 2402a and 2402b, the provisions made in Article 175 are not repealed, but are still in force and effect.

Article 4042c fixes the tenure or term of office of the members of the Board of Managers of the Southwestern Insane Asylum at a term of six years, and it is now to be remembered that the contract made by the Board of Managers of the Southwestern Insane Asylum with the San Antonio Water Supply Company was for a period of ten years.

Article 4042c further provides that the members of the Board of Managers of the Southwestern Insane Asylum shall be divided into equal classes, numbered one, two and three; that such members shall hold their offices two, four and six years respectively from the time of their appointment, and one-third of the membership of such board shall hereafter be appointed at each regular session of the Legislature, who shall hold their offices for six years respectively.

Thus, it will be seen that every two years there would be one-third of the members of such board to retire, unless reappointed by the Governor, and the board would be in the nature of a continuing board. There is some conflict of authorities on the question as to boards of this kind, or other government agencies, making a contract for a longer period of time than their tenure of office; some cases holding that such contracts are invalid, the chief objection, if not the only one, being that in the absence of some affirmative showing as to some necessity or special circumstance indicating that the public good is subserved, further contracts are prejudicial to public interest and against public policy, and that they are therefore void.

There is nothing in this contract to indicate that the public good

is not subserved, and such contract, therefore, could not be prejudicial to the public interest, and, therefore, not against public policy, or, for that reason, void. This conclusion is supported by the following authorities:

Imperial Sugar Co. vs. Cabell, 179 S. W., 183.
Manley vs. Scott, 121 N. W., 628.

In the case of Imperial Sugar Company vs. Cabell, the Penitentiary Commissioners made a contract with the Imperial Sugar Company for a term of ten years, and the defendant, the State of Texas, urged that such contract was contrary to public policy, and void, and in this case, Chief Justice Pleasants, of the Court of Civil Appeals, held against the defendant, the State of Texas, and motion for rehearing was denied.

The Supreme Court of this State, in the case of Fristoe vs. Blum, 92 Texas, page 80, 45 S. W., 998, in discussing the rights of parties under contracts of this kind, used this language:

"It is well settled that so long as the State is engaged in making or enforcing laws or in the discharge of any other governmental function, it is to be regarded as a sovereign, and as prerogatives which do not appertain to the individual citizen, but when it becomes a suitor in its own courts, or a party to a contract with a citizen, the same law applies to it as under like conditions governs the contracts of an individual."

In the case of Manley vs. Scott, 121 N. W., 628, the Supreme Court of Minnesota held:

"Where the personnel of its membership changes, the corporation continues unchanged. It has power to contract. Its contracts are contracts of the board, and not of its members. An essential characteristic of the valid contract is that it is mutually binding upon the parties to it. A contract by a board of commissioners, the duration of which extends beyond the term of service of its then members, is not, therefore, invalid for that reason."

In keeping with and in support of the rule as laid down in the case of Fristoe vs. Blum, supra, that is to say, where a contract relates to the ordinary business affairs of a government, State, county or municipality which the governmental agency represents, as did the Board of Managers of the Southwestern Insane Asylum in this case, such governmental agency may lawfully exercise the power conferred in the same way and in its exercise, the governmental subdivision will be governed by the same rules which control a private individual or business corporation under like circumstances. Illinois Trust and Savings Bank vs. Arkansas City, 34 L. R. A., 518; Pike's Peak Power Co. vs. Colorado Springs, 44 C. C. A., 333; 105 Federal, page 1; McBean vs. Fresno, 31 L. R. A., 794; 53 Am. State Reporter, 191; Higgins vs. San Diego, 50 Pac., 670; Biddeford vs. Yates, 72 Atlantic, 335; Galv vs. Kalamazoo, 9th Am. Reporter, page 80; Westminster Water Co. vs. Westminster, 64 L. R. A., 630; Blood vs. Manchester Electric Light Co., 39 Atlantic, 335; Tanner vs. Auburn, 79 Pac., 494; Omaha Water Co. vs. Omaha, 12 L. R. A. (N. S.), 736.

In further amplification of the doctrine enunciated in the case of Fristoe vs. Blum, supra, the United States Circuit Court of Appeals, Eighth Circuit of Nebraska, in passing upon the right and legal au-

thority of the City of Omaha to make a contract for the supply of water for a period of 25 years, used this language:

"A city has two classes of powers, the one legislative or governmental, by virtue of which it controls its people as their sovereign; the other, proprietary or business, by means of which it acts and contracts for the private advantage of the inhabitants of the city and of the city itself. In the exercise of powers which are strictly governmental or legislative, the officers of a city are trustees for the public, and they make no grant or contract which will bind the municipality beyond the terms of their offices, because they may not lawfully circumscribe the legislative powers of their successors. But in the exercise of the business powers of a city, the municipality and its officers are controlled by no such rule, and they may lawfully exercise these powers in the same way, and in their exercise the city will be governed by the same rules which control a private individual or a business corporation under like circumstances. In contracting for the construction or purchase of waterworks to supply itself and its inhabitants with water, a city is not exercising its governmental or legislative, but is using its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city and for its denizens."

In the case of *Indianapolis vs. Indianapolis Gas, Light & Coal Co.*, 66 Ind., 396, it was held that the city council of Indianapolis had the legal authority to contract for a supply of gas or water for a stated period of time extending beyond the tenure of office of individual members of the council making the contract.

In the case of the *Pickett Publishing Company vs. the Board of Commissioners*, 92 Pac., 524, 13 L. R. A. (N. S.), 1115, the Supreme Court of Montana held that a board of county commissioners may, just before the expiration of the terms of its members, and after the election of their successors, exercise the statutory authority to enter into a contract for the county printing for a term of two years, although such contract would extend over almost the entire life of the succeeding board, that the public policy of the State is to be determined from legislative declaration, or in their absence, from judicial decisions. The grounds or reasons upon which the above cases were based are that a board of managers is a continuously existing board, and consequently where the personnel of its membership changes, the board continues unchanged except as to its personnel, and its contracts are the contracts of the board, and not of its members, so it follows that those contracts extending beyond the term of service of its then members are not invalid for that reason.

It has been said in numerous cases in discussing this principle of law that to hold such contracts invalid because part or all of the board ceases to exercise public functions would be to put such governmental agencies acting for some political subdivision at an enormous disadvantage in making the contracts which are essential to the safe, prudent and economical management of the affairs of a State, county or municipal government.

In this, as in many other instances of seeming or apparent conflict, a well-defined, positive or inflexible rule either way does not seem possible, nor is it even desirable, for much depends upon questions of duty, expediency, immediate or reasonable necessities, and other particular circumstances of the case. In some instances, and under some conditions and circumstances, the right of such boards of managers

to act prospectively should be upheld, whereas, under a different state of circumstances, it should be unhesitatingly denied.

In the instant case, however, from an extensive search and investigation of the authorities applicable to the contract involved herein, there is a vast majority of the authorities holding that the Board of Managers of the Southwestern Insane Asylum was authorized to make such contract, although it extends for a longer period of time than their term of office, and you are therefore advised that such contract is valid and is still in force and effect and cannot be repudiated by the San Antonio Water Supply Company until the expiration of time as provided for in such contract.

Very truly yours,

C. L. STONE,
Assistant Attorney General.

Op. No. 2292, Bk. 55, P. 182.

MUNICIPAL CORPORATIONS—NAVIGATION DISTRICTS—EXPENDITURE OF FUNDS TO SEND A LOBBY TO WASHINGTON.

Navigation districts are public instrumentalities usually denominated quasi-corporations or corporations sub modo, and as such have no powers other than those conferred upon them by constitution or law either expressly or by necessary implication.

The rule of strict construction will be applied against the exercise by such districts of any doubtful authority.

A navigation district, formed under Title 96 of the Revised Civil Statutes of 1911 as amended, has no authority to expend its funds raised by taxation, to defray a portion of the expense of a committee in going to Washington, D. C., and lobbying for additional appropriations by Congress for ship channel improvement.

AUSTIN, TEXAS, February 18, 1921.

Honorable H. L. Washburn, County Auditor, Houston, Texas.

DEAR SIR: This is in response to yours of the 2nd inst., requesting an opinion as to the authority to expend funds of a navigation district to pay the expenses of a committee to go to Washington and prevail upon Congress to make an additional appropriation to be used in the improvement of the Houston Ship Channel.

It seems from your communication and from a newspaper clipping which you enclose that the United States Congress has heretofore made an appropriation of Two Hundred and Fifty Thousand (\$250,000) Dollars to carry on new work on the ship channel. At a recent meeting participated in by representatives of the Navigation District and the City of Houston, it was decided to send a committee, composed of two citizens, the Mayor, the Engineer employed by the Navigation District and two members of the Navigation Commission, to Washington, D. C., to induce Congress to make an additional appropriation. Some time since, the Navigation District entered into an agreement with the City of Houston by which the engineer is employed jointly by the city and the Navigation Board to superintend the work of the Navigation District and to do certain work for the city, and under this agreement the city and the Navigation Board

share equally in the expenses thereof. You state that it is your understanding that the City of Houston will defray the expenses of the committee and the engineer to Washington and a bill is being prepared to be presented to the Navigation District for one-half of the expenses incident to such trip, including railroad fare, hotel bills and incidentals, and that it is insisted that the Navigation District has a right to defray such expenses.

The sole question is whether navigation district authorities are authorized to expend navigation district funds to pay half of the expenses of this committee.

Navigation districts of this character are created and organized under and by virtue of Title 96 of the Revised Civil Statutes as amended, and said title of the statutes with amendments will be found in Complete Texas Statutes of 1920, published by Vernon Law Book Company.

An examination of the statutes will disclose that navigation districts when established under the law have the authority to make improvements of rivers, bays, creeks, streams and canals running or flowing through such districts or any part thereof and may construct and maintain canal and waterways to permit navigation or in aid thereof, and to defray the expenses of such work and improvements may issue bonds in payment thereof as provided in the act. The method of paying for the bonds and the interest thereon is by taxation against the property of taxpaying voters of the district. For the operation and upkeep of such navigation district and the improvements constructed by such district an annual tax is also authorized to be levied on all property in the district. The statute provides that such navigation district may sue and be sued in the courts of this State in its own name by and through the navigation and canal commissioners provided for, and that all courts of this State shall take judicial notice of the establishment of all such districts. The affairs of the district, when established, are administered by and through "three navigation and canal commissioners." The statute authorizing the establishing of these districts contains also the following provisions:

"Provided, that said commissioners shall have full power and authority to co-operate and act with the government of the United States, or any officer or department thereof, in any and all matters pertaining to or relating to the construction and maintenance of said canals, and the improvement and navigation of all such navigable rivers, bays, creeks, streams, canals, and waterways, whether by survey, work or expenditure of money made or to be made either by said navigation and canal commissioners, or by said government of the United States, or any proper officer or department thereof, or by both; and, to the end that the said government of the United States may aid in all such matters, the said commissioners shall have authority to agree and consent to the said government of the United States entering upon and taking management and control of said work, in so far as it may be necessary or permissible under the laws of the United States, and the regulations and orders of any department thereof."

A navigation district such as the one herein involved, while it is not a municipal corporation strictly speaking, is generally treated under that head, and governmental agencies of this kind have been denominated by some authorities as "quasi corporations" or "corporations sub modo," 14 Corpus Juris, page 78. But whatever they

may be called they are creatures of the Legislature for particular purposes and have such rights, powers and functions and such only as are conferred upon them by law either expressly or by necessary implication. In this respect they are similar to municipal corporations, though more limited in authority and the acts of the Legislature creating or authorizing them to be created are subject to the same general rules of construction. Indeed, it is conceivable that instances might arise in which it would be proper to apply a more rigid rule of construction relative to this character of public corporations than in the case of cities or counties owing to the difference in their nature as public agencies.

In two or three States of the Union municipal corporations have been deemed to have certain inherent powers, but that rule does not obtain and has never obtained in this State.

Moreover, it has been held in this State that the inhabitants of a given territory have no inherent powers to create therein a municipal corporation and cannot incorporate independent of the Legislature. *Hoya vs. Dunson*, 71 Texas, 65, 70, 9 S. W., 103; *Buford vs. State*, 72 Texas, 182, 10 S. W., 401.

As was stated in *Blessing vs. Galveston*, 42 Texas, 641-658, "public or municipal corporations are creatures of the State, made for a specific purpose to exercise within a prescribed territory limited powers which are conferred upon them."

Or in the language of the court in *Harris County vs. Stewart*, 91 Texas, 133, 139, 41 S. W., 650, "all power exercised by a municipal corporation is derived from the State; a corporation has no other."

Grants of power to municipal corporations whether by charters or general statutes, are strictly construed. *Boyha vs. Carter*, 7 Texas Civil Appeals, 1, 26 S. W., 107; *Ex parte Grace*, 9 Texas Criminal Appeals, 381; *Cleburne vs. Gulf, etc., Railway*, 66 Texas, 467, 1 S. W., 342; *Pye vs. Peterson*, 45 Texas, 312.

A municipal power will be implied only when without its exercise express duty or authority would be nugatory. *Cleburne vs. Gulf, etc., Railway*, *supra*.

It will be presumed that the State has granted in the charter to a municipal corporation in clear and unmistakable terms all that it has designed to grant. *Pye vs. Peterson*, *supra*.

Any fair and reasonable doubt concerning the existence of the power of a municipal corporation is resolved by the courts against the corporation and the power is denied. *Brenham vs. Brenham Water Company*, 167 Texas, 542, 4 S. W., 143.

For a time there seems to have been some doubt by reason of certain intimations in opinions of the Supreme Court of the State as to whether the commissioners court had general authority over the county's business which would authorize it to do certain things not specifically conferred by the statutes. However, that question was settled in *Bland vs. Orr*, 90 Texas, 492, 39 S. W., 558, and since that time the commissioners court has been deemed to have no authority except such as is conferred upon it by law either expressly or impliedly. It has been held that the commissioners court has no authority to appropriate the county's money unless specifically authorized by the stat-

ute to do so, however much they may believe that the appropriation is for the general good of the county. *Jefferson County vs. Young*, 86 S. W., 985.

The foregoing discussion has been indulged in, in order to arrive at the nature of a navigation district and as to the rules of construction properly to be applied when arriving at the power and authority to expend the funds of such a governmental organization.

There is no good reason why the ordinary rules of construction in the case of municipal corporations should not apply to such districts, and in fact districts of this kind are more limited in scope and authority than the ordinary municipal corporation and they certainly have no authority except such as is conferred upon them by law.

We start out, therefore, with the proposition that the statute will be construed strictly against the exercise of any doubtful authority by the navigation district under consideration. If cities and counties have no general or inherent powers it could not reasonably be argued that a navigation district has any general authority to be exercised in the discretion of the officers of such district, even though the exercise of such authority is thought to be in the interest of the citizens, in the absence of specific legislative authority.

We find nothing in the Constitution or laws of this State conferring authority upon navigation districts to use their funds to send a lobbying committee to Washington.

It is true that the Legislature has conferred authority upon the navigation commissioners to co-operate with the Federal Government in the construction and maintenance of the work authorized to be carried on by said navigation district, and the commissioners have authority to agree that the Government of the United States may enter upon and take over the management and control of such work in so far as it may be necessary or permissible under the laws of the United States and the regulations and orders of any department thereof. But, in our opinion, this language is not sufficient to authorize the district to use its funds derived from taxation to induce Congress to grant additional authority to United States departments or officers, and that is what it would amount to if we should hold that the district has authority to send a lobby to Washington for the purpose mentioned in your communication. The co-operation referred to evidently contemplates that there are sufficient laws in effect to allow such co-operation and the language used does not mean that the district may clothe itself with the ordinary attributes of a citizen and exercise the privileges and immunities of a citizen or natural person. It may be true that it would be in the interest of the citizens of the district and of the vicinity, or even of the State, to induce Congress to allow additional appropriations and carry on this character of work, but it does not follow that the district may use its funds for that purpose. The district as such has no interests in the sense that citizens have interests. It is an artificial being with only limited powers and functions and has not the rights, privileges and immunities of a citizen.

Ever since the case of *Paul vs. Virginia* was decided it has been the settled rule under the decisions of the United States Supreme

Court that a corporation is not entitled to the privileges and immunities of the citizens of the several States under the Constitution of the United States.

It is doubtful whether the authority contended for under our Constitution be conferred upon a navigation district, though it is unnecessary to decide that point in this opinion in view of our holding that the Legislature has not attempted to confer such authority. It will not be presumed that the Legislature attempted to do so in the absence of clear language evidencing such an attempt, and we find no such clear language.

The weight of authority is against the power and authority of a municipal corporation to use public funds to employ persons to attend legislative sessions and influence legislation.

The Attorney General of Texas under a prior administration held that the commissioners court of Galveston County was without authority to appropriate money for the purpose of defraying or assisting in defraying expenses incurred by employing counsel to go before a congressional committee or departments at Washington on behalf of the people of Galveston County for the purpose of looking after and securing appropriations for deepening Galveston harbor, constructing sea walls and other improvements on or around Galveston island. See Opinions of Attorney General of Texas under administration of R. V. Davidson, 1906-1908, page 374.

We have examined the authorities in other jurisdictions and find that they are overwhelmingly to the effect that a municipal corporation is without authority to expend public funds for such a purpose. We here collate all that have come to our attention, including two or three that tend to hold to the contrary.

In the case of *Buchanan vs. Farmer* (1916), 122 Ark., 562, 184 S. W., 33, it was held that an attorney was not entitled to recover from a county his expenses incurred in lobbying a bill through the Legislature appropriating a sum of money to compensate the circuit judge of the Eighteenth Judicial Circuit. An act of the State of Arkansas provided that two-thirds of the salaries of the judge and prosecuting attorney should be paid by Garland County by order of the county court and the remaining one-third should be paid in the same manner as salaries of other judges and prosecuting attorneys. The Supreme Court of Arkansas had held that the salaries of circuit judges must be paid by the State and that the act creating the Eighteenth Judicial Circuit, in so far as it imposed the payment of two-thirds of the salary upon one county in the circuit, was invalid. Garland County entered into an agreement with an attorney employing him to recover back the amount paid to the circuit judge and agreed to pay him twenty-five per cent of the amount recovered. The judge refused to repay the salary he had received from the county, but agreed that should the Legislature make an appropriation covering such salary he would refund the same to the county. It was to induce the Legislature to make such appropriation that the attorney above mentioned was employed. The Supreme Court of Arkansas held that such agreement was void as the same contravened public policy.

In the case of *Farrel vs. Town of Derby* (1889), 58 Conn., 234, 7

L. R. A., 776, 20 Atl., 460, the Supreme Court of Errors of the State of Connecticut held that a town had power to employ counsel to oppose, before the general assembly, a petition for the division of its territory. The case arose upon a complaint by certain residents and taxpayers of the town of Derby praying for an injunction restraining the defendants from paying the charges of counsel and other expenses incurred in defending against a petition for the incorporation of the town of Ansonia. As above stated, the court held that the town had authority to employ such counsel, but the court based its decision upon the theory that the matter involved a dismemberment of the town in respect to territory and population and also a division of its corporate property, a reduction of its grand list, and an apportionment of its debts, liabilities and burdens as to highways, bridges, paupers and the like. The court remarked that in respect to these matters the town and every taxpayer in the town had an interest and they and everyone were duly cited to appear before the Legislature that they might be heard. The court also said that the right of self-defense applies to a town as well as to a natural person. The following language was used:

"Moreover, this resolution apportions the town deposit fund, the property of the old town, its debts and liabilities, and also its duties and burdens."

Henderson vs. City of Covington (1878), 14 Bush (Ky.), 312. This is a well considered case decided by the Court of Appeals of the State of Kentucky. The city council of the City of Covington passed a resolution appropriating \$186 to pay the expenses of persons sent by the council to Frankfort and Washington City to procure such legislation as might be necessary to authorize the city to build a bridge over the Ohio River. Residents and taxpayers of the city brought suit to enjoin the city officials from paying money in accordance with the resolution. The court below sustained a demurrer to the petition and the case was appealed to the Court of Appeals. The judgment was reversed, the court holding that the city was wholly without authority to appropriate money for such a purpose and in the course of its opinion observed that municipal corporations are agencies of sovereign, to whom certain powers are delegated because they can be safely confided to, and can be more intelligently and advantageously exercised by a local magistracy than by the sovereign authority in the State; but that as the powers delegated are sovereign powers the instrument by which they are delegated will always be strictly construed so that only such as were clearly intended will be regarded as having been granted. That such corporations can exercise no powers, but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of their purposes of their association. Particular attention is directed to the following language of the court:

"True, such an enterprise might be of very great advantage to the city by inviting population, enhancing the value of real estate, and in many other ways.

"The same might be said of the establishment of a line of ferryboats to ply between Covington and Cincinnati, of a line of packets to ply between Covington and New Orleans, Louisville or Pittsburgh, and of a railroad connecting with

any of the large cities on the Atlantic seaboard; and if the city council might lawfully appropriate the revenues of the city to procure legislation to authorize it to build a bridge over the Ohio because such a bridge would benefit the city, it might, upon the same ground, make appropriations to secure legislative authority to accomplish the other enterprises to which we have referred, and corporate expenditures might thus be increased indefinitely.

“With the question whether their corporate powers should be enlarged, the corporate authorities, as such, had no concern. Their duties and powers were ascertained and fixed by the Legislature which created the corporation to exercise the powers granted, and perform the duties imposed, and the city council has no authority to appropriate any of the revenues of the city except to enable it to discharge some duty imposed by law, or to accomplish some object for which the corporation was created. (*Stetson vs. Kempton*, 13 Mass., 271.) The members of the city council, in their capacity of citizens, had a right to apply to the legislature to enlarge the powers of the corporation; but it would be dangerous in the extreme to hold that they might employ the power already granted and the money belonging to the city to obtain, through persons sent by them to appear before the General Assembly, an increase of the powers of the corporation. If the authorities of cities and towns may, at their discretion, use the corporate revenue to procure such legislation as they may deem to the interest of their municipalities, the worst consequences may be apprehended. Such a practice would inevitably lead to abuses, and the history of municipal corporations in this country during the last quarter of a century gives ample warning of the danger of relaxing the well-established rule that municipal charters are to be strictly construed, and the powers of corporate authorities confined to such as are granted in express words, or are necessarily and fairly implied, or are essential to the objects of their creation.”

Westbrook vs. Deering (1874), 63 Maine, 231. In this case the Supreme Judicial Court of the State of Maine denied to a town the authority to incur expenses in opposing, before a legislative committee, a division of its territorial limits. The decision of the court was predicated upon the theory that such a use of its funds by the town would be *ultra vires*, and this in the face of the fact that the statute under consideration contained the very general phrase authorizing towns to incur “other necessary town charges.” The opinion in this case reviews rather fully the authorities and, among others, calls attention to the following:

Stetson vs. Kempton, 13 Mass., 272. The question in the latter case was whether the town of Fairhaven could raise money to resist the landing of British troops then lying in sight off the coast, threatening to land and lay waste the dwellings and other property of the inhabitants of the town. It would seem that the court went the limit in denying authority in a municipal corporation to use its funds beyond the purposes of its existence in holding in that case that municipal funds can not be used to repel an invasion that threatened the property of the citizens. The court founded its decision upon the theory that it is not a corporate duty to defend a town against an enemy but that on the other hand that is properly the business of the State.

Mead vs. Inhabitants of Acton (1885), 139 Mass., 341, 1 N. E., 413. The town of Acton voted to appoint a committee to appear before the Legislature and procure the passage of an act authorizing the town to pay bounties to each soldier or his legal representative who re-enlisted as a veteran in the Twenty-sixth Regiment of Massachusetts Volunteers under the call of the President of October 17, 1863, with authority to employ counsel if necessary. The committee em-

ployed counsel and procured the passage of the act and rendered its bill of expense to the town, which at a meeting held September 2, 1882, voted to pay the bill of the committee. The court held that the town was without authority to pay the bill, saying:

"It was clearly no part of the duty or functions of the town to procure the passage of this statute, and it cannot legally appropriate money to pay the expenses of procuring its passage." Citing *Minot vs. West Roxbury*, 112 Mass., 1; *Coolidge vs. Brookline*, 114 Mass., 592.

Minot vs. Inhabitants of West Roxbury (1873), 112 Mass., 1, 17 Am. Rep., 52. The holding in this case is by the Supreme Judicial Court of Massachusetts and is to the effect that a town cannot raise by taxation or by pledge of its credit, or pay from its treasury, money for the expenses of a committee directed by a vote of a town to petition the Legislature for the annexation of a town to another town. Says the court:

"As it exists for a definite purpose, as a municipal corporation, its powers all lie within the sphere of its municipal duties."

And further along in the opinion the court observes:

"The people of a town may be interested in, and their municipal affairs may be affected by the building of a railroad, or the establishment of a manufacturing corporation within their town limits; but the town in its corporate capacity would have no right, without special legislative authority, to tax their inhabitants to promote such undertakings, whatever the advantage to local prosperity which would result."

This decision is important from another viewpoint. It will be remembered that in the Constitution of the United States and probably in that of every State in the Union, citizens are guaranteed the right of petition and the right to assemble in an orderly manner to consult upon the public good, etc. This decision holds that to deny a municipal corporation the authority to incur expenses of a committee to lobby before a Legislature does not impair the right of the people to petition and to lawfully assemble. Upon this point the court said:

"This the inhabitants of West Roxbury have the right to do and to ask for any changes in the laws which they think necessary or desirable. But it does not follow that such action would be in the nature of a corporate action by the town or that it would necessarily involve the expenditure of money; and it certainly does not follow that it is a purpose for which the town can raise money in the absence of any statute provisions."

Coolidge vs. Brookline (1874), 114 Mass., 592. Ten taxpayers filed a petition to restrain the town of Brookline from paying money from its treasury for an alleged illegal purpose. The alleged illegal purpose was this: an order was introduced in the board of aldermen of Boston that the mayor be requested to petition the Legislature for an act annexing a portion of Brookline to Boston. It does not appear that the order was passed, or that any further action was taken upon it; however, the town authorities at a meeting voted that certain persons should constitute a committee for the purpose of preventing the annexation of the town, or any part thereof, to the City of Boston, and that they be authorized to employ counsel, and such other means as they deem expedient. To defray their expenses, they were authorized by the same vote to draw orders on the treasurer of the town, who

was directed to pay the same out of funds of the town. The question was raised in the Supreme Judicial Court as to the authority of the town to incur such expenses. The court did not concur in the contention that the town had authority to expend its funds for such a purpose, and held to the contrary upon the proposition that such action was not within its corporate duties as a town, and was not for a purpose, and did not relate to a subject matter for which towns by the statutes, either in terms or by implication, are empowered to raise money and tax their inhabitants. The court held that the language, "for all other necessary charges arising therein" meant all necessary charges incurred in the exercise of any duties conferred or powers given in other portions of the statute but that what are necessary charges must in all cases be determined by the statutes creating and conferring authority upon towns. The court denied that a town had authority to expend money to defend its own existence or maintain its corporate limits when assailed, as against the government, and stated that towns in the State of Massachusetts do not exercise their powers within their limits under a grant or by virtue of any contract, express or implied, but that they are political organizations created for political purposes and as mere instrumentalities by which the Legislature administers certain laws within particular limits; that what those laws shall be it is for the Legislature to determine and from time to time modify, change or repeal; that such a town has no duties to perform in regard to what its own duty shall be or over what territory or for how long a term they shall be exercised. The following may be quoted from the opinion of the court:

"The annexation of the town of Brookline to Boston, or a change in its boundaries, may seriously and vitally affect the interest of its present inhabitants, and be repugnant to the wishes and feelings of a large majority, but they cannot use the corporate powers of the town to enable them to oppose such change, and thereby impose burdens on the taxpayer, when the town has no corporate duty imposed or implied by law. And that the town has no such duty necessarily follows from the character of its powers, and from its relations to the government."

Frost et al. vs. Inhabitants of Belmont et al. (1863), 6 Allen (Mass.), 152. The Supreme Judicial Court of Massachusetts in this case held that a town has no authority to appropriate money for the payment of expenses incurred by individuals prior to its corporate existence as a town in procuring the passage of its charter by the Legislature.

Connolly et al. vs. Inhabitants of Beverly et al. (1890), 151 Mass., 437, 24 N. E., 404. In this case the court held that a town had authority to employ counsel to represent it in a hearing in a petition to divide a town before a legislative committee, but the holding was based upon a statute specifically authorizing "any town interested in a petition to the Legislature" to employ counsel to represent the town in such a hearing.

Richardson vs. Scott's Bluff County (1899), 59 Neb., 400, 48 L. R. A., 294, 80 Am. St. Rep., 682, 81 N. W., 309. In this case there was involved the authority of the county to contract with and compensate an attorney to draft a bill and have it introduced in the Legislature and make arguments in its favor before legislative com-

mittees and do all things useful and proper to secure its passage, the compensation to be liberal but contingent upon the passage of the bill. The court held that there could be no recovery against the county upon such a contract, nor as upon any implied contract, nor upon a quantum meruit. The court did not discuss the proposition of ultra vires contracts, but seemed to base its decision upon the theory that such a contract was involved in that case, being for a contingent fee, etc., was vicious and illegal.

Webster vs. Hopewell Borough (1902), 19 Pa. Super. Ct., 549. This is another case where authority was denied to a municipal corporation to use its fund to defend its corporate existence. Proceedings were instituted in the Court of Sessions for the annulment of the charter of the Borough of Hopewell under the provisions of an act of 1834 and remonstrances were filed by a number of citizens, and after a hearing it was determined that it was not expedient to grant the prayer of the petitioners. Those who were opposed to the annulment of the charter had expended money in resisting the application. The question for decision in the Pennsylvania Supreme Court in the above case was whether Hopewell Borough had authority to pay all legal costs accruing in the lawsuit in defending the borough charter in the above mentioned proceeding. The court's decision was to the effect that the borough was not and could not be a party to the proceeding in which the expediency of a change in the form of local government was the subject of the inquiry and that, therefore, the borough did not become liable for such expenses. The opinion states that no power had been delegated to the municipality to resist such a change in the form of government and no municipal duty had been imposed in connection therewith, and that in the absence of such a grant of power it cannot be said to be within the purposes for which the municipality was created to resist a change in the form of government in the manner provided by the supreme law of the commonwealth; that, as a borough, the municipal corporation was without authority to appropriate the money for such a purpose, in the first instance, and it was equally without authority to subsequently reimburse private individuals who had made the expenditure. And the court further held:

"This resolution is in violation of the seventh section of the ninth article of the Constitution of 1874. It is an appropriation of money for a private individual and not for a municipal purpose." Citing authorities.

Shannon vs. Huron (1896), 9 S. D., 356, 69 N. W., 598. A city has no authority to incur indebtedness for expenses of a campaign to secure the selection of the city as the capital of the State, was the holding in this case. The Supreme Court of South Dakota said that no taxpayer of the city can be compelled to contribute money for the purpose of promoting a capital campaign, however much the inhabitants of the city might be personally benefited thereby; that a municipal corporation is forbidden by law and has no vested right or inherent power to contract debts and issue evidence thereof to advance the interest of individuals; that, under the Constitution of the State of South Dakota, the delegated power of taxation can be used

only for a public governmental purpose as distinguished from a private purpose, "over which the case before us is a glaring example."

State ex rel. Port of Seattle vs. Superior Court (1917B), L. R. A., 354, 160 Pac., 755. The caption of this case discloses the holding when it states that a corporation created by the Legislature for governmental and business purposes has no power to use public funds raised by taxation to secure a nullification by means of a referendum of a statute increasing the number of its commissioners and limiting the amount of its bonded indebtedness. The Port of Seattle was a corporation and in the above case it was alleged that the port commissioners for the purpose of defeating an amendment to the law relative to the Port of Seattle. The amendment increased the number of port commissioners and limited the bonded indebtedness of port districts of the first class. It was alleged that, for the purpose of defeating said enactment, the port commissioners were attempting to secure a nullification by means of a referendum and for that purpose said commissioners had wrongfully and unlawfully expended funds of the port district for the purpose of advertising, lobbying and printing circulars which had been scattered throughout King County and a considerable portion of the State. A restraining order was prayed for to prevent the commissioners from expending further sums of port funds for such purpose. The restraining order was granted and a writ was sued out to the Washington Supreme Court to review said order of the court in granting the restraining order. The order of the court was sustained. Many authorities were reviewed and quoted from by the court in its written opinion, and, among other things, the Supreme Court of Washington said that the corporation involved was in the nature of a municipal corporation engaged in the building of wharfs and docks and harbor improvements and in operating and maintaining the same. Its powers are given by the State. If the State decides to limit those powers, the court itself and its commissioners have no special interest therein. They are simply agents of the State and "it seems absurd to say that an agent of the State may be permitted to expend money of the State for the purpose of defeating a proposed curtailment of the powers of that corporation by the State." The court further pointed out, that a few States have adopted the view that municipalities have an inherent right to local self-government not dependent on legislative authority, and that this right was brought to this country from the rule adopted in the Anglo-Saxon countries, from which our laws descended. That this power is entertained by the courts of Indiana, Kentucky and Michigan, but that practically all the rest of the jurisdictions hold that municipal corporations have only such power as is conferred upon them by the Legislature and that the Legislature, in the absence of constitutional inhibition, controls such municipalities absolutely. Such is the power of the Supreme Court of the United States, says the court in *Barnes vs. District of Columbia*, 91 U. S., 540, 23 L. Ed., 440. The opinion ended with the following language:

"The commissioners might determine that the best interests of the business of the port required that the individual members of the commission be perpetuated in office and because of that reason used the funds of the port to insure their own election. We are clearly of the opinion that when the port

was created, no thought was held by any person that the money raised by the port can be used for political purposes or any purpose other than for the direct use of the port and its business."

There are two or three decisions in foreign jurisdictions tending to hold contrary to the weight of authority upon the question here involved.

Thus in the case of *Meehan et al. vs. Parsons et al.* (1916), 271 Ill., 546, 11 N. E., 529, reversing (1915), 194 Ill. App., 131, it was held that the City of Cairo had authority to expend city funds to reimburse its mayor for expenses incurred in going to Washington and interviewing senators and congressmen in the endeavor to induce them to vote an appropriation for strengthening and repairing levees and embankments in and about the city, the court saying:

"The interest of the City of Cairo would undoubtedly be affected by whatever action Congress should choose to take in reference to the appropriation for the building of its levees. Should Congress refuse to appropriate any sum whatever, the whole burden of building and maintaining its levees would rest upon the city. That burden would be lightened by whatever appropriation Congress should see fit to make."

Attention might be called to the fact that a flood in the Ohio and Mississippi rivers, occurring after the passage of the annual appropriation bill of the City of Cairo, "demonstrated the necessity of raising and strengthening the levees of the City of Cairo, and also the impracticability of providing a sufficient sum for the work without assistance from the general government in order to complete the necessary work before the next spring rise in the rivers should *menace the safety of the city.*"

Bachelor vs. Epping (1854), 28 N. H., 354. In this case the right of a committee to recover from the town of Epping expenses incurred in applying to the Legislature to provide that one term of court should be held in Epping in consideration of the town erecting a court house for the use of the county. The court held that the committee might recover from the town for such expenses. The court stated that the town might apply to the Legislature for the above purpose by a committee, and that such town had authority to pay the committee expenses. The opinion is short and does not go into the question very deeply, contenting itself with mere statements to the effect that the town has such authority.

Denison vs. Crawford County (1878), 48 Iowa, 211. The Supreme Court of Iowa held that it was competent for the county to employ agents or attorneys to bring before the attention of Congress, and obtain legislation by proper means, swamp lands within the borders of the county. However, in this case, it was shown that Congress had recognized the fact that a county was entitled to swamp lands within its boundaries, and since further legislation by Congress became necessary to complete the matter, a county had the right to incur and pay expenses for the purpose of inducing Congress to pass such further legislation.

Upon principle and authority, therefore, we are of the opinion that the navigation district is without authority to expend its funds for the purpose of defraying a portion of the expenses of a committee

to go to Washington and endeavor to induce Congress to make additional appropriation of funds for ship channel improvement. .

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2330, Bk. 55, P. 332.

HEALTH—CITY HEALTH OFFICER—SCHOOL CHILDREN—EXAMINATION
OF PUPILS' BODIES AND DISMISSAL OF SCHOOL.

Where a case of chickenpox is discovered in the city schools, a city health officer, under general law, is not authorized to examine the bodies of all the pupils against the pupils' will, or dismiss school, or demand that the school superintendent send the pupils to him for examination.

AUSTIN, TEXAS, March 28, 1921.

Dr. Manton M. Carrick, State Health Officer, Capitol.

I have yours of February 28, 1921, enclosing copy of a letter signed by E. L. Mason, Superintendent of the public schools at Flatonia, Texas, of date February 25, addressed to Miss Annie Webb Blanton, State Superintendent. You request this Department to render an opinion upon the questions submitted in Mr. Mason's letter. The letter referred to presents the following inquiry:

A case of chickenpox was discovered in the public schools at Flatonia, Texas, and the city health officer came to the school to conduct an examination of every pupil. He began with the grades, examining their bodies beneath their clothing for breaking outs. High school girls objected to submitting to this, their mothers not being present and the school superintendent sent them all home. The doctor had already dismissed school for the day. The city health officer then ordered the school superintendent to send all high school students to him for examination. The question is, did the city health officer exceed his authority?

In answering the inquiry I assume that no ordinance was passed by the town of Flatonia conferring or attempting to confer upon the City Health Officer authority to do the things described in the letter above mentioned, and also that no rule or regulation was passed relative thereto by the school authorities. The question as to what authority the city or the school authorities would have in the premises is an entirely different one from the question presented. As to the authority of incorporated cities and towns to pass ordinances requiring, for instance, vaccination as a condition precedent to the right to attend public schools, and the authority of school trustees to make a similar requirement, see the following cases:

City of New Braunfels et al. vs. Waldschmidt et al. (Sup. Court of Texas), 207 S. W., 303.

Staffel et al. vs. San Antonio School Board et al., 201 S. W., 413.

Zucht vs. King et al., 225 S. W., 228.

The statute defining the duties of a city health officer generally is Article 4543 of the Revised Civil Statutes of 1911, which reads as follows:

"Each county health officer shall perform such duties as have heretofore been

required of county physicians, with relation to caring for the prisoners in the county jails and in caring for the inmates of county poor farms, hospitals, discharging duties of county quarantine and other duties as may be lawfully required of the county physician by the commissioners court and other officers of the county, and shall discharge any additional duties which it may be proper for county authorities under the present laws to require of county physicians; and, in addition thereto, he shall discharge such duties as shall be prescribed for him under the rules, regulations and requirements of the Texas State Board of Health, or the president thereof, and is empowered and authorized to establish, maintain and enforce quarantine within his county. He shall also be required to aid and assist the State Board of Health in all matters of local quarantine, inspection, disease prevention and suppression, vital and mortuary statistics and general sanitation within his county; and he shall at all times report to the State Board of Health, in such manner and form as it shall prescribe, the presence of all contagious, infectious and dangerous epidemic diseases within his jurisdiction; and he shall make such other and further reports in such manner and form and at such times as said Texas State Board of Health shall direct, touching such matters as may be proper for said State Board of Health to direct; and he shall aid said State Board of Health at all times in the enforcement of its proper rules, regulations, requirements and ordinances, and in the enforcement of all sanitary laws and quarantine regulations within his jurisdiction."

What is known as the Sanitary Code contains provisions relative to quarantine as to certain diseases. Chickenpox is not a quarantineable disease under this code. See opinion of the Attorney General, No. 1729, to be found at page 778 of the Report and Opinions of the Attorney General for 1916-18. The only regulation therefore, so far as the duty of the city health officer is concerned, under general law, relative to chickenpox, in Rule 15 of the Sanitary Code under Article 4553a, Revised Civil Statutes. This rule is in the following language:

"Persons suffering from measles (rothlen) and chickenpox, shall be required to be barred from school for twenty-one days (at the discretion of the local health officer) from date of onset of the disease, with such additional time as may be deemed necessary, and may be readmitted on a certificated (certificate) by him attesting to their recovery and non-infectiousness."

Rule 17 is in the following language:

"Provided, that the above requirements shall in no sense be construed as abrogating any additional precautionary measures enforced by local health authorities, but it is expected that additional restrictive measures will be taken, at the discretion of the local health authorities when the necessity arises, more especially in the more densely populated cities and towns, or when violations of quarantine occur."

Rule 18 declares that whenever a local health authority is informed or has reason to suspect that there is a case of smallpox, scarlet fever or *other reportable disease* within the territory over which he has jurisdiction he shall immediately examine into the facts of the case and shall adopt the quarantine or employ sanitary measures as "herein provided." This section of the law applies only to the diseases mentioned therein and other reportable diseases. By referring to rules 1 and 3, it will be found that chickenpox is not a reportable disease. Rule 1 makes reportable any *contagious disease*, and Rule 3 defines the term "contagious disease," and such definition does not include chickenpox.

Unless the city health officer has the authority to do the things set forth in the letter mentioned in the beginning of this opinion, under

and by virtue of the statutes above quoted, he is in our opinion wholly without such authority.

Rule 15 above quoted says that persons suffering from chickenpox shall be required to be barred from school for twenty-one days, at the discretion of the local health officer, from the date of onset of the disease with such additional time as may be deemed necessary, and may be readmitted on a certificate by him attesting to their recovery and non-infectiousness. We find no express authority in this rule or elsewhere for the city health officer to examine school children suspected of having chickenpox against their will. It says that any person suffering from chickenpox shall be required to be barred from school for twenty-one days, but as to other persons it does not even make this requirement. It does not even say that the local health officer is given authority to dismiss a pupil from school who has chickenpox, but in all probability if it should be shown that a pupil had chickenpox, the school authorities could be compelled to bar such pupil from school for the time specified in the statute and that the local health officer would have the discretion of determining the exact period of time within which such pupil would be in a condition to return to school. The school authorities are thus required to consult the local health officer as to when it is proper to allow such a person to return to school, but at no place in the statute do we find that authority and control over the schools have been taken out of the school authorities and placed in the hands of the city health officer.

The right of personal liberty and security is a sacred one; it does not owe its existence to statute law, but is the birthright of every citizen. It must give way to necessary restraints in order to secure to others equal liberty, but no further. There is a limit beyond which the Legislature itself can go in curbing the liberty of citizens.

The statement immediately preceding may seem a little academic, but it naturally leads to the proposition that a statute will not be interpreted as authorizing a peremptory laying on of the hands or an examination of the person of another against the other's will unless it confers such authority in unmistakable terms. In case of doubt, we must decide against the authority. Neither can we assume that a city health officer has authority to dismiss the public schools in the face of the statutes placing the control of public schools in the hands of others and in the absence of statute conferring such authority upon the city health officer.

We do not find that the law in unmistakable terms confers authority upon the city health officer to do the things described in the letter herein quoted.

Since the school authorities have general control and management over the schools and the authority given to the city health officer is very limited and the law does not in terms confer upon such city health officer the authority above mentioned, we hold that he was without authority to examine the pupils against their will to ascertain whether they had chickenpox.

Second: That he did not have authority to dismiss school.

Third: He did not have authority to demand of the superintendent

of schools that he send the pupils to him for examination simply because one pupil was found to have chickenpox.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2411, Bk. 57, P. 79.

CONSTITUTIONAL LAW—PECULATION—CONTRACTS WITH COUNTIES BY MEMBERS OF STATE SENATE.

1. It would be violative of the State Constitution for a person to make a contract with a county pursuant to the provisions of the State Highway Commission Law enacted by the Legislature at time when such person was a member of the State Senate. Such a contract would be void. A contract for road construction out of money derived in whole or in part from motor vehicle registration funds awarded to the county by the State Highway Commission would be such a contract.

2. It would be violative of the Constitution for a person to enter into a contract with a county for road construction out of funds derived from State aid granted by the State Highway Commission which funds were appropriated by the Legislature at a time when such person was a member of the State Senate. Constitution of Texas, Art. 3, Sec. 18.

AUSTIN, TEXAS, January 30, 1922.

Hon. A. C. Buchanan, Member of the State Senate, Temple, Texas.

DEAR SIR: This Department is in receipt of yours of the 28th inst. reading as follows:

"Will you be kind enough to give me your opinion on the following question?

"Can a State Senator enter into a contract (legally) with a county to build highways where State and Federal aid is granted?"

"We will need this opinion Tuesday, January 31.

"Thanking you in advance for this kindness, etc."

What is known as the State Highway Commission statute was originally enacted by the Thirty-fifth Legislature. See Chapters 190 and 205 of the General Laws of the Thirty-fifth Legislature. Under these statutes, as amended, a portion of the automobile registration fees is turned over to the counties and a portion to the State Highway Department. Upon application being made to the State Highway Department upon a proper showing funds may be apportioned to the various counties for use in the construction, etc., of public highways. The Legislature makes biennially an appropriation of these funds in the hands of the State Highway Department so that the same may be used to carry out the purposes of the State Highway Laws.

It is our information that you were a member of the Thirty-fifth Senate and have been a member of the State Senate continuously since that time, including the Thirty-seventh Senate with its called sessions.

We are inclined to the opinion that you are inhibited by our State Constitution from making a contract with a county involving the use of funds awarded by the State Highway Department for road construction work under the laws above mentioned.

The provision of the Constitution making necessary this holding is

a portion of Section 18 of Article 3. We quote the entire section, italicizing that part of it bearing directly upon your inquiry:

"No Senator or Representative shall, during the term for which he may be elected, be eligible to any civil office of profit under this State, which shall have been created, or the emoluments of which may have been increased during such term; no member of either house shall during the term for which he is elected, be eligible to any office or place, the appointment to which may be made, in whole or in part, by either branch of the Legislature; and no member of either house shall vote for any other member for any office whatever, which may be filled by a vote of the Legislature, except in such cases as are in this Constitution provided. Nor shall any member of the Legislature be interested, either directly or indirectly, in any contract with the State, or any county thereof, authorized by any law passed during the term for which he shall have been elected."

The Court of Civil Appeals in the year 1900, in *Lillard vs. Freestone County*, 57 S. W., 338, had occasion to pass upon the validity of a contract with Freestone County for the publishing of a delinquent tax list as required by a statute enacted by the Twenty-fourth Legislature. The person making a contract with the county had been a member of the Twenty-fourth Legislature at the time a statute was enacted providing for the publication of such delinquent lists. A similar statute had been in force prior to the enactment of this statute and it was contended that in view of the fact that similar contracts were already authorized that this new statute should not be construed as the law authorizing such contracts within the meaning of the Constitution. Moreover, it was argued that the person making the contract was not a member of the Legislature at the time the contract was entered into and that for this reason the contract was not void as violating the provisions of Section 18 of Article 3.

The court, however, overruled these contentions, holding that the contract was null and void and unenforceable. We quote the following from the court's opinion:

"We are not willing to admit the contention that, appellant's term of office having expired as a member of the Twenty-fourth Legislature he thereby became authorized to contract with Freestone County, by virtue of a law passed by that Legislature. We think it apparent that the intention of the above clause of the Constitution was to absolutely prohibit any person from entering into a contract with the State or county authorized by a statute passed by a Legislature of which such person was a member. Such being the case, the intention should be given effect. *Cooley, Const. Law, p. 69; Story, Const., Sec. 413; Rawle, Const., Ch. 1, p. 31; Potter's Dwar. St., p. 659.* We are of the opinion that the contract was prohibited by reason of the appellant having been a member of the Twenty-fourth Legislature. The law was amended and re-enacted as a whole by the Twenty-fifth Legislature. The fees for publishing the delinquent tax list were changed. It may be the change was slight, but, whether a change was made at all in this respect, we think the entire law, having been re-enacted as a whole, was 'passed' within the meaning of Article 3, Section 18 of the Constitution, and that under said section plaintiff could not make a valid contract with Freestone County, authorized by the provisions of said law. We conclude that the court did not err in sustaining the exception to the petition, and the judgment is affirmed."

In an opinion dated August 26, 1919, addressed to Honorable Earle B. Mayfield, member of the Railroad Commission of Texas, which opinion was prepared by Honorable E. F. Smith, Assistant Attorney General, this Department held that a certain senator was ineligible

to be appointed as deputy supervisor of the Oil and Gas Division of the Railroad Commission of Texas, because such senator was a member of the State Senate at the time of the enactment of the law providing for such appointment. This opinion was based on two grounds, first, because such appointment would violate the first part of Section 18 of Article 3 making ineligible senators and representatives to be appointed to any civil office of profit which was created during the term of such senators or representatives, and second, on the ground that it would violate that part of Section 18 declaring that no member of the Legislature shall be interested directly or indirectly in any contract with the State authorized by any law passed during the term for which he shall have been elected.

We copy the following from the opinion referred to:

"Considering then that the position of deputy supervisor is not an office, but is an employment and that the person who fills the position is not an officer of the State, but merely an employe of the State, the person who accepts the employment makes and enters into a contract with the State of Texas through the agency of the Railroad Commission, whereby such employe agrees to perform the duties in connection with such employment for a stipulated sum per month. This is clearly a contract of employment, and this employment or contract was authorized by the law passed during the term for which Honorable Lon A. Smith was elected to the State Senate."

We are therefore of the opinion that a person who was a member of the Legislature at the time of the enactment of what is known as the State Highway Commission law could not lawfully make a contract with a county for road construction work involving funds awarded to such county by the State Highway Commission. We think also that a person who was a member of the State Senate at the time of the enactment of the law appropriating registration fees to the State Highway Commission could not lawfully contract with a county where funds appropriated by such act are to be expended. An appropriation act is, of course, a law. See Section 6, Article 8, State Constitution.

County contracts of the kind here under consideration could not be made if the statute creating the State Highway Commission and providing for automobile registration fees had not been enacted. Neither could such contracts be made unless the Legislature had appropriated the State Highway funds. We think it clear, therefore, that a contract of this kind is to be considered as having been "authorized" by the State Highway Commission statutes and the appropriation act above referred to. It necessarily follows that any member of the State Senate who was such a member at the time of the enactment of such laws is inhibited by the Constitution from entering into such a contract.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2353, Bk. 56, P. 458.

ROAD DUTY—ALIENS—MEXICANS.

Mexicans residing in this State are not exempt from road duty.
Chapter 3, Title 119, Revised Civil Statutes of 1911.

AUSTIN, TEXAS, June 6, 1921.

Honorable R. B. Alexander, County Attorney, Bastrop, Texas.

DEAR SIR: This is in reply to yours of May 16th, addressed to the Attorney General, requesting opinion as to whether an alien is subject to road duty. You state that the coal mines in your county employ quite a number of Mexicans who do not stay a great length of time and who complain when requested to do road duty. Numbers of Mexicans refuse to work the road, you state, and apply the term "peon" to the Mexican farmers who do perform road duty.

You are respectfully advised that in the opinion of this Department Mexicans residing in this State are subject to road duty to the same extent that our citizens are subject thereto.

Chapter Three, Title 119, Revised Civil Statutes, provides that all male persons between the ages of twenty-one and forty-five shall be required to work on the public roads, etc., ministers of the gospel in the actual discharge of their ministerial duties, invalids, members of the Texas National Guard and members of volunteer fire companies in the actual discharge of their duties as firemen, excepted. The statute does not exempt aliens.

A requirement to do road duty is in the nature of a police regulation. 26 R. C. L., 24.

The rights of a sovereignty extend to all persons not privileged that are within the territorial limits of a State. Independently of a residence with intention to continue such residence, independently of any domiciliation, independently of the taking of any oath of allegiance or of renouncing of any former allegiance, it is well known that by the public law an alien for so long a time as he continues within the domain of a foreign government, owes obedience to the laws of that government and may be punished for treason or other crimes as a native born subject might be unless his case is varied by some treaty stipulation. 1 R. C. L., 805.

An alien is even guaranteed certain fundamental rights under the Constitution of the United States. While an alien is not entitled to the privileges and immunities of a citizen, strictly as such, under the final clause of this provision of the Federal Constitution he is a "person" whom the State cannot deprive of life, liberty or property without due process of law and to whom the State cannot deny the equal protection of the laws. It has been held that in the light of the Fourteenth Amendment a resident alien cannot be deprived by law of the right to engage in certain pursuits. 1 R. C. L., 799.

We are directing your attention to the foregoing for the purpose of emphasizing the idea that it would not be just for resident aliens to enjoy the protection and rights under our government and at the same time escape the burdens and liabilities.

Our statute does not expressly exempt aliens from road duty and we are not justified in reading into it an implied exemption.

We know of no treaty stipulation that would establish a contrary rule to the one announced in this opinion.

You are, therefore, respectfully advised that alien Mexicans who have been residing in your county for a space of fifteen days immediately preceding the summons to work the road are liable to road duty unless entitled to exemption on other grounds. They are not exempted by reason of the fact that they are aliens.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2385, Bk. 56, P. 6.

APPROPRIATIONS—INTENT OF LEGISLATURE.

An appropriation made to the Live Stock Sanitary Commission "for the enforcement of all laws coming under the supervision of the Live Stock Sanitary Commission and all expenses incident thereto" is not one necessarily for the purpose of paying the salary of a lawyer to assist county attorneys in the prosecution of alleged violations of the live stock sanitary laws.

The Constitution of Texas makes it the duty of the county or district attorney to represent the State in the prosecution of all alleged offenses. An item in the appropriation bill appropriating a certain sum of money for the enforcement of a certain law cannot be held as authority for the employment of a lawyer to assist the county attorneys in the discharge of their constitutional duties.

AUSTIN, TEXAS, September 27, 1921.

Honorable Lon A. Smith, Comptroller, Capitol.

DEAR SIR: You have requested this Department to advise you as to whether or not you should draw your warrant in the payment of the salary of a lawyer employed by the Live Stock Sanitary Commission.

In reply you are advised that there is no law expressly authorizing the Live Stock Sanitary Commission to employ or appoint a lawyer to assist the county attorneys in the prosecution of alleged violations of the Live Stock Sanitary law. However, we do find in the biennial appropriation bill passed by the First Called Session of the Thirty-sixth Legislature, an appropriation of \$2500 for each of the two fiscal years "for the enforcement of all laws coming under the supervision of the Live Stock Sanitary Commission, and all expenses incident thereto."

You have also furnished this Department with a letter written by J. E. Boog-Scott, Chairman of the Live Stock Sanitary Commission. The letter reads as follows:

"In reply to your letter of September 20th, will say that in our opinion the deciding of what constitutes law enforcement and the expenses incidental thereto rests with the chairman of the Live Stock Sanitary Commission.

"The intention of the Legislature in giving us this appropriation was to provide means for the employment of an attorney to assist county attorneys in the prosecution of cases involving violations of the live stock sanitary laws of

Texas. The Governor was of the same opinion as he personally appointed an attorney to represent this commission.

"If, however, there is going to be any controversy in regard to this matter we ask that you strike out of the September pay roll the item paying Mr. Snodgrass \$166.66 from Appropriation D-846, and mail to us the other warrants at the regular time, leaving this matter to be straightened out."

We cannot agree with Mr. Boog-Scott in his construction of this item included in the appropriation made for the support and maintenance of the Live Stock Sanitary Commission for the reason that Section 21, Article 5, Constitution of Texas, makes it the duty of the county attorney to represent the State in all cases in the district and inferior courts with the right in the Legislature to regulate by law the respective duties of district and county attorneys where a county is included in a district having a district attorney.

Section 22 of Article 4, Constitution of Texas, makes it the duty of the Attorney General to represent the State in all suits and pleas in the Supreme Court and also provides that the Attorney General shall "perform such other duties as may be required by law."

Mr. Chief Justice Phillips in the case of Maud vs. Terrell, 109 Texas, exact page 99, says that "the powers thus conferred by the Constitution upon these officials are exclusive. The Legislature cannot devolve them upon others. Nor can it interfere with the right to exercise them." In support of this statement, Judge Phillips cites the following cases:

Brady vs. Brooks, 99 Texas, 366.

Harris County vs. Stewart, 91 Texas, 133.

State vs. I. & G. N. Ry. Co., 89 Texas, 562.

Continuing, Mr. Chief Justice Phillips said:

"It may provide assistance for the proper discharge by these officials of their duties, but since in the matter of prosecuting the pleas of the State in the courts the powers reposed in them are exclusive in their nature, it cannot, for the performance of that function, obtrude other persons upon them and compel the acceptance of their services. Wherever provision is made for the services of other persons for this express purpose, it is the constitutional right of the Attorney General and the county and district attorneys to decline them or not at their discretion, and, if availed of, the services are to be rendered in subordination to their authority."

The effect of this opinion is to hold that the Legislature, by a duly enacted law, may provide for the services of an attorney to assist the county attorneys in the prosecution of alleged violations of the law, but the county attorneys have the right to decline to accept the assistance thus provided for.

It must be presumed that the Legislature in passing the appropriation bill for the support and maintenance of the Live Stock Sanitary Commission was acquainted with the law, and had they intended to provide a lawyer to travel over the State of Texas for the sole purpose of assisting county attorneys in the prosecution of those charged with violating the Live Stock Sanitary laws, such provision would have been made in language free from any ambiguity and clearly stating that the Legislature intended to provide a lawyer to assist the county attorneys in the prosecution of those charged with violating the Live Stock Sanitary laws.

The item in the Live Stock Sanitary Commission appropriation is practically identical with an item contained in the appropriation for the maintenance of the Adjutant General's Department. In this latter department, we find that an appropriation has been made of \$15,000 for each of the two fiscal years "for expenses Adjutant General in enforcing the laws, etc." We do not think that the Legislature intended for the Adjutant General to employ a lawyer or a number of lawyers to assist in the prosecution of those charged with crimes and misdemeanors throughout the State of Texas.

We also find in the appropriation for the maintenance of the Department of Insurance and Banking that \$5000 for each of the two fiscal years has been appropriated for the "enforcement of Insurance and Banking laws." We do not think that the Legislature intended for the head of this department to employ a lawyer or lawyers to assist in the prosecution of those charged with violating the Insurance and Banking laws.

As a matter of fact, the Legislature, from time to time, has made appropriations for various State departments which included an item for the enforcement of the law, and yet no department, so far as we are advised, has never taken the position that it had the right to employ a lawyer to assist the Attorney General or the county attorneys in the discharge of their constitutional duties.

In 1915 the General Assembly of the State of Illinois made an appropriation to the Insurance Superintendent "for expenses of prosecutions of violations of the insurance laws, \$15,000 per annum." The Insurance Superintendent attempted to employ lawyers but the right of the Superintendent to employ lawyers and pay them out of this appropriation was contested, and in the case of *Fergus vs. Russell*, 270 Ill., 504, the Supreme Court of the State of Illinois said:

"The appropriation of \$15,000 for expenses of prosecutions of violations of the insurance laws is not one necessarily for the purpose of paying the salaries or fees of attorneys for legal services in the prosecution of any suit or proceeding, but may be for the purpose of conducting investigations in connection with the prosecutions of violations of the insurance laws and meeting various items of expense that might properly be incurred on the part of the Insurance Superintendent in preparing to institute prosecutions. *The use of any part of this sum for the purpose of employing attorneys to perform legal services would not be proper, and the Auditor should refuse to issue a warrant, and the State Treasurer to pay the same, for any such purpose.* It does not appear from the language used in this item of appropriation that such is the purpose."

This language used by the Supreme Court of Illinois applies, in our opinion, with equal force to the appropriation now under consideration. We do not think the Legislature intended by making this appropriation that the Live Stock Sanitary Commission should employ or appoint a lawyer to travel over the State of Texas for the purpose of assisting county attorneys in the prosecution of those charged with violations of the Live Stock Sanitary laws. The appropriation is not one necessarily for that purpose. This appropriation may be used for the purpose of conducting investigations in connection with the prosecution of violations of the Live Stock Sanitary laws and in the payment of various and necessary items of expense that may properly

be incurred on the part of the Live Stock Sanitary Commission in preparing to institute prosecutions.

I am, with respect,

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2356, Bk. 56, P. 19.

APPROPRIATION BILLS—"SPECIFIC APPROPRIATIONS."

The Comptroller is without authority to draw a warrant in payment of a claim barred by Article 1134, Code of Criminal Procedure, until the Legislature repeals or suspends the provisions of that article, and in addition to repealing or suspending that article, makes a "specific appropriation" to pay claims barred by said article.

AUSTIN, TEXAS, March 1, 1921.

Honorable Lon A. Smith, Comptroller of the State of Texas, Capitol.

DEAR MR. SMITH: In your letter of February 24th, you ask the Attorney General to advise you if the proviso in the appropriation bill for the support of the judiciary for the two fiscal years beginning September 1, 1919, passed at the Second Called Session of the Thirty-sixth Legislature, authorizes you to pay the account of officers whose claims or accounts are barred by the provisions of Article 1134, Code of Criminal Procedure.

Said Article 1134 provides for the payment of accounts of the district or county attorneys, sheriffs and district clerks due them by the State for services rendered in felony cases when such accounts have been approved by the district judge, and after examination, found correct by you.

This article then provides:

"And all such claims or accounts not transmitted to or placed on file in the office of the Comptroller of Public Accounts, within twelve months from the date of the final disposition of the case in which the services were rendered, shall be forever barred."

The appropriation bill to which reference has been made, contains this proviso:

"Provided that all accounts under this section which require the approval of any district judge shall be examined by the Comptroller, and, if correct, he shall issue his warrants therefor, but if he shall find same incorrect, in whole or in part, he may cause an audit of same to be made before warrant issues. The Comptroller may also issue warrants on any account when approved by any district judge, or adjust the same after an audit has been made and the account found to be correct, irrespective of the provisions of Article 1134, Revised Criminal Statutes, 1911." (Page 263, Acts of the Second Called Session of the Thirty-sixth Legislature.)

You state in your letter that the sheriffs, through a misconception of the law, have failed to present their accounts for the full amount they were entitled to for many years, and that they think the proviso entitles them to be paid at this time, even though their accounts have been for a long time barred by the provisions of Article 1134.

This Department is in full sympathy with the sheriffs in this mat-

ter, and we cannot refrain from pointing out that it was in an opinion of this Department of date March 1, 1919, that the mistake as to the amount sheriffs were entitled to was corrected, and that since said date, the sheriffs have received the amount of mileage they were entitled to under the law.

This Department has twice held that the proviso in the appropriation bill to which reference has been made did not authorize the payment of those claims barred by Article 1134. One of these opinions was written by Judge C. W. Taylor, and the other by Mr. C. L. Stone.

Notwithstanding this fact, we were very glad to grant to Honorable C. F. Greenwood, attorney for the sheriffs, a hearing on the question submitted in your letter. Present at the hearing were Judge Taylor, Mr. Stone and the writer.

Mr. Greenwood has also filed with us an able brief presenting the law from the standpoint of the sheriffs. We have read this brief and carefully considered the authorities referred to therein, but are unable to reach the same conclusion as that reached by Mr. Greenwood. We will briefly state our reasons for reaching a different conclusion from that arrived at by Mr. Greenwood.

We do not pass upon the question of whether or not an appropriation bill can repeal or suspend a provision of the general law.

We are of the opinion that the proviso in the appropriation bill to which reference has been made does not permit or authorize you, as Comptroller, to draw a warrant in payment of any claim barred by Article 1134, for the reason that nowhere in the appropriation bill is there a "specific appropriation" to pay the claim of any officer that is barred by the provisions of said Article 1134.

Section 6, Article VIII of our Constitution provides that:

"No money shall be drawn from the treasury but in pursuance of *specific appropriations* made by law; nor shall any appropriation of money be made for a longer term than two years * * *."

Regardless of what effect the proviso in the appropriation bill may have upon Article 1134, you would not be justified in drawing a warrant in payment of claims barred by said Article 1134, unless there was a "specific appropriation" for the payment of such claim. In the absence of such "specific appropriation" the proviso can only mean that accounts accruing and payable out of this appropriation, that is, accounts accruing after September 1, 1919, may be paid even though not presented to the department within twelve months "irrespective of the provisions of Article 1134, Revised Criminal Statutes, 1911"; but such accounts must be filed with the department before September 1, 1921, for, on that date, the money appropriated by this bill remaining unexpended will go back into the general fund and cannot be paid out.

There is no doubt in our minds as to the correctness of the conclusion reached, and while we are in full sympathy with the sheriffs, our duty under the law is clear, and we must advise you that you have no authority to pay these claims that are barred by Article 1134.

In the event the sheriffs are dissatisfied with the conclusion reached by us in this opinion, they have an adequate remedy, and a speedy one. They may bring mandamus proceedings in the Supreme Court

in an effort to compel you to issue a warrant in payment of their claims which are barred by Article 1134.

In the event such an action is brought, it will be the duty of this Department to represent you in the Supreme Court, and this we will very gladly do. However, in the event such an action is brought, this Department will do everything possible in order to expedite the case in the Supreme Court to the end that an early decision upon this question from the court of last resort may be obtained.

After the foregoing was written, we submitted a copy of the opinion to Mr. Greenwood, attorney for the sheriffs and, at his request, we held up the transmission of the opinion to you until he could investigate additional legal authorities. Several days later he presented us with an able brief in which he contended that we were in error in advising you not to draw warrants in payment of the claims barred by Article 1134.

We have carefully read his brief and examined the authorities cited.

We cannot agree with his contention. If the Legislature intended to pay these claims that have been barred for many years by the provisions of Article 1134, why didn't they say so? This appropriation is for the support of the judiciary for two years beginning September 1, 1919. Nowhere in the bill is there an appropriation made to pay any claim except for the support of the judiciary *after* September 1, 1919.

We are convinced that our position as herein announced is correct. If we were in doubt about it our advice to you would be the same.

Your letter indicates that you are willing to be governed by the advice of this Department. This is the legal department of the State, created and maintained largely for the purpose of protecting the rights of the State. In view of this fact we cannot authorize the payment of the State's money so long as we have a reasonable doubt as to the legality of such payment. If we decide in favor of the State and our decision is wrong the courts can correct us. If we authorize the payment of the money and our decision is wrong the courts will never have an opportunity to make a correction in behalf of the State.

In the present case we are not in doubt. There is no "specific appropriation" for the payment of these barred claims and in the absence of such appropriation you have no authority to draw a warrant in payment of such claims.

I am, with respect,

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2418, Bk. 57, P. —.

COLLEGE OF INDUSTRIAL ARTS—SUMMER SCHOOL—STATUS OF APPROPRIATION—FORMER OPINION

Former opinion advising that the appropriation for College of Industrial Arts makes teachers employes of State for twelve months withdrawn and held: Their employment is for the usual customary session of approximately nine months, with deferred payments of salaries to cover a period of twelve months. Such teachers and employes cease to be employed by the State at the end of the

regular session and may be employed to teach in summer school and paid out of summer school appropriation.

AUSTIN, TEXAS, March 3, 1922.

Honorable F. M. Bralley, President, College of Industrial Arts, Honorable Robert E. Vinson, President University of Texas.

GENTLEMEN: On November 15, 1921, this Department, after consultation, advised Honorable Lon A. Smith, in reply to a question from him, that Section 33 of Article 16 of the Constitution of Texas would inhibit the payment of salaries to teachers regularly employed in the College of Industrial Arts for work in the summer school out of an appropriation for the "support of summer school" in the sum of Twenty-nine Thousand (\$29,000) Dollars for each fiscal year.

On February 24, 1922, the Department wrote Honorable F. M. Bralley, as President of the College of Industrial Arts, in reply to a number of communications and as a result of personal interviews. From this letter we quote the following:

"We have given this matter our most earnest attention and consideration and fully realize the far-reaching effect of our holding but are unable to reverse our position. A careful perusal of the 'Educational Bill,' that is, the act making appropriations for the University of Texas and other educational institutions (Chapter 7, General Laws, p. 272, Second Called Session of the Legislature) discloses that the provisions relative to the payment of salaries in twelve equal monthly installments is in aid of the purpose and intent of the Legislature to prevent teachers, etc., of these institutions drawing more pay than the salaries fixed for them in the bill. Whatever doubt might have existed on this point is dispelled by a reading of another clause in the act which is in the following language and which applies to all institutions included in the act:

"* * * and provided further that no professor, instructor, or other person for whom any salary is herein fixed shall be allowed to draw more than the amount of such salary from any other salary or amount herein fixed, or from any State fund or funds under the control of the governing board of any institution mentioned in this bill."

The conclusion reached in the instance of the College of Industrial Arts is based largely on the following provision of the appropriation bill for it: "All salaries shall be paid in twelve equal monthly installments, unless otherwise provided for herein." It was our conclusion at that time that this clause made such teachers employees of the State by reason of their respective appropriations for a period of twelve months, and that for this reason they could not receive any salary from the State contrary to the above referred to provision of the Constitution.

On December 13, 1922, in a letter addressed to Dr. Vinson as President of the University of Texas, he was advised that the last above quoted clause requiring twelve monthly installments to be paid to teachers does not appear in the University Appropriation Bill, and for that reason such teachers could be paid in nine equal monthly installments, or such period of time as they may be employed in the customary regular session of the University.

Again on February 24th, we addressed a communication to Dr. Vinson as President of the University, reiterating the former statement as to the employment of regular term teachers for the summer school, the distinction in the original holding being because of the wording of the appropriation bill for each institution.

The Department has had the matter under consideration in conference and, after a complete analysis of the entire appropriation bill, has concluded that the restrictions placed upon the bill relative to all of the schools, and quoted in our communication to Dr. Bralley, are ineffective for their apparent purpose because of the more specific appropriations which make contrary provisions and we therefore withdraw the opinion heretofore given to the Honorable Lon A. Smith, Comptroller, and to Dr. Bralley as President of the College of Industrial Arts wherein we held that teachers engaged in the regular session of the College of Industrial Arts and paid a salary out of the regular appropriation bill could not be employed in the summer session and paid a salary out of the Twenty-nine Thousand (\$29,000) Dollar appropriation made for the purpose of paying expenses of the summer school, and herein advise that such regular teachers may be employed for the summer school and paid a salary therefor out of the summer school appropriation.

We do this without any change of view as to the law and the effect and meaning of Section 33, Article 16 of the Constitution and without changing our former conclusion that the teachers employed in the regular session of the college must receive their pay in twelve equal monthly installments. We conclude that such teachers are employees of the State for the usual and customary regular session at which time their employment ceases, but that the State still owes a balance of salary which the Legislature has decreed shall be paid in monthly installments until the full amount of such salary has been paid.

As stated above, this conclusion has been reached after a careful analysis of the entire educational appropriation bill and we deem it necessary that we give herewith in part the analysis which inevitably leads to this conclusion. We deem it expedient also that we withdraw any concession which we might heretofore have made which would lead to the conclusion that our former ruling worked a hardship on the institutions affected by it because a further investigation of the facts leads us to the belief that our present opinion, based solely on the law in the case, regardless of the effect it may have, works an unusual discrimination against teachers in other institutions and is particularly a preference for the institutions in question, responsibility for which must rest with the Legislature, which acted within its constitutional powers. This view of the act gives to the teachers affected salaries apparently out of proportion to that paid to teachers of other institutions, but we must concede to the Legislature power to do this if they so desire. We look for the intention of the Legislature in construing its acts, but we cannot go beyond, and certainly not contrary to, the specific provisions which the Legislature has written into its acts. To do so would be for this Department to legislate; that we cannot do, but it is our purpose and our duty to give that conclusion that we believe the courts would give to the act if before them for decision.

We recognize the fact that it is most unusual for the Legislature to provide for employment for one period of time and fix the pay to extend over a greater period of time by installment. We have not supposed that such would be done and for this reason have been slow to

reach the conclusion above stated. However, the Legislature has done this very thing for they have provided for such installments in the case of a number of schools that do not have a summer school and where the teachers are only employed for the usual customary session of approximately nine months. An instance may be cited in the Prairie View State Normal and Industrial College for Negroes found on page 325. On page 330 at the close of this appropriation will be found the same provision for twelve equal monthly installments as that found in the appropriation for the College of Industrial Arts, yet this institution has no summer school, according to our information. Another instance is that of the Grubbs Vocational College where no summer school is provided for and the teachers are employees of the State for the usual and customary period of the regular session which is approximately nine months. Yet at the close of this appropriation, on page 324 of the General Laws of the First and Second Called Sessions, will be found the identical language as that found in the appropriation for the College of Industrial Arts providing for payments to be made in twelve equal monthly installments.

The language heretofore quoted from Section 1 of Chapter 7 of the educational appropriation bill found on page 272 applies to all of the appropriations for the various schools alike. The language quoted as providing for the payment of salaries in twelve equal monthly installments to all teachers of the College of Industrial Arts, as found on page 336, applies to all teachers and employees of that institution. There is no contrary provision in it with the exception of an assistant engineer whose employment is for a period of five months. If this language is to be understood as requiring the employment of all of the teachers and employees of the College of Industrial Arts for the full period of twelve months, then we should be unable to explain why in the body of the bill, as found on page 334, they have specifically provided that the President, registrar, auditor, cashier, general secretary, assistant cashier, secretary to the President, secretary to the Dean, two stenographers for registrar, dairyman, assistant dairyman, superintendent of grounds, engineer, three laborers on grounds, four janitors, night watchman and elevator operator are employed for a period of twelve months. The only inference we can get from this specific provision is that they are an exception to the others in the bill and the only explanation of the exception is that such other employees are to serve for the usual and customary period of the regular session of approximately nine months, while those designated must serve for the full twelve months in order to earn their salaries. This leaves the regular teachers in the College of Industrial Arts, who receive their salaries in twelve equal monthly installments, on the same basis as the teachers and employees of the Prairie View Normal and the Grubbs Vocational College and such other institutions as have the same provision. Whatever reason the Legislature may have had for providing those deferred payments in the case of those schools which do not have a summer term can apply with equal force to those which do.

The appropriation bill for the College of Industrial Arts has carefully provided for every necessity of the institution, its administrative force, janitor service, elevator service, yard men, etc., to run

through the period of the summer school. The incidental expenses are carefully taken care of. No purpose can be discovered for the appropriation of Twenty-nine Thousand (\$29,000) Dollars unless it be for the payment of salaries to teachers in the summer school. It is adequate for that purpose. It is an amount beyond all reason for the aggregate of all other usual and necessary expenses. The Legislature must have meant that it be used for the payment of teachers' salaries. If the Legislature had intended that the regular teachers should serve through the summer school, this appropriation would certainly not have been made and we must conclude that that is its purpose. If a teacher is disqualified because of his employment by the State to teach in the College of Industrial Arts during the regular term to teach in its summer school, the same provision of the Constitution disqualifies him from teaching in any other State institution. We cannot conceive of the Legislature intending to disqualify all of those teachers from teaching in any State institution and thus forcing the necessity that all institutions similarly affected should import into the State teachers from beyond its borders or employ those within the State inexperienced in college work to form the faculty of the summer schools. If we give to the language quoted from Section 1 (found on page 272) the meaning which we have heretofore given, that is the inevitable result. The history of the legislation has provided for us a meaning for that section which makes it very clear, but which it is not necessary to discuss in this opinion. It cannot apply to them except during the period of their employment.

Having concluded that the teachers are employed for the usual and regular session of the college with deferred payments, and that at the end of each session they cease to be employed by the State which is indebted to them for balance of salaries already performed we could not give Section 1, and particularly the language quoted, a meaning that would inhibit their teaching in the summer schools, for then they would be barred from engaging in their profession for the sole reason of their former employment. This is a harsh and arbitrary law, if such be its purpose, and its constitutionality would be doubtful. We cannot believe the Legislature so intended.

It may be suggested that the appropriation made for the summer schools for the University of Texas and the College of Industrial Arts, together with such other schools as must pay their teachers on twelve equal monthly installments, was unintentional, and that this item should not be used to reach the conclusion that we have herein reached. This view we have considered, but we cannot overlook the record of the proceedings of the Legislature wherein it is disclosed that the appropriations for summer schools were strongly contested and after days of discussion, which attracted public attention and caused State-wide comment by the press, the appropriations were passed. The majority of the Legislature passing this enactment in view of its opposition must have been fully advised and certainly knew the purpose and intent of the appropriation.

It will be observed that this opinion does not overrule the opinion heretofore given to the University of Texas but the question has been constantly raised as to whether or not the ruling of the College of In-

dustrial Arts would nevertheless apply to the University of Texas regardless of the failure of the bill to provide twelve monthly installments in payment of teachers and employes' salaries. This communication is addressed to Dr. Bralley, as President of the College of Industrial Arts, and to Dr. Vinson, as President of the University of Texas, that the status of each institution may be understood and a copy of same is furnished the Honorable Lon A. Smith, which he will understand supersedes the advice heretofore given him. By this he will be advised that he has authority to issue warrants to teachers employed in the summer schools of the College of Industrial Arts and the University of Texas regardless of their employment in the regular session of such institution.

Yours very truly,

TOM L. BEAUCHAMP,
Assistant Attorney General.

Op. No. 2392, Bk. 56, P. 242.

INSURANCE OF PRISON PROPERTY AGAINST LOSS BY FIRE.

Senate Concurrent Resolution No. 3, adopted at the Second Called Session of the Thirty-seventh Legislature, does not prohibit the Board of Prison Commissioners from insuring against loss by fire such State property as belongs to the State penitentiaries, and as a sound and prudent business policy might dictate should be so insured, and said board is authorized so to insure such property and to pay the premiums therefor out of the appropriation made for the benefit of the State penitentiaries for the fiscal years 1922-1923.

AUSTIN, TEXAS, October 3, 1921.

Board of Prison Commissioners, Huntsville, Texas.

GENTLEMEN: We have yours of recent date requesting a ruling from this Department as to whether or not, in view of Senate Concurrent Resolution No. 3, passed at the Second Called Session of the Thirty-seventh Legislature, you would be authorized to contract for, or to continue in effect, fire insurance upon public buildings and contents belonging to the State Penitentiary System. This resolution reads as follows:

"S. C. R. No. 3, Relating to insurance on State property.

"Whereas, It is of great financial importance to the State that a fixed policy be established with reference to carrying fire insurance upon buildings and contents belonging to the State and its various institutions; and

"Whereas, The insurance data and information tabulated and set out on page 261 of the first annual report of the State Board of Control indicate that a substantial saving can be made to the State in carrying its own insurance; therefore, be it

"Resolved by the Senate of the State of Texas, the House of Representatives concurring herein, That hereafter it shall be and is the fixed policy of this State that the State shall carry its own insurance upon State buildings and contents, and that no insurance policies shall be taken out upon any of the public buildings of this State, nor upon the contents thereof, and the State Board of Control and all other boards having charge of buildings of the State, and the contents of such buildings, are hereby instructed not to have such buildings nor property insured, notwithstanding there may be items in the appropriation bills authorizing the expenditure of money for the payment of insurance premiums.

"Provided, that it is declared to be the policy of the State hereafter at the end of each two-year period to set aside approximately one per cent of the value of all public buildings owned by the State as a sinking fund until ten per cent of the total value of all such buildings has been accumulated, and that this sinking fund shall be invested in school bonds in the school districts of this State.

"Provided, however, that this resolution, or any part of its provision, shall not apply to or affect the University of Texas, and its branches, and that it is the fixed policy of the State that all buildings and the contents thereof, belonging to the University of Texas, and its branches, shall be kept insured at all times against any loss by fire or tornadoes."

In view of the provisions in the appropriation bill with respect to the Adjutant General's Department for the fiscal years ending August 31, 1922, and August 31, 1923, making an appropriation of certain money "for the payment of insurance premiums covering property belonging to the State, and for other purposes," and notwithstanding said Senate Concurrent Resolution No. 3, it was held by this Department in an opinion prepared by Honorable E. F. Smith, Assistant Attorney General, and addressed to Honorable Lon A. Smith, Comptroller, on September 26, 1921, that the Comptroller was authorized to draw his warrant against that appropriation in payment of premiums on fire insurance policies in certain State property intended to be covered by this appropriation.

In that case, there was a specific appropriation "for the payment of insurance premiums" made by a law duly and properly passed in the form of a bill in the manner and form required by the Constitution, and the conclusion thus reached by Mr. Smith was largely based, and rightly so, we think, upon the proposition that this law, so enacted, could not be and was not nullified or repealed by this resolution.

Likewise, the general appropriation act for the fiscal years 1922-1923 makes specific appropriations for the payment of fire insurance premiums on State property belonging to the University of Texas, including the medical branch of same situated at Galveston. The Agricultural and Mechanical College, the John Tarleton Agricultural College, the Grubbs Vocational College and the Prairie View Normal, and of course the rule announced in that opinion with respect to the Adjutant General's Department would also be applicable to these other State institutions, and for the same reasons.

The general appropriation act, however, contains no such wording with respect to the appropriations made for the benefit of the State Penitentiary, nor, as to that matter, with respect to any State institution or property other than the University of Texas and the medical branch of same situated at Galveston, the Agricultural and Mechanical College, the John Tarleton Agricultural College, the Grubbs Vocational College, and the Prairie View Normal.

This being true, and since there is no general law providing in express terms for or against the insurance of penitentiary property against loss by fire, does it follow, aside from this resolution, that such insurance of State penitentiary property is unauthorized or prohibited, or would be unlawful? We think not.

In the first place, it is quite generally, if not universally, recognized in this country as a sound business policy that property that is subject to be destroyed or damaged by fire should be insured against such

loss, and in the absence of a requirement to the contrary we know of no reason why those charged with the custody and care of public property should not be permitted to exercise the same precaution in the protection of the State against such loss as might result from the damage or destruction of its property by fire, if in their judgment a sound business policy with respect to any particular property so dictates, as an ordinarily, reasonably prudent business man exercises with respect to his private property.

In the second place, it has been the general practice for a number of years on the part of those having the care and custody of certain public property, to have same insured against loss or damage by fire and to pay the premiums for such insurance out of certain appropriations made from time to time for the benefit of such property. This practice was well known to the Legislature, as evidenced by this resolution, as well as by numerous official reports and public documents with respect to the handling of State properties, and the Legislature has at no time condemned this practice, nor passed any law prohibiting it, unless that effect be given to this resolution.

In the third place, the appropriation made for the fiscal years 1922-1923, for the benefit of the State penitentiaries, as well as for the benefit of most of our State institutions, is worded substantially, and in most cases exactly, like the wording of previous appropriations. The Board of Prison Commissioners as well as the heads of certain other State institutions have for many years construed these appropriations as authorizing the payment of fire insurance premiums out of the appropriations so made. This construction is placed upon these appropriation acts was clearly disclosed by the official reports of the heads of these institutions, as well as by other public and official documents, and was generally known and understood. Notwithstanding this, these appropriations have been construed from time to time in substantially the same words. A construction thus placed by the head of a department of the State government upon a law enacted to govern the control and management of such department, and long practiced, is entitled to and should be given great weight, and such construction should not be held to be violative of law unless found to be contrary to some statutory or constitutional provision, and, as we have already stated, there is not, in our opinion, any statutory or constitutional inhibition against such insurance.

Hence, it is our opinion that the Board of Prison Commissioners are authorized to procure or to continue in force such insurance of prison property against loss by fire as sound business judgment may dictate, and to pay the premiums thereon out of the appropriation made for the benefit of the State penitentiaries for the fiscal years 1922-1923, unless prohibited from doing so by this resolution. Is this prohibited by this resolution? We think not.

Viewing this resolution as a whole, we do not understand that it was intended by it to prohibit absolutely the insurance of State property against loss by fire. On the contrary, it declares, in substance, in favor of such insurance. The preamble to the resolution declares that "a substantial saving can be made to the State in carrying its own insurance." The resolution proper states that "hereafter it shall be

and is the fixed policy of this State that the State shall carry its own insurance upon State buildings and contents." In substance, the resolution is the declaration of a policy in favor of the State carrying its own insurance against loss of its buildings and contents by fire. So this resolution is, within itself, a declaration in favor of such protection. It cannot be said, of course, that this resolution opposes the principle of fire insurance, when it, by its own terms, declares in favor of same and attempts to make provision for such insurance.

The resolution does declare, however, in favor of the State carrying its own insurance, but no provision is made by general law or otherwise for doing so. It is true that the "proviso" following the resolution might be construed as an attempt to create a fund for taking care of such insurance, but in the opinion of this Department, prepared by Honorable E. F. Smith, and hereinbefore referred to, this provision was held to be ineffective for this purpose. On the other hand, this "proviso" might well be taken as a further declaration of a policy. It says that "It is declared to be the policy of the State *hereafter* at the end of each two year period to set aside approximately one per cent of the value of all public buildings owned by the State as a sinking fund, until ten per cent of the total value of all such buildings has been accumulated," etc. It is not stated for what purpose this "sinking fund" is to be thus created. Presumably, in view of the general tenor of the resolution, it was to be created for fire insurance purposes, but this is not stated. No method is provided for arriving at the value of public buildings, no person or officer is authorized to "set aside" the percentage provided for, no attempt is made to make an appropriation of or for such percentage, no appropriation fund is designated out of which to "set aside" such percentage, no law was or has been enacted for the investment of such fund in district school bonds of this State, or for otherwise handling or caring for this fund during the ten year period mentioned or any part of such period; in short, no provision is made by general law for putting into operation or carrying into effect the policy of fire insurance here declared in favor of, and this resolution does not do so.

Hence, it is our opinion that this resolution is wholly insufficient to effect the creation of the fund seemingly sought to be created by it, or to render effective or susceptible of practical application, the insurance policy declared in favor of by it, even aside from the reasons advanced by Mr. Smith for so holding.

In view of the fact that the method of insurance declared in favor of by the Legislature in this resolution cannot be pursued, and since the failure otherwise to insure "State buildings and contents" against loss by fire would leave such property without insurance, can it be reasonably said that the Legislature nevertheless meant by this resolution to prohibit the insurance of "State buildings and contents" in the manner that such insurance has been generally carried heretofore? We think not. A stated policy is declared in favor of, but no law is passed or has been enacted by which such a policy can be put into operation.

We note certain words in this resolution which say that "the State Board of Control and all other boards having charge of buildings of

the State and the contents of such buildings, are hereby instructed not to have such buildings or property insured," and these words, dissociated from other provisions of the resolution, might indicate an intent on the part of the Legislature to discontinue the practice of insuring such buildings and contents in the manner heretofore prevailing, but it is our opinion, in view of the resolution as a whole, that these words should not be given this effect. To do so, in view of the ineffectiveness of the method of insurance declared in favor of by this resolution, would altogether preclude the insurance of State property against loss by fire, except that the University of Texas and its branches are excepted from the policy announced by this resolution.

We are of the opinion, therefore, and you are so advised, that Senate Concurrent Resolution No. 3, adopted at the Second Called Session of the Thirty-seventh Legislature, does not prohibit you from insuring against loss by fire such State property as belongs to the State penitentiaries, and as a sound and prudent business policy might dictate should be so insured, and that you are authorized so to insure such property and to pay the premiums therefor out of the appropriation made for the benefit of the State penitentiaries for the fiscal years 1922-1923. We do not mean to say that such property, or any State property, should or should not be so insured. We are not passing upon that question.

Very truly yours,

W. W. CAVES,
Assistant Attorney General.

Op. No. 2408, Bk. 57, P. —.

APPROPRIATIONS—NECESSITY OF SWORN ACCOUNTS FOR SALARIES OF
JUDGES AND EMPLOYEES OF COURTS OF CIVIL APPEALS—FORM OF
ACCOUNT AND EVIDENCE AS TO VIOLATION OF ANTI-
NEPOTISM LAW.

1. The Comptroller is not permitted to issue warrants for salaries of judges and employes of Courts of Civil Appeals except upon sworn accounts.
2. The Chief Justice of the Court of Civil Appeals would be a proper person to make the affidavit.
3. The Comptroller has authority to prescribe forms of accounts for the payment of salaries to said judges and employes, and has authority to include thereon a form of certificate, or other evidence, as to relationship between employe and the person having the power of appointment.

AUSTIN, TEXAS, December 8, 1921.

Honorable Lon A. Smith, Comptroller, Capitol.

DEAR SIR: I have yours of November 29, 1921, propounding substantially the following questions:

1. Is it necessary for the account submitted to the Comptroller for salaries of judges and employes of Courts of Civil Appeals to be sworn to?
2. If question number one is answered in the affirmative, who is the proper person to make the sworn affidavit?
3. Whether or not a certificate should be made by the person empowered to make appointments of employes to the effect that no relationship exists between the appointing power and the employes within the degrees prohibited by law.

Replying to the first inquiry above set forth, beg to advise as follows:

Under our State Constitution no moneys may be drawn from the State Treasury except in pursuance of specific appropriations made by law. Section 6, Article 8, State Constitution. The Legislature having the exclusive power to appropriate money out of the State Treasury, that body has the lesser power of prescribing conditions, rules and regulations upon which such moneys may be disbursed. Therefore, there cannot be any reasonable doubt as to the power and authority of the Legislature to prescribe the duties of the accounting officers of the State in connection with the disbursement of public funds, and one of the accounting officers is the State Comptroller of Public Accounts. It becomes necessary, in view of what has been said, to examine the statutes relative to the duties of the State officer just mentioned.

Article 4327, Revised Civil Statutes of 1911, is in the following language:

"He shall require all accounts presented to him for settlement; not otherwise provided for by law, to be made on forms prescribed by him, and all such accounts shall be verified by affidavit taken before some officer authorized to administer oaths, touching the correctness of the same, or by oath or affirmation, which may be administered by himself, in any case in which he may deem it necessary; and all such accounts of the same class and kind shall be uniform in size, arrangement, matter and form."

Article 4346 provides that all claims and accounts against the State shall be submitted on forms prescribed by the Comptroller, and in duplicate, when required by him, etc.

Article 4348 contains a provision to the effect that, as to pay rolls, the department or institution shall be the claimant, in so far as the listing of the claims is concerned in the Comptroller's office.

Article 7087 provides that officers entitled to salaries may demand monthly payment of the same; and upon filing with the Comptroller of Public Accounts proper vouchers, the Comptroller shall issue his warrant upon the Treasurer for the amount of salary due to the officer applying therefor; and the Treasurer shall pay such warrant out of the fund appropriated for the payment of the same.

It will be seen from the above that the salaries of judges and employes of Courts of Civil Appeals are paid upon "proper vouchers," and that all accounts presented to the Comptroller for settlement not otherwise provided by law must be verified by affidavit taken before some officer authorized to administer oaths touching the correctness of the same or by oath or affirmation which may be administered by the Comptroller himself in any case which he may deem necessary. The statutes do not define the word "voucher" or "proper voucher," and therefore we must arrive at the meaning of the Legislature by construing all the statutes on this subject together. It will, of course, be presumed that the words are used according to their ordinary acceptation.

We believe that the word "voucher," as used in the statute above mentioned, means substantially as held in the case of *People vs. Green*, a New York case quoted from 8 Words and Phrases, page 7362. In that case it was said that "the word 'voucher' would seem to mean

the evidence, written or otherwise, of the truth of the fact that the service had been performed or the expense paid or incurred." Reading this statute in connection with Article 4327, above quoted, we are of the opinion that the words "proper voucher" mean an account prepared in accordance with said Article 4327.

This forces us to the conclusion that it is necessary for accounts to be submitted in accordance with Article 4327 before the Comptroller is authorized to issue warrants for salaries of judges or employes of courts of civil appeals. This means, of course, that the account submitted must be sworn to before some officer authorized to administer oaths. In this connection I direct attention to the fact that the clerk of the Court of Civil Appeals is authorized to administer oaths. See Article 10, Revised Civil Statutes of 1911.

The above is in accordance with the custom from time immemorial in the case of various departments and institutions of the State Government, including the Governor's office, the Attorney General's office, the Treasurer's office, the Supreme Court of Texas and some of the courts of civil appeals. In other words, it has never been doubted in the case of the departments and courts referred to that it is necessary to file sworn accounts in order for the Comptroller to be authorized to issue salary warrants for the heads of said departments and employes thereof.

It has been suggested by someone that the same necessity does not exist for sworn accounts in connection with salaries of employes, where the salaries are fixed by law, as exist in respect to other accounts. However, we think this contention loses sight of the purpose and intent of the Legislature in requiring sworn accounts. In the nature of things, the State Comptroller does not know personally all of the officers and employes of the State Government. It was evidently the intention of the law makers to prevent the issuing of warrants to persons not properly entitled to the salaries. The question might reasonably arise in a given case whether the person claiming the salary is the person who is actually entitled thereto. The Comptroller cannot know the facts, whereas the head of a department or court is peculiarly in a position to know the facts. Is the person whose name is on the pay-roll actually employed and was he employed during the month and is the pay-roll genuine? These are questions the Legislature had in mind, and while another method might be as good there is no reasonable doubt that the statutes require the sworn affidavit as one method of precaution. While these considerations might seem far-fetched in a given case, still when we consider that the State has hundreds of employes, it does not seem unreasonable that the Legislature should make these requirements even in relation to salaries fixed by law. We find no statute making a certificate of an official sufficient.

Your second question is: Who would be the proper party to swear to such accounts? It has been the custom for years to permit the heads of various departments and presiding judges of various courts to swear to the accounts submitted for the payment of salaries of the heads of departments and courts and their employes. It has been customary to submit a pay-roll and the head of the department, in-

stitution or court makes the usual sworn affidavit as to the correctness, etc., of the entire account. This kind of account has been accepted by the Comptroller as complying with the statutes. It will be noted that the statute does not designate specifically who shall make the affidavit. In view of the departmental and contemporaneous construction of the statutes in this respect, and especially in the light of Article 4348 which recognizes the propriety of considering departments and institutions as the claimants in connection with the pay-rolls for certain purposes, we are inclined to the opinion that the law would be complied with if the chief justice of a court of civil appeals should make the proper sworn affidavit to the account submitted to the Comptroller for the payment of the salaries of the justices of his court and the employes thereof.

Your third question arises by reason of the Nepotism Law of this State and especially on account of the provisions of the current appropriation act. This appropriation act for courts of civil appeals contains a provision reading as follows:

"It shall be unlawful for the Comptroller of this State to draw any warrant for the payment of any claim for money appropriated by this act for services performed after this act takes effect to any person employed under this act who may be related within the third degree of consanguinity or affinity to the person empowered under this act to make appointments, in whole or in part, and any person violating any provision of this act, upon conviction thereof, shall be punished as provided by the law passed by the Thirtieth Legislature prohibiting nepotism."

There is still another provision of the statutes which would probably make it unlawful for the Comptroller to issue salary warrants in favor of persons related within the prohibited degrees under our Nepotism Law to the appointing power. See Article 385, Penal Code of 1911.

In view of the provision of the appropriation act, above mentioned, relative to nepotism and the provisions of our Penal Code on this subject, we are of the opinion that the Comptroller would have authority to require proper evidence tending to show that the persons claiming the salary are not related within the prohibited degrees. Therefore, we express the opinion that you would be within your rights in requiring a certificate to be made by the presiding justice of a court of civil appeals to the effect that no person included in the pay-roll is related to the appointing power within the prohibited degrees.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2290, Bk. 55, P. 179.

STATUTORY CONSTRUCTION—EFFECT OF REPEAL OF REPEALING
STATUTE.

1. The common law rule to the effect that the repeal of a repealing statute revives the repealed statute does not prevail in this State, and whenever one law which shall have repealed another shall itself be repealed, the former law shall not be thereby revived without express words to that effect.

2. Hence, a bill repealing Chapter 179 of the General Laws of the Regular Session of the Thirty-fifth Legislature, will not, if enacted into law, have the effect of reviving laws expressly or impliedly repealed by said Chapter 179, unless said bill contains express language evidencing an intention that such prior repealed acts should be revived.

AUSTIN, TEXAS, February 15, 1921.

Honorable R. R. Owen, Member of the House of Representatives, Capitol.

DEAR SIR: Yours of the 15th inst., addressed to Honorable C. M. Cureton, Attorney General, relative to a proposed act repealing Chapter 179, Acts of the Thirty-fifth Legislature, has been referred to me for attention.

You state that you have introduced in the Legislature a bill to repeal said Chapter 179 which chapter requires the publication of certain legal notices in newspapers in lieu of posting such notices. You desire to be advised whether, if enacted into law, the bill you have introduced will have the effect of reviving any and all laws repealed by said Chapter 179, of the Acts of the Thirty-fifth Legislature.

At common law the rule is well settled that simple repeal, suspension or expiration of a repealing statute revives the repealed statute whether such repeal was express or only by implication. Lewis' Sutherland's Statutory Construction (Second Edition), Section 268, page 561.

However, the common law of England prevails in this State only in so far as the same has not been altered or repealed by the Legislature. See Article 5492 of the Revised Civil Statutes of 1911.

The Legislature of this State has long since declared the rule of construction pertinent to your inquiry, subdivision 7 of Article 5502 of the Revised Civil Statutes of 1911 declaring:

"Whenever one law which shall have repealed another shall itself be repealed, the former law shall not be thereby revived without express words to that effect."

This same provision has been in our statutes since 1840 and in the case of *Stirman vs. The State*, 21 Texas, 735, the Supreme Court of Texas held that by reason of the provisions of said statute the repeal of a repealing act will not revive laws repealed by said repealing act unless the last repealing law contains express words to that effect. The court went further and held that such rule applied equally to express and implied repeals. The opinion referred to contains the following language:

"It is very clear on these rules of construction that the Act of 1852, giving jurisdiction to the district court, was repealed and superseded by the Act of 1856; and though the repeal of the Act of 1856 would, on the principles of the common law, revive the former statute, yet this rule has been abolished by the provision of the Act of January, 1840 (Art. 2348), to the effect that when one law, which shall have repealed another, shall itself be repealed, the former law shall not be revived without express words to that effect. The law makes no distinction between express and implied repeals, and it would not be convenient, nor are we authorized to give an effect to one different from that attached to the other. The repeal of the Law of 1856 did not revive that of 1852, consequently the district court had no jurisdiction to determine upon the claim."

See also *Hanrick vs. Hanrick*, 61 Texas, 596.

You are respectfully advised, therefore, that the bill introduced by

you repealing Chapter 179 of the General Laws of the Regular Session of the Thirty-fifth Legislature, if enacted into law, will not have the effect of reviving any laws repealed either expressly or by implication by said Chapter 179, unless you have inserted in your bill express words making it clear that such revival of former acts is intended.

Yours very truly,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2390, Bk. 56, P. 454.

PENITENTIARY—ESTABLISHMENT OF FACTORIES—SALE OF
CONVICT LABOR.

The Legislature has expressly authorized the Prison Commission to establish factories.

A contract whereby a certain amount of the finished product of a factory owned and operated by the prison system is sold at a price to be determined by the cost of raw material is not a sale of convict labor within the meaning of Article 6174, Texas Complete Statutes, 1920.

The Attorney General will not express an opinion as to the advisability of the prison system engaging in manufacturing, because the law leaves that to the judgment of the Prison Commissioners.

AUSTIN, TEXAS, October 3, 1921.

Board of Prison Commissioners, Huntsville, Texas.

GENTLEMEN: You have submitted to this Department the memorandum of a contract, which, if finally executed, will be a contract between the Prison Commissioners and the Reliance Manufacturing Company, of Chicago, a corporation, with the request that we advise you whether or not you have the authority under the law to make such a contract.

This contract, briefly stated, obligates the Prison Commissioners to procure by purchase or lease all the necessary machinery for the manufacture of workshirts, dresses, aprons and children's play-suits, the factory to be established in the prison buildings at Huntsville, and to purchase all the necessary raw material used in such manufacture, and to procure foremen and instructors to teach the convicts how to handle machinery and to manufacture the above named articles and to furnish a minimum of three hundred and a maximum of five hundred convicts to be used in the making of such articles.

The Reliance Manufacturing Company agrees to purchase, for a period of five years, all the goods manufactured by a maximum of five hundred convicts at so much per dozen above the actual cost of the raw material, and will execute a bond for \$25,000, conditioned that it will faithfully carry out its part of the contract.

Before attempting to answer the question submitted, we desire to state that the Attorney General will not express an opinion as to the advisability of the Prison Commission executing the contract under examination, neither will the Attorney General express an opinion as to the advantages or disadvantages of this contract viewed from a business standpoint, for the reason that the law makes it the duty of

the Prison Commissioners to exercise their own judgment in such matters.

In answering your question, your attention is first directed to Article 6183, Complete Statutes of Texas, 1920, which provides that the Prison Commissioners may establish "such factories as in their judgment may be practicable and that may afford useful and proper employment for prisoners." By the enactment of this article the Legislature has expressly authorized the Prison Commission to establish such factories as in its judgment is deemed practicable. There is no limitation as to the kind or character of factories that may be established by the Prison Commission.

Article 6174, Texas Complete Statutes, 1920, provides that "in no event shall the labor of a prisoner be sold to any contractor or lessee." In our opinion this prohibition does not apply to the contract under examination.

We held the contemplated contract between the Prison Commissioners and Eli H. Brown, attorney, which you submitted a few days since, to be in effect a sale of convict labor because in that contract Mr. Brown agreed to install his own machinery and to furnish all the raw material, and to pay so much per dozen to the Prison Commission for making the garments, the Prison Commission furnishing nothing except the labor of convicts and was paid for nothing except such convict labor. In the present contract the Prison Commission is obligated to procure by purchase or lease the necessary machinery; they purchase all the raw material and then sell the finished product to the Reliance Manufacturing Company. By the terms of this contract, the Prison Commissioners are only obligated to sell the finished product that can be manufactured by a maximum of five hundred convicts. They may use more convicts in such manufacturing process and sell the finished product to whomsoever they please. The raw material may be purchased by the Prison Commission from any one having such material for sale.

There is no distinction between the sale of manufactured goods as provided for in this contract and the sale of farm products. The Prison System owns and leases farms. It prepares the ground, procures and plants the seed, cultivates the growing crops and at the proper time harvests and markets what has been produced, and the sale of the farm produce is not and never has been considered a sale of convict labor within the meaning of the prohibition contained in Article 6174.

The fact that the price to be paid under this contract for the finished product is a given amount above the cost of the raw material does not alter the situation. It only acts as a safeguard against loss on the part of the Prison System.

It is the opinion of this Department, and you are so advised, that there is nothing in our laws that prohibits the Prison Commission from executing this contract if the members of said commission so desire.

I am, with respect,

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2374, Bk. 56, P. 15.

APPROPRIATION BILLS.

It is not necessary to add a proviso to the general appropriation bill to the effect that the money appropriated shall not be spent for any purpose except for the specific purposes named in the bill.

Money appropriated for a specific purpose cannot be otherwise expended.

The Legislature cannot, in an appropriation bill, amend, change or alter a provision of a general law. This is a general rule. In certain cases there may be exceptions to this rule.

AUSTIN, TEXAS, August 18, 1921.

Senator R. M. Dudley, Chairman, Senate Finance Committee, Capitol.

DEAR SENATOR DUDLEY: Your letter of August 17th, addressed to the Attorney General, received. Your letter reads as follows:

"If consistent, I would like an official opinion on two points which are involved in our appropriation bills. The first is, what is the effect of placing amendments in appropriation bills, such as the so-called Pope amendment, or any similar amendment, and has it any right there, and, if so, any force? Second, what limitations can be placed on the use of funds in an appropriation bill if the use of such funds is provided for by statute?"

In answering your first question, it becomes necessary to consider the amendments to which you refer. As the writer understands it, these provisos added to the various appropriation bills provide that any money appropriated for any particular purpose, if not used for the specific purpose named in the appropriation bill, shall not be used for any other purpose whatsoever, but that the unused portion shall be returned to or left in the State Treasury.

You want to know what force or effect such proviso has when attached to and made a part of an appropriation bill.

Your attention is first directed to Article 2402a, Texas Complete Statutes, 1920, which reads as follows:

"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 for in any appropriation bill."

Also attention is directed to Article 2402b, which is as follows:

"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."

Attention is also directed to Article 2402c, which is as follows:

"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."

Article 104 of the Penal Code provides that:

"If any person shall knowingly and wilfully borrow, withhold or in any manner divert from its purpose, any special fund, or any part thereof, belonging to or under the control of the State, which has been set apart by law for a specific use, he shall be punished by confinement in the penitentiary for a term not less than two nor more than ten years."

This Department in an opinion written by the present Attorney General when he was First Assistant, of date August 29, 1913, in Opinions of the Attorney General, Vol. 32, page 209, held that the amounts placed in the separate columns of the appropriation bill are limitations on the amount which may be expended during the fiscal year indicated by the column heading.

A good definition of the word "appropriation" is found in 3 Cyc., 565, as follows:

"The act of setting apart, or assigning to a particular use or person, in exclusion of all others; application to a special use or purpose an authority from the Legislature, given at the proper time and in legal form to the proper officers, to apply sums of money out of that which may be in the treasury, in a given year, to specified objects or demands against the State."

In 4 Corpus Juris, 1460, the following statement is made, supported by many authorities:

"An appropriation of funds is an authority from the Legislature, given at the proper time and in legal form to the proper officers, to apply sums of money, out of that which may be in the treasury in a given year, to specified objects or demands against the State; the act of the Legislature in setting apart or assigning to a particular use a certain sum of money to be used in the payment of debts or dues from the State to its creditors; a setting apart from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to *use that money and no more for that object, and for no other.*"

It is the law of this State that no part of the money appropriated by the Legislature can be used by any person charged with its expenditure for any purpose other than the specific purpose named in the appropriation bill. An expenditure for a purpose other than the one for which the money was appropriated would be a misapplication of public funds. The Comptroller would not be authorized to draw his warrant on any fund for any purpose except the purpose named in the act, and the Treasurer would be without authority to honor a warrant on any fund for any purpose except that named in the appropriation bill.

Such amendments as you refer to in your letter do not add to or take from the force and effect of the general laws of this State and the rules above stated, and in the absence of the provisos contained in these amendments, the money could not be expended for any purposes except those for which it was appropriated.

Your second question is not specific, but is general, and our answer must also be a general one. It is a rule of statutory construction that a general law cannot be amended, changed or altered by an ap-

propriation bill. There may be in certain cases exceptions to this general rule of law.

I am, with respect,

Yours very truly,

E. F. SMITH,
Assistant Attorney General.

Op. No. 2269, Bk. 55, P. 27.

APPROPRIATIONS—EQUIPMENT.

Contracts for plumbing, heating and wiring a building can be paid from the item in the appropriation bill for the erection of the building, but only such portions of the contract as relate to apparatus placed in a building to make it habitable for the particular purpose for which it is erected may be paid from the item "to equip the building."

AUSTIN, TEXAS, January 11, 1921.

State Board of Control, Capitol.

GENTLEMEN: Through the Inspector of Masonry, Honorable W. R. Hendrickson, you have submitted to this Department for an opinion thereon the question of whether or not certain accounts arising from the erection and equipment of a dormitory for small children at the State Orphan Home may be paid from the item in the appropriation bill, "To Fully Equip Dormitory, \$8000."

There is contained in the appropriation of the State Orphan Home for the year ending August 31, 1920, two items as follows:

"Build Dormitory for small Children.....\$92,000.
"Fully Equip Dormitory..... 8000."

It appears from statements submitted by Mr. Hendrickson, contracts were entered into under these two items as follows:

General with G. W. Brillhart.....\$81,919.60
Plumbing and Heating, J. H. Wooley..... 8,615.00
Wiring, Davidson Electric Co..... 2,300.00

Total contract.....\$92,834.60

To which must be added, architect's fees..... 4,621.82
Furniture 3,548.17

Making a total of all obligations against these
two items of.....\$101,004.59

It appears therefore that the contracts for the erection of a building, plumbing and heating, wiring and architect's fees, aggregating a total of \$97,456.42 is \$5456.42 in excess of the \$92,000 appropriated to build the dormitory, and the question propounded by you is—May this excess be paid from the \$8000 item to fully equip the dormitory?

A correct answer to your question depends upon the proper construction to be placed upon the language: "To fully equip dormitory," used in the appropriation bill. As we understand the statements submitted by Mr. Hendrickson, a portion of the plumbing,

heating and wiring contracts have been or will be paid from the item of \$92,000 to build the dormitory. It is manifest that heating, plumbing and wiring are either a part of the building, or they are equipment, and a portion of the contracts cannot be paid out of one fund and the remainder out of the other, unless it can be said that certain parts of the heating, wiring and plumbing systems are of such a nature that they can be segregated from the building, and therefore held to be equipment. Any part of the work done under these contracts that is built into, and thereby becoming a part of the building, cannot be paid from the item to equip the building, but if any of these fixtures are of such a nature that they can be used only while the building is used as a dormitory, and can be easily removed without affecting the permanent portion of the building, then they could be held to be equipment and be paid for out of the item for that purpose.

Webster defines "equipment" to be:

"Whatever is used in equipping; necessaries for an expedition or voyage; the collective designation for the articles comprising an outfit; equipage; as a railroad equipment (locomotives, cars, etc., for carrying on business); horse equipment; infantry equipments; naval equipment; laboratory equipments."

Under the above definition, it appears that it would be easy to determine what would constitute equipment of a building for dormitory purposes; that is to say, it would be those articles necessary to place in a building wholly unoccupied that would make it habitable as a sleeping apartment for small children, as contradistinguished from a building occupied for any other purpose. All buildings in order to be habitable must have plumbing, wiring and heating apparatus, and such apparatus, consisting of wires, pipes, etc., are under modern conditions built into the building and become a part thereof. Buildings used for different purposes, however, are equipped with furniture and certain fixtures appropriate to the use for which the building is occupied, and it is those things necessary for the occupancy of the building as a dormitory that the Legislature intended should be purchased from the item: "To fully equip the dormitory."

We advise you, therefore, that if in the erection of this building, portions of the heating, plumbing and lighting system were built into the building, becoming a part of it, that the same may be paid from the item of \$92,000 for the erection of the building, and that if other portions of these three systems were placed in the building merely to make it habitable as a dormitory, and are not necessarily a part of the building proper, they would come under the definition of equipment and may be paid from the item in the bill, "To fully equip the dormitory."

Yours very truly,

C. W. TAYLOR,
Assistant Attorney General.

Op. No. 2296, Bk. 55, P. 221.

CONSTITUTIONAL LAW—LOCAL AND SPECIAL LAWS—AN ACT INCREASING THE COMPENSATION OF THE COURT REPORTER IN THE EIGHTH JUDICIAL DISTRICT.

An act having for its purpose to increase the compensation of the court reporter in a named judicial district composed of four counties is unconstitutional as attempting to regulate the affairs of said counties by local or special law contrary to Section 56 of Article 3 of the Constitution of the State of Texas.

AUSTIN, TEXAS, February 25, 1921.

Honorable J. M. Melson, Member of the Legislature, Capitol.

DEAR JUDGE: I have yours of the 22nd instant, addressed to the Attorney General, enclosing a copy of a bill now pending in the House, the purpose of which is to increase the salary of the court reporter of the Eighth Judicial District composed of four counties. The bill provides that the official court reporter of said district shall receive a salary of two thousand (\$2000) dollars per annum, together with an allowance of three hundred (\$300) dollars per annum for traveling expenses, supplies, etc., incident to the performance of his official duties in addition to the compensation for transcript fees as provided by law. Then follows this language:

"Said salary and expenses to be paid monthly by the commissioners courts of the several counties constituting the Eighth Judicial District, each county to pay its pro rata portion of said salary and expenses, according to the number of weeks court which may be held in said counties, respectively."

You desire to be advised as to the constitutionality of a measure of this kind should it become a law.

As a general proposition where there is no expressed constitutional restriction against the passage of local laws, the courts will not hold such laws void for want of constitutional authority to enact them. *Boyman vs. Black*, 47 Tex., 466; *Orr vs. Rhine*, 45 Tex., 345; *Davis vs. State*, 2 Cr. App., 425.

However, Section 56 of Article 3 of our State Constitution declares that the Legislature shall not, except as otherwise provided in the Constitution, pass any local or special law for the purposes enumerated in said Section 56. Among others, said section enumerates the following: "regulating the affairs of counties, cities, towns, wards or school districts."

Said Section 56 also enumerates the following: "and in all other cases where a general law can be made applicable no local or special law shall be enacted." The courts tend to hold that the Legislature is the exclusive judge as to when a general law can be made applicable. See *Smith vs. Grayson County*, 44 S. W., 921, with authorities cited therein. It is not necessary, however, to pass upon this question in view of the fact that we hold that the bill in question attempts to regulate the affairs of counties within the meaning of the Constitution and would be for that reason invalid if it should be passed by the Legislature.

This Department has heretofore held that an act of the Legislature granting to a district clerk \$1200 additional compensation for

services as clerk of a newly created district court, is invalid, being a special law regulating the affairs of a county. (Reports and Opinions of the Attorney General, 1916-18, p. 515.)

An act amending an act of the Legislature establishing the office the county auditor, which amendment attempted to exempt a certain county, naming it, from the operation of the act, is a special or local law regulating county affairs and is therefore unconstitutional. *Hall vs. Bell County*, 138 S. W., 178.

In the case immediately above cited, in holding that an attempt to exempt Bell County from the provisions of the county auditors' law was an attempt to regulate the affairs of a county contrary to the Constitution. The court said:

"The word 'regulating' as used in the Constitution should not be given a narrow or technical significance. If the result of the legislation is to repeal or materially change any law controlling or affecting the collection, safe-keeping or disbursement of county funds, such legislation, within the purview of the Constitution, is a law regulating county affairs. If the act exempting Bell County from the statute requiring a county auditor is valid and enforced, then material changes in the counties' affairs will necessarily result. In the first place the county will save the expense of that office," etc.

In the case of *Altgelt vs. Gutzeit et al.*, 201 S. W., 400, the Supreme Court of this State held invalid an attempt on the part of the Legislature in a special road law to fix the compensation of county commissioners for all purposes, and it would seem from a reading of the opinion that the court based its decision upon the proposition that the Legislature in the special road law under consideration attempted to regulate the affairs of the county in that the statute not only purported to fix the compensation of county commissioners for services rendered in connection with the public roads of the county, but also attempted to fix the compensation for all services required of them by law. The Legislature thus went beyond the scope of a special road law and attempted to regulate the affairs of the county in other respects.

The bill about which you inquire undoubtedly attempts to regulate the affairs of the counties composing the Eighth Judicial District, since the compensation of the court reporter is paid by said counties and the amount they are required to pay under the general laws is increased by said proposed act. We do not understand from the provisions of the Constitution or the decisions that in order to render a special or local law unconstitutional as regulating the affairs of counties, it is necessary that all the affairs of the county shall be attempted to be regulated. In fact, we do not find in any of the cases decided upon this point that any law held invalid in such cases attempted to regulate all of the affairs of the county or counties affected.

We hold, therefore, that the proposed act inquired about by you would be unconstitutional as attempting to regulate the affairs of the counties composing the Eighth Judicial District.

Very truly yours,

L. C. SUTTON,
Assistant Attorney General.

Op. No. 2297, Bk. 55, P. 172.

APPROPRIATIONS—UNIVERSITY CAMPUS ADDITION—CONSTITUTIONAL LAW.

The Legislature may appropriate out of the general revenue of the State funds to enlarge present University Campus.

AUSTIN, TEXAS, February 15, 1921.

Hon. W. O. Wright, Member of the Legislature, Appropriation Committee, State Capitol, Austin, Texas.

DEAR SIR: The Attorney General's Department received your communication of February 8, 1921, in behalf of the Appropriation Committee of the House of Representatives, and same has been placed upon my desk for consideration and reply.

We understand that your committee desires to be informed as to whether or not the Legislature has the power to authorize the purchase of land so as to enlarge the present campus now located in the City of Austin, and to appropriate a sufficient sum out of the general revenue funds of the State for the purchase price.

We respectfully refer you to an opinion rendered to your committee on February 12, for a discussion of the various constitutional clauses affecting the appropriation of funds derived from the general revenue of the State. We need not repeat here what was said in that opinion, either as to the general power of the legislative branch of the government in regard to appropriating power, nor to the various restrictions of the use of such power as is found in the Constitution of 1876. In that opinion, in the second paragraph, sixth page, we simply say that each item for which it is sought to expend funds out of the general revenue must be considered separately, and it must be ascertained whether such item comes within the restrictions mentioned in Section 14, Article 7 of the Constitution.

The duty is upon the Legislature to establish, maintain, support and carry on the University. (Sec. 10, Art. 7; Sec. 48, Art. 3, of the Constitution.) That duty being recognized, carries with it the power and authority to raise revenues and appropriate funds for that purpose. The Legislature is not restricted in so doing, except as such restrictions appear in the Constitution. The provision of paragraph 5, Section 48, Article 3, that the Legislature shall levy taxes and appropriate moneys for "the support of public schools, in which shall be included colleges and universities established by the State," is an expressed authorization to the Legislature by the people, but such expressed authorization is not exclusive and cannot be construed as to be restrictive of the unlimited power of the Legislature. This provision of the Constitution is properly classified as one of the permissive clauses and cannot be construed as restricting the power of the Legislature to appropriate funds for the *support* only of colleges and universities.

We must now look for a direct or implied restriction upon the Legislature restraining that body from appropriating money out of the general fund to purchase lands upon which to place public buildings with particular reference to the University. Ostensibly, we find such

a provision in Section 14, Article 7, of the Constitution, which reads as follows:

“* * * provided that no tax shall be levied and no money appropriated out of the general revenue, either for this purpose or for the *establishment* and erection of the buildings of the University of Texas.”

We may immediately dismiss consideration of the last portion of this clause, with reference to erecting buildings, for it is not a restriction upon the Legislature to purchase lands upon which to place University buildings. It may be forcibly argued that having restricted the appropriation of general funds for the erection of buildings only, that such restriction constitutes permission for all other purposes.

This same section and clause of the Constitution prohibits appropriation of the general fund of the State for the “*establishment of the University of Texas.*” It is arguable that the purchase of lands for a campus comes within this restriction, but we are disposed to hold otherwise, and to place an interpretation upon the word “establishment” so that it shall mean “to originate,” “create,” “to found,” or “institute,” and “*imports an original intended outlay*” of money for setting up a University.

9 Hare, 647.

78 Texas, 406.

69 N. Y. Supplement, 462.

Placing this meaning upon this phrase of the Constitution, we must look to see if the purpose of the purchase of the land herein is to originally and in the first instance provide for a campus or a University site. This is not true, for we find that the establishment of the University has long since been accomplished by an act of the Seventeenth Legislature, Chapter 75, pages 79 to 82, in the year 1881, and this original outlay and expense for fixing certain, rendering without doubt and initially setting up an institution of learning has already been accomplished and made.

The establishment of the University at its present location and there never having occurred an abandonment or discontinuation, we must conclude that this phrase in the Constitution has spent itself, and so far as it may affect the question propounded to us under the given facts that the lands desired to be purchased are to supplement the present campus, we are permitted to consider it inapplicable. Therefore, we find that none of the restrictions in Section 14, Article 7, apply, and the Legislature may exercise in general power to appropriate without restraint.

As a further interpretation of this phrase of Article 14, we call attention to the fact that the convention was conscious, and its members had within their minds, the knowledge that the Third Congress of the Republic of Texas in 1839 had already provided for a campus or grounds upon which the University might be located. And this knowledge, we can presume with no want of reason, actuated the authors of our Constitution in drawing and wording the clause dealing with and having reference to the University. If such was true, it is easy to conclude that they would look with disfavor on the purchase of another University site when the Third Congress had already secured and provided one. But we cannot believe that such disfavor

was so written as to forever thereafter prevent the enlargement and extension of a site already so selected and acquired.

Placing the foregoing construction upon the words "Establishment of a University," we hold that the Legislature now has power, since there are no restrictions in the Constitution, to purchase additional grounds to be used as a campus for the University in connection with the campus originally selected and acquired in the establishment of the University, and such grounds or lands may be paid for out of the general fund of the State. We desire to say, however, that the conclusion of the Attorney General is of course not binding upon the courts, but this is a case where there is a doubt and we have resolved that doubt in favor of the freedom of power in the Legislature to provide for the education of the youths of Texas.

Yours very truly,

WALACE HAWKINS,
Assistant Attorney General.