OFFICIAL OPINIONS

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

OPINIONS RELATING TO BANKS AND BANKING

Op. No. 2721, Bk. 62, P. 406.

BANKS AND BANKING—USE OF TERMS "BANK," "TRUST COMPANY," AND SIMILAR TERMS.

1. A Morris Plan Bank organized under Chapter 9, Title 16, Revised Statutes, may use the word "bank" as a part of its corporate name.
2. A corporation organized under Subdivision 49, Article 1302, Revised Statutes, or under Chapter 17, Title 32, may not use the word "trust" or "trust company," or similar terms as a part of its corporate name.

Construing: Article 491, R. S.
Chapter 9, Title 16.
Chapter 17, Title 32.
Subdivision 49, Article 1302.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 19, 1928.

Hon. R. J. Randolph, Assistant Secretary of State, Capitol.

DEAR SIR: In your letter of the 18th instant to the Attorney General, you make the two following inquiries:

"1. May a corporation organized under Chapter 9, Title 16, Revised Statutes, use the word "bank" as a part of its corporate name, or does Article 491 of the Statutes exclude a corporation of that character from the use of such a word when it limits such use to those corporations organized or formed under Title 16?"

"2. May a corporation formed under subdivision 49, Article 1302, Revised Statutes, use the word "trust" as a part of its corporate name, notwithstanding the prohibition in Article 491, it being a word clearly indicating the real purpose of the business?"

Article 491 provides in part, as follows:

"It shall be unlawful for any incorporated bank other than State banking corporations and national banks to advertise or put forth any sign as a bank, bank and trust company, or savings bank, or in any way solicit or receive business as such, or as any such, or to use as their name or part of their name, or upon any sign, advertising, letterheads or envelopes, the word "bank," "banker," "banking," "trust," "trust company," "savings bank," "savings," or any other term which may be confused with the name of corporations organized under this title."

We believe that the reasonably clear intent of the law as codified is to protect against the confusion of names of corporations otherwise organized with the names of corporations organized under Title 16, styled "Banks and Banking," which is the title embracing Article 491 in the Code. Since Chapter 9 of this same title provides for the organization of Morris Plan Banks as corporations, such banks would seem to be within the protection of Article 491 rather than within its inhibition.

The terms "State Banking Corporations" in Article 491 are

broad enough to include Morris Plan Banks, and since there are other corporations to which the term "bank" might be loosely applied besides those organized under Title 16, there is no forceful contrary persuasion had from these terms as used in the first part of Article 491.

We therefore advise as to your first inquiry that any corporation organized under Title 16, Revised Statutes, may use the word "bank" or other appropriate term as a part of its corporate name.

As to your second question, we believe that corporations, formed under Subdivision 49 of Article 1302, embraced in Title 32, Revised Statutes, styled "Corporations," as well as corporations organized under Chapter 17 of the same title, come within the inhibition of Article 491 and may not use the words "trust," "trust company," or similar terms as a part of their corporate names. Of course, this does not mean that a trust company, organized under Title 16, electing to take the powers specified in Article 1513, which is the first article under Chapter 17 of Title 32, would be precluded from using its proper name of "trust company." The exercise of such additional powers does not vary the fact that the last mentioned corporations are organized under Title 16.

It will be noted that, though Chapter 17 is entitled "Trust Companies and Investments," the corporations referred to therein, with the just noted exception, and not termed "trust companies."

Yours very truly,

C. W. TRUEHEART,
Assistant Attorney General.

OPINIONS RELATING TO CORPORATIONS

Op. No. 2658, Bk. 62, P. 20.

CORPORATIONS—PAYMENT OF STOCK—FRANCHISE AS PROPERTY PROOF OF VALUE.

1. A franchise granted by proper authority authorizing the erection of waterworks and the use of public streets and highways in connection therewith may be property actually received within the meaning of Article 12, Section 6 of the Constitution of Texas, when transferred to a corporation in exchange for stock.
2. Such a franchise may be paid for in stock only to the extent of the actual value of the franchise.
3. The value of such a franchise must be established to the satisfaction of the Secretary of State before it will be accepted as property actually received and for which stock is to be issued in a concern seeking to be chartered as a corporation.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 1, 1927.

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

DEAR MADAM: This is to acknowledge receipt of your letter of January '7th, which reads as follows:

"Please advise this Department whether or not a charter may be granted to a corporation organized for profit, authorizing said corporation to receive in payment, in whole or in part, of its capital stock a franchise for a water works system.

Mr. A. C. Kellersberger of Austin desires to form a waterworks corporation and to convey to said corporation one certain franchise granted to him by the Commissioners' Court of Gillespie County for the construction of a waterworks system in the town of Fredericksburg, Texas, and to receive from said corporation its stock in payment of said franchise. Certified copy of said franchise and other papers are herewith enclosed.

We raise this question in view of the provisions of the Constitution, particularly Sub. 6, Sec. 1, Art. XII, and laws, particularly Sub. 3 of Art. 1308, governing the manner in which the capital stock of a private domestic corporation may be paid. There seems to be some doubt as to whether such a franchise is 'property' within the contemplation of our Constitution and statutes."

This constitutional provision to which you make reference reads as follows:

"No corporation shall issue stock or bonds, except for money paid, labor done or property actually received, and all fictitious increases of stock or indebtedness shall be void.."

In construing this section of the Constitution, the Supreme Court of Texas held in the case of O'Bear-Nester Glass Company v. Antiexplo Company, 101 Tex. 432, 108 S. W. 967, that the phrase "property actually received" refers to something that is substantial and of a character that could be subjected to the payment of claims against the corporation. A secret chemical

formula was held not to be such property. In the case of Cole v. Adams, 92 Tex. 171, 46 S. W. 790, the Supreme Court of Texas held that an option on an ice plant in the city of Bryan and a contract to furnish water and lights to that city, were property actually received when given in payment of stock, to the extent of their actual value.

In the case of Thomas v. Barthold, 171 S. W. 1071, a franchise was obtained from the town of Weatherford. It was obtained by the promoters without the expenditure of any money and was transferred to the corporation and capital stock in the corporation taken in payment therefor. Judge Dunklin in the opinion of the Court of Civil Appeals at Fort Worth says:

"The proposition now under discussion proceeds upon the theory that, as the franchise cost the defendants nothing, the stock issued to the defendants therefor was without any consideration, and that accordingly defendants should be held to an accounting therefor. A sufficient answer to these propositions is that no evidence was introduced tending to show the value of the franchise at the time it was acquired by the company. For aught that appears in the record, it may have been worth more than the face value of the stock issued to the defendants as a consideration therefor."

This case went to the Supreme Court of Texas and was reversed on another point. The proposition as to whether or not such a franchise was property which might be given in payment of stock in a corporation was not passed upon.

In Fletcher Cyclopedia Corporations, Vol. 2, Section 1163, we read:

"That a special franchise is property admits of no doubt, although there is some conflict, mostly in regard to taxation, as to whether it is real or personal property.

"In some states, it is held that the franchise does not involve an interest in land. It 'is not real estate, but a privilege which may be owned without the acquisition of real property at all. The use of a franchise may require the occupancy, or even the ownership, of land; but that circumstance does not make the franchise itself an interest in land.' The special franchise may, according to the weight of authority, be sold or assigned, and it may survive the corporation that received it and exercised it."

In 12 Ruling Case Law, page 175, the law on this subject is stated as follows:

"In character and nature a franchise is essentially in all respects property, and is governed by the same rules as to its enjoyment and protection, and regarded by the law precisely as other property. More often than not franchises are very valuable and productive property, and when not conferred for the purpose of giving effect to some reserved power of a state, seem to be as properly objects of taxation as any other property. It is its character as property only which imparts value to a franchise, and alone authorizes a right of action for invasions or disturbances of its enjoyment. Thus it has been held in a number of cases that the grantee of a public utility franchise has such a property right as will en-

title him to restrain by injunction any person or corporation attempting without authority to exercise such right in competition with him although the franchise is not exclusive. The owner of a franchise has the same security for its protection, under the Constitution, as has the owner of any other property."

It has been specifically held that the grant by a city of the exclusive privilege to construct a waterworks plant in the city and to use the streets for that purpose was the grant of a franchise; that the franchise to so construct the waterworks and use the streets of the city is a valuable right, constitutes property and is taxable. Adams v. Bullock and Company, 94 Miss. 27, 47 So. 527.

In the case of Smith v. Martin, 135 Cal. 247, 67 Pac. 779, the Supreme Court of California held that the issue of the capital stock of the street railway corporation in payment of stock and franchises of another company was not without consideration, under a constitutional provision practically identical with that of Texas.

The franchise of a toll bridge company had been appropriated under the power of eminent domain and compensation awarded for the extinguishment of the franchise. West River Bridge Company v. Dix, 6 How., 507, 12 L. Ed. 535. In that case, on the question of property it was said:

"We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property, and nothing more; it is incorporeal property, and is so defined by Justice Blackstone, when treating, in his Second Volume, c. 3, p. 20, of the Rights of Things. It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment."

And it has been held that whether a governmental franchise is to be regarded as realty or personalty, it is a property right which may be subjected to the debts of the franchise holder. Leonard v. Baylen Street Wharf Company, 59 Fla. 547, 52 So. 718.

It is common knowledge that some franchises are of great value. It is our opinion that a franchise granted by the proper authorities to erect a waterworks system and to use the public streets and highways for the operation of the system is property within the meaning of Section 6, Article 12 of the Constitution of Texas.

There is an additional practical question which the statute casts upon the Secretary of State which will be somewhat difficult. That is to ascertain the value of a given franchise tendered in payment of stock.

Articles 1308-9 and the decisions of our courts declare the Secretary of State must be satisfied as to the value of any particular property tendered in payment of stock. On this question of value in 12 Ruling Case Law, page 185, we find the following statement:

"Generally franchises are an asset of great value to utility companies, and a principal basis for credit. A franchise, however, cannot be said to have a market value; and when its value is necessary to be proved, resort must be had to the nearest relative facts and circumstances from which such value may be fairly inferred. The franchise or bare right to do a thing considered with reference to itself alone is of no value. It is only when it is considered relatively and in connection with its use that it can be said to be valuable. To determine its value, the practical uses to which it can be put must be taken under consideration or the profit which by proper management can be made out of it. Where a franchise is without value, and of such character as to render both an expenditure of money and the application of business judgment and skill in its management necessary to make it useful and profitable, its value must be determined by a consideration of it in connection with such possibilities."

In the case of Black v. McKay, 108 Tex. 224, 191 S. W. 557, the Supreme Court of Texas held that corporations may be authorized to issue capital stock for property received only on furnishing satisfactory evidence of its value to the Secretary of State.

In that particular instance, the Secretary of State refused to approve a value of $64,000.00 for a patent and the Supreme Court refused to control the discretion of the Secretary of State on the question of value. Incidentally, the Supreme Court declined to decide the question as to whether or not a patent was property within the meaning of the constitutional provision here under discussion.

Based upon the authorities, we reach this conclusion:

1. That a franchise granted by proper authority authorizing the erection of waterworks and the use of public streets and highways in connection with such waterworks may be property actually received when transferred to a corporation in exchange for stock only to the extent of its actual value.

2. The value of such a franchise must be established to the satisfaction of the Secretary of State before stock in a corporation may be issued therefor.

In conclusion, we call your attention to the fact that the franchise in the present case purports to be granted by the Commissioners' Court of Gillespie County for the construction of waterworks and the use of the public roads leading into and within the town of Fredericksburg. We have not considered the question of the authority of county commissioners to grant such a franchise within an incorporated town, if Fredericksburg is such.

Yours very truly,

D. A. SIMMONS,
First Assistant Attorney General.

Op. No. 2674, Bk. 62, P. 132.

CORPORATIONS—CHARTER AMENDMENT—FILING FEES—CHANGING PAR TO NON PAR SHARES—REVISED STATUTES, ARTICLES 1538a, 1538c, ARTICLE XII, SECTION 6 OF THE CONSTITUTION.

1. The exchange of the par value shares for non par value shares representing the same proportional interest in the corporation is not a violation of the constiutional provision that stock shall be issued only for money, labor done, or property actually received.

2. A conversion of shares of par value into an equal or greater number of shares of no par value to be exchanged therefor, without any capitalization or impairment of any existing surplus or accumuulated and undistributed profits is not an increase of stock, but is merely a substitution of one muniment of title for another or others, without in any particular affecting, altering or modifying the nature of the property owned by the corporation.

3. Upon the tender of an amendment to a charter merely chanaging par shares to an equal or greater number of no par value shares, where there is no increase of capital stock and no provision for the capitalization of the surplus or undivided profits, the minimum fee provided by Article 3914 covers the filing of the amendment.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 24, 1927.

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

DEAR MADAM: We have before us for attention your letter of March 18th from which we quote enough to show the facts upon which we base this opinion:

"El Paso Electric Company has tendered to the Secretary of State for filing, an amendment to its charter converting all of its par value stock into non par value stock, and has offered to pay the minimum filing fee of $200.00. The corporation at this time has an authorized capital stock of par value of $3,500,000.00, divided into 35,000 shares of $100.00 each. Thirty thousanad shares are now out standing and the remaining 5,000 shares have not been subscribed. The amendment proposes to exchange, on a basis of five shares to one, 150,000 shares of non par value stock for the 30,000 par value shares now outstanding and to authorize the Board of Directors to dispose of the remaining 25,000 shares of non par value for such consideration as it may fix.

"The Secretary of State contends that the corporation should pay a filing fee based on the amount of any excess in the company's assets over the amount of the authorized capital stock on which it has already paid a filing fee. The corporation refuses to pay the fee calcultaed in this manner, but contends that the minimum filing fee of $200.00 required to be paid by a street railway company for the filing of an amendment to its charter, is all that it can be required to pay for the filing of this amendment.

"Based upon the foregoing statement, we respectfully request an opinion on the following matters:

"1. In the case of a conversion of par value stock into non par value stock, pursuant to Article 1538-h, Revised Civil Statutes, what is the actual consideration received for the issuance of the non par value shares, within the meaning of Article 1538-h?

"2. If the amendment converts the par value shares into a greater number of non par value shares, as to any non par value shares which

are not subscribed and paid for at the time of the conversion, is a filing fee required to be paid on such unissued non par value shares, according to the schedule and in the manner provided in Subdivision (b) of Article 1538-h?"

You state that it is not your contention that the corporation must pay a filing fee at this time on such part of its capital stock for which a filing fee has already been paid, but that the corporation is required to pay a filing fee on any excess over the amount of its capital stock on which the fee has already been paid, considering such excess as an increase in the capital stock. You further state that you believe that when a corporation converts its par value stock into stock of non par value, that the practical effect of such conversion is to liquidate the par value stock and to constitute the net assets of the corporation the fund which shall thereafter be the basis of the corporation's credit, and shall constitute the capital stock.

We think it appropriate, first to refer to the applicable statutes:

Article 1538a provides that domestic corporations, other than banking or insurance companies, may amend their charters to provide for the issuance of shares of stock without nominal or par value.

The consideration therefor may be prescribed in the amendment, or by the stockholders at a special meeting, or by the directors acting under special or general authority. Art. 1538c.

Shares may be issued under our Constitution only for money paid, labor done, or property actually received. Art. XII, Sec. 6.

Corporations heretofore organized with par value shares, excepting banking and insurance corporations, may amend their charters so as to change the stock into the same number, or into a larger or smaller number of shares without nominal or par value and exchange these for the old shares. Art. 1538h.

Art. 3914 requires the Secretary of State to charge fees in a case of this kind as follows:

"For each 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 twenty-five hundred dollars."

In construing this article in the Revised Statutes of 1895 the Supreme Court of Texas held that the minimum filing fee should be charged for every amendment of a charter, but that the additional fees could only be charged upon an increase

of the capital stock. St. Louis S. W. Ry. Co., of Texas v. Tod, Secretary of State, 94 Tex. 632, 64 S. W. 778.

The material question here is to determine what is the capital stock of a corporation having shares of no par value. The cases decided by the courts of this state concerning corporations issuing shares of no par value have dealt with the question of the franchise tax of foreign corporations. Staples v. Kirby Petroleum Co. 250 S. W. 293; American Refining Co. v. Staples, 269 S. W. 420; and Investment Securities Co. v. Meharg, 115 Tex. 441, 282 S. W. 802. The method of figuring the franchise tax is different from that used for the filing fees. The basis for figuring the franchise tax is the capital stock, surplus and undivided profits of a par value stock corporation; and the gross assets of a non par value stock corporation. The proportion thereof used in its Texas business determines the franchise tax of the foreign corporation.

Filing fees are based upon the authorized capital stock. The capital stock of a corporation is the amount contributed by the shareholders for the prosecution of the business. Staples v. Kirby Petroleum Co., supra. In par value stock corporations the amount of the capital stock is specified in the charter and no question can arise thereon.

Non par stock laws are of comparatively recent origin, and although our information is that they are now in force in thirty-nine states, but few questions thereon have come before the courts.

It seems to be the view of the Supreme Court of Missouri that corporations issuing shares of no par value have no capital stock State v. Freehold Investment Co., ——No.———, 264 S. W. 702. But the franchise tax can be determined from its property and business done in the state. State v. Sullivan, Secretary of State, 282 Mo. 261, 221 S. W. 728; St. Louis, San Francisco Ry. Co. v. Middlekamp, 256 U. S. 226, 65 L. ed. 905, 41 Sup. Ct. 480.

According to the Supreme Court of Kansas, the 'lawfully issued capital' and the 'capital stock' of non par value stock corporations are the assets devoted to the prosecution of the business. North American Petroleum Co. v. Hopkins. 105 Kan. 161, 181 Pac. 625.

Under our statutes filing fees must be paid on the actual consideration received by the corporation for shares of no par value. If all such shares are not subscribed and paid for at the time of the filing of the original charter or amendment those not subscribed and not paid for shall be assumed to have the same value as those sold. If they are later sold for more than this assumed value, filing fees must then be paid on the additional amount received. Art. 1538f.

Thus a record must be kept of the actual consideration received by the corporation for such shares. It is our opinion that the total consideration recieved by tha corporation for

issuing shares of no par value is the capital stock of a no par value stock corporation. Eearnings on this amount become surplus as in the case of a par value corporation. If the earnings become part of the capital stock, dividends could never be paid, because it is fundamental that dividends cannot be paid out of capital stock.

In the instant case the non par value shares are not issued and sold, but are exchanged on a ratio of five for one, both for the stock issued and unissued. This exchange is authorized by the statute. Each old certificate is recalled and a new one of five shares issued therefor. The holder thereof owns the same proportional interest in the corporation that he did before the exchange. The assets of the corporation are no more and no less. The exchange of certificates is not an issuance of stock within the inhibition of Art. XII, Sec. 6 of the Constitution. The original stock was issued for money, labor or property. The exchange of certificates herein contemplated needs no new consideration any more than would be required for the replacement of a lost certificate. The capital stock will remain three and one-half millions of dollars until increased or diminished by the stockhoders.

The exchange of par value shares for non par value shares representing the same proportional interest in the corporation is not a violation of a constitutional provision that stock shall be issued only for money, labor done, or property actually received. Randle v. Winona, 206 Ala. 254, 89 So. 790.

A conversion of shares of par value into an equal or greater number of shares of no par value to be exchanged therefor, without any capitalization or impairment of any existing surplus or accumulated and undistributed profits, is not an increase of stock, but is merely a substitution of one muniment of title for another or others, without in any particular accepting, altering or modifying the nature of the property owned by the corporation. And this is true though the number of shares is increased where the total capital stock of the corporation remains the same. Hood Rubber Co. v. Commanwealth, 238 Mass. 369, 131 N. E. 201; Olympia Theatres, Inc., v. Commonwealth, 238 Mass. 374, 131 N. E. 204; Randle v. Winona Coal Co., supra; Fletcher Cyclopedia Corporations, Vol. 11, p. 743; Whitman v. Consolidated Gas etc. Co., 148 Md. 90, 129 Atl. 22.

It would seem better practice for the stockholders, in the resolution directing the change from par value shares to shares of no par value to specifically provide that the capital stock should be unaffected by the change, to prevent the suspicion that the change is used to cloak a capitalization of surplus, reserves and accumulated profits.

We take the liberty of quoting at some length from the case of Whitman v. Consolidated Gas etc. Co., supra, both, because the facts are very similar to those before us and

because we believe the reasoning is sound. In that case it was proposed to amend the corporate charger so that four shares of no par value stock might be issued for one par value share. Some of the old stock was unissued. The court said:

"When the exchange of the certificates of the old for the new shares of stock had been effected, the stockholders were unchanged; the relative holdings of the then issued and outstanding stock, and of the rights and the burdens of membership in the corporation were the same, while the the corporate assets and liabilities, receipts and disbursements had neither been increased, diminished, nor affected in their nature or allocation, and the value represented by the aggregate of the new stock remained equivalent to that of the old, without a single existing stockholder obtaining any advantage over any other stockholder. In short, the shares without par value gave the stockholders exactly the same participation in the affairs of the corporation, the same proportionate return in dividends, and the same portion of the assets when distributed."

"The issuance of the new certificates for shares of stock with no par value did not add a penny's worth to the assets of the Company in cash, property or services, or in the reduction of its liabilities, or the lessening of its obligations for expenses. The capital stock remained as it was. The number of shares into which it was divided alone was increased fourfold. The new certificate of stock, therefore, was merely a substitution of a somewhat different form of token, muniment or evidence of title for another representing the same thing."

"The appellants, however, have insisted that the transformation of the original issued and outstanding common stock of the appellee into certificates of stock with no par value consolidated the Company's capital, surplus, and net undivided profits so that the no par value stock which was to be issued in the stead of the former stock with a par value would become the representative of this merged capital, surplus and net profits in the form of capital. In other words, that the change of the former issued and outstanding stock with a par value into stock with no par value was, in effect, although indirect, a stock dividend or capitalization of earnings which converted the surplus and net undivided profits into capital.

"However, this is not a tenable position, because, in the sense in which it is now being considered, stock, whether evidenced by a certificate of shares, with or without a nominal value, is the total of all the corporate wealth and resources at any given time, subject to all corporate liabilities and obligations. The net capital stock is, consequently, always the difference between the total assets and the total liabilities, and it may be in the form of three items (1) capital, which represents the original amount contributed in money or property or services; (2) surplus, which represents, the earlier undistributed profits; and (3) undivided profits, which are the later, and usually smaller, undistributed profits. The surplus and undivided profits are the increment of capital so defined."

"There can be no doubt that this dedication of surplus or undivided profits, with its resulting conversion into increased capital, may be accomplished through the medium of a stock dividend of either par or no par value stock, but it may not be done indirectly or inferentially but only in compliance with a precise statutory method."

"There was no need of negativing in express words that the amendment of the charter was to be made without capitalization or impairing the existing surplus, as there is no suggestion on the record that the appellee entertained such a purpose, or took a single of the indispensable, positive, statutory steps in that direction."

"Our conclusion is that the contemplated substitution of certificates of shares of no par stock for the original issue of shares of par stock, at the rate of four for one, is fundamentally a mere alteration in the number

and form of the shares of stock of the appellant that is accomplished by a surrender of the old certificates and their reissue in a new form."

Our conclusion is that the non par value shares may be exchanged for the par value shares, both issued and unissued. As to the latter, the corporation is required by Art. 1538f to report and pay additional filing fees if they are sold for a sum in excess of that upon which filing fees have been paid. The par having been $100 per share, and five no par shares being issued for one, any sale in excess of $20 per non share will call for additional filing fees.

It is our opinion that the present amendment should be filed upon payment of the minimum fee of $200 required by Art. 3914, of the Revised Civil Statutes of Texas of 1923.

Yours very truly,
D. A. SIMMONS,
First Assistant Attorney General.

Op. No. 2675, Bk. 62, P. 140.

CORPORATIONS—TITLE AND TRUST COMPANIES—HOUSE BILL NO. 93 OF THE 40TH LEGISLATURE.

1. House Bill No. 93 of the 40th Legislature merely adds a new subdivision to Article 1302 of the Revised Civil Statutes of 1925, and does not permit corporations generally by amendment to add two or more of the purposes to a previous business dissimilar in character.
2. Under Sub-section 1111 of this bill, a corporation chartered with trust powers as one of its purposes under this bill must have a minimum capital stock of fifty thousanad dollars.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 2, 1927.

Honorable Dan Moody, Governor of Texas, Capitol.

DEAR GOVERNOR: Your letter of the 26th inst., concerning House Bill No. 93 is before us for attention. You desire to know whether the language of this bill is subject to the interpretation that a private corporation organized for any one of the several purposes set out in Article 1302 could, by amendment to its charter add to its powers any two or more of the purposes stated in this bill.

The wording of this bill is obscure. The answer to the question you raise as to whether or not the wording of Section 1 amends Article 1302 in its entirety or merely adds thereto a new sub-division, is not entirely free from doubt. A search through the Sesson Acts which adds the more recent subdivisions to this Article has not disclosed wording similar to this. In most instances the addition to this Article is made by adding thereto a numbered subdivision and the Act sets

forth the new number and subdivision in its entirety. This is true of subdivision 17 (Acts 1st C. S. 1921, page 151); Subdivision 50 (Acts 1921, page 265); Subdivision 78 (Acts of 1919, page 7); Subdivision 81 (Acts 3d C. S. 1920, p. 27) and others. In other instances the Act merely provides for the adding of a section to Article 1302 (Acts 1923, 3d C. S. p. 171). Still other laws are enacted authorizing the creation of corporations for designated purposes without referring in the Act to this Article or the title on corporations. These acts are incorporated into the Article as subdivisions by the codifiers. This was done in the case of subdivision 49 (Acts 1919, page 134) and in subdivision 79 (Acts 1921, page 227).

Notwithstanding the difference in the wording of House Bill No. 93, we have concluded that it merely creates a new subdivision to Article 1302 and does not permit corporations generally by amended to add two or more of the purposes to a previous business dissimilar in character. We reach this conclusion from a consideration of the Act in its entirety viewed in the light of the declared policy of this state.

The caption of this bill states that Article 1302 is to be amended to provide for the formation of title and trust Companies. Secton 3 of the bill, the emergency clause, declares there is no adequate law providing for the creation of title and trust companies and makes this need the moving force behind the enactment. Sub-section llll of Section 1, provides that corporations organized under this subdivision are hereafter to be known as Title and Trust Companies and are required to include those words in the corporate name and to use after the name and phrase "without banking privileges." Since sub-section ll of Section 1 refers to the guarantee of titles, and sub-section llll refers to the trust power, while sub-section lll provides the limitation against banking privileges, we believe the reasonable construction of this Act would be that the entire Section 1 is to be considered a subdivision which is to be added to Article 1302 of the Revised Civil Statutes, 1925. The word "subdivision" appears twice in sub-section llll, but the second use of the word specifically calls attention to the fact that it is referring to the 4th subdivision of the Act, which properly should have been termed sub-section llll.

Sub-section 1 of this Act is identical with subdivision 56 of Article 1302; sub-section ll is identical with sub-division 57. Sub-sections lll and llll are largely covered by subdivision 49. Subdivisions 15, 49 and 88 of Article 1302 each provides for the creation of corporations with one or more purposes. It is interesting to note that 15 and 88 authorize the creation of private corporations for two or more purposes and 49 for one or more purposes, while the caption of House Bill No. 93 provides for one or more of the purposes stated, while Section 1 of the bill says two or more. This discrepancy between the caption and Section 1 however, we do not consider as sufficient

to invalidate the Act, since the provisions of the Act is narrower than the caption.

It is the established policy of this State to charter corporations for a single business. As said by the Honorable C. M. Cureton, when First Assistant Attorney General in an opinion of June 11, 1913, this corporation purpose article is strictly construed and a corporation will be limited to one business unless the statute expressly states otherwise. This statement is reiterated by the same writer in an opinion which will be found in the 1912-14 volume of the Opinions, page 332, and is based upon sound reasoning and the decisions of our courts as well as the enactments of the Legislature. The Supreme Court of Texas in the case of Ramsey v. Tod, Secretary of State, 95 Tex. 614, 69 S. W. 135, held that the statute does not authorize incorporation for two distinct purposes, each of which is mentioned in a separate subdivision of the Article. This holding was followed in the case of Borden v. Trespalacious Rice & Irrigation Co., 82 S. W. 461. The next case which arose narrowed the rule still further when Mr. Justice Williams in the case of Johnston v. Townsend, Secretary of State, 103 Tex. 122, 124 S. W. 417, announced that the charter purpose may include one subdivision in its entirety only when the subdivision refers to one business, but that if the subdivision includes two or more businesses the charter of a given corporation must be limited to one of them.

To this general rule the legislature had added but two or three exceptions, noted above. In those instances the combinations permitted were logical and the businesses related. The same may be said of permitting the formation of an abstract and title corporation with trust privileges. We believe House Bill No. 93 was drawn for that purpose and has that effect.

There is another ambiguity in this bill which you have no doubt noted. The last proviso of sub-section lll contains two negatives. "No corporation shall be incorporated * * * with a capital stock of not less than fifty thousand dollars."

We believe it was the intention of the Legislature to require a minimum capitalization of fifty thousand dollars for a Title and Trust Company exercising trust powers under sub-section llll. However should "not less," be construed to be equivalent to "equal" or "more" the meaning of the proviso is reversed and all such corporations would be capitalized for fifty thousand dollars or less.

We believe the courts will construe this provision as requiring a minimum rather than prescribing a maximum in view of the declared policy of the Legislature in fixing minimum capitalizations for corporations exercising trust powers, and enlarging those powers as the capitalization increases. Article 1520 prohibits any corporation from engaging in the loan and trust business with a paid in capital of less than ten thousand

dollars. Under Article 1513 all trust companies organized under the laws of this State with a capital of not less than five hundred thousand dollars are granted additional powers. Surety companies with trust privileges are required by Article 4969 to have a paid up capital of not less than one hundred thousand dollars. By article 4982 banking and other corporations are permitted to exercise specified trust powers upon depositing with the State Treasurer fifty thousand dollars or its equivalent. To extend these powers such corporations must in additon have a paid up capital or surplus of at least one hundred thousand dollars.

Our conclusion is that House Bill No. 93 is a new subdivision to be added to Article 1302, and corporations created thereunder which include the purpose set forth in sub-section lll must have a minimum capital stock of fifty thousand dollars.

Very Respectfully,
D. A. SIMMONS,
First Assistant Attorney General.

Op. No. 2684, Bk. 62, P. 190.

CORPORATIONS—BLUE SKY LAW—FILING FEES—EXEMPTIONS.

1. The fee for a permit to sell stock under Title 19 of the Revised Civil Statutes of 1925, the Blue Sky Law of Texas, is based upon the amount of stock desired to be sold in Texas, and is equal to the filing fee of a private corporation of the same nature having capital stock and surplus of the amount of stock desired to be sold in Texas.
2. The fee in question is based upon the selling price of the stock and not upon the par value thereof.
3. A foreign corporation or concern which has no permit to do business in Texas is not exempt from the filing fee imposed by Article 580 of the Revised Statutes of 1925.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 13, 1927.

Honorable John W. Martin, Chief Blue Sky Division, Department of State, Austin, Texas.

DEAR SIR: You have submitted to this office several questions relative to filing fees under the Blue Sky Law, which is Title 19 of the Revised Civil Statutes of 1925. We now answer your questions as follows:

1. Article 580 of the Revised Statutes, which article imposes the fee for a Blue Sky Permit, provides in part:

* * * filed in the office of the Secretary of State, together with a **fee equal in amount to the filing fee of a private corporation having capital stock and surplus of like amount,** the following: * * *"

Under this article you are advised that the fee for a permit to sell stock under Title 19 of the Revised Civil Statutes of 1925, the Blue Sky Law of Texas, is based upon the amount of stock desired to be sold in Texas, and is equal to the filing fee of a private corporation of the same nature having capital stock and surplus of the amount of stock desired to be sold in Texas. The reason for this ruling is clearly to be seen. The Blue Sky Law is based upon the police power, the object of the exercise of which is not the raising of revenue, but the regulation of industry for the purpose of protecting the people. See:

Standard Oil Co. v. Davis, 217 Fed. 904;
Van Hook v. Selma, 70 Ala. 36;
Walker v. Jameson, 140 Ind. 591;
Mestayer v. Corrige, 38 La. Ann. 707;
Easton v. Covey, 74 Md. 262;
Pitts v. Vicksburg, 72 Miss. 181;
Carthage v. Rhodes, 101 Mo. 175; and
Hill v. Abbeville, 59 S. C. 396.

Under the law of the police power it has been held that license fees should not, and can not, greatly exceed the cost of the administration and enforcement of the law.

There are numerous corporations, heavily capitalized, which desire to sell in this State small blocks of stock. If these corporations should be compelled to pay Blue Sky filing fees based upon their authorized capital stock, the sale of such small blocks would be entirely impossible because, in such cases, the fee charged for the permit would be grossly excessive and prohibitive.

The object of the Blue Sky Law is not to *prevent* the sale of stock in Texas, but to regulate the sale, and thus to protect the citizens of this State against fraud and deceit. This end would not be promoted by an imposition of a fee grossly in excess of that which is essential to the administration of the law. Considering the rules to which we have referred we construe the phrase "of like amount" to refer to the amount of stock desired to be sold in this State.

You have raised the question as to corporations, where the filing fee of corporations are less than the fee which would be assessed for a Blue Sky permit upon this basis. We are aware of no such instance. You cite an insurance company which is required to pay a charter filing fee of Twenty Dollars, regardless of the amount of its capital stock. In such a case the fee for the Blue Sky permit could not exceed Twenty Dollars, regardless of the amount of stock to be sold in Texas by insurance companies. For instance, an insurance company desires to sell One Million Dollars worth of stock in this State. It pays for its Blue Sky permit a fee equal to the amount of the filing fee of an *insurance company* having capital stock and

surplus of One Million Dollars, which is to say, Twenty Dollars.

2. You ask the further question as to the fee being based upon the par value of the stock. I now advise you that in our opinion the fee should be based upon the price at which the stock is to be sold.

3. We advise you further that where Blue Sky permits are sought by foreign corporations or concerns having no permit to do business in Texas, or by other concerns not corporations entitled to exemption under article 588, the Blue Sky filing fee must be paid, such corporations and/or concerns not being exempt from the fee imposed by Article 580.

Very truly yours,
PAUL D. PAGE, JR.,
Assistant Attorney General.

Op. No. 2694, Bk. 62, P. 246.

CORPORATIONS—FARMERS UNIONS—CHARTER PURPOSE.

1. Subdivision 83 of Article 1302 of the Revised Civil Statutes of 1925 authorizes the formation of a corporation having as its purpose the protection of farmers in their various pursuits, viz: the cooperation of the members to study and improve the conditions of farm life, to produce better crops, study markets to secure a profitable return to members on farm products, to develop a system of local lodges for the members and to develop an effective marketing system.
2. Such a corporation has no authority to purchase or subscribe for stock in other corporations engaged in similar activities.
3. Article 1302, subdivision 83, and Articles 5737 to 5764.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 25, 1927.

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

DEAR MADAM: This is to acknowledge receipt of your letter of the 23rd inst., requesting our opinion as to whether the tendered corporation papers of the Farmers Marketing Association of America may be filed under subdivision 83 of Article 1302 of the Revised Civil Statutes of 1925, or whether the papers must be redrawn and filed under the provisions of Article 5737 to 5764, which authorize the creation of corporations to market agricultural products.

The appropriate part of Article 1302 reads as follows:

The purposes for which private corporations may be formed are: Section 83: "To organize laborers, workingmen, wage earners and farmers to protect themselves in their various pursuits."

The Marketing Association Act of 1921 is too long to quote, but provides generally that five or more persons engaged in the production of agricultural products may form a co-operative

association, the main purpose being to market the products of its members. Article 5760 provides that any corporation association organized under previously existing statutes may by a majority vote of its stockholders be brought under the provisions of the marketing association law by limiting its membership and adopting the other restrictions as provided in that law. We think it plainly appears from this Article that the marketing association act does not purport to be exclusive and is merely in addition to previous acts which authorize formation of corporations for agricultural purposes.

The tendered charter of the Farmers Marketing Association of America seeks to incorporate under subdivision 83 of Article 1302 and states its purpose to be:

"To organize farmers to protect themselves in their various pursuits."

This is followed by a more detailed statement of the purposes, obviously to comply with the rule of law that a charter purpose expressed in the words of the statute is insufficient, and the business which the proposed corporation seeks to do must plainly appear. From this additional statement, it appears that the proposed corporation seeks, (a) mutual cooperation of its members to study and improve the conditions of farm life, (b) to educate and direct its members in providing variety, quality and quantity of profitable crops, (c) to study the markets and by proper means to secure by cooperation of its members a profitable return for farm products, (d) to establish a system of local lodges within its membership, and (e) to develop an effective marketing system.

Obviously the purpose of this corporation would not come within the provisions of the Marketing Act of 1921 as it is considerably broader in scope than a mere cooperative marketing association.

The question then remains whether or not Section 83 is broad enough to include these various aims.

It is our opinion that Section 83 of Article 1302 in so far as it refers to farmers was passed to encourage and provide for the incorporation of farmers unions. We mean the word union to include the full meaning of that term as understood by the people generally at the time this Act was passed in 1897. The Legislature undoubtedly was familiar with such associations, the manner of their organization and the various pursuits in which they were engaged to protect the farmers who were members thereof. The question then is whether the purposes set forth from (a) to (e) of the tendered charter of the Farmers Marketing Association of America are such as are included in the words "various pursuits" as used in the Statute.

It is our opinion they are.

Agriculture is the basis of all life and every legitimate pre-

sumption should be indulged in favor of organizations seeking to improve the conditions of agriculture and agriculturists.

It has been stated that the powers of an incorporated agricultural society for the purpose of affecting the objects of incorporation are as broad and comprehensive as those of an individual unless the exercise of the asserted power is expressly prohibited. Fletcher's Cyclopedia Corporations, Volume 2, page 1814, citing Thompson v. Lambert, 44 Iowa, 239.

There are but few cases dealing with corporations organized by farmers to protect themselves in their various pursuits or to improve agriculture, but those we have found are enlightening.

In the case of Crawley v. American Society of Equity of North America, 153 Wisconsin, 13, 139 N. W. 734, the corporation was organized under a law authorizing incorporation to promote the interest of farmers. The activities of the society other than the publication of a newspaper did not appear from the report, but the form of organization does appear and we learn that the society was subdivided into state unions, district unions, county unions and local unions, to protect the interest of the farmers.

The statutes of Kentucky authorize the incorporation of companies to "educate, elevate, improve and protect agriculture." Under this a company was incorporated, local unions were formed and the state union purchased goods, wares and merchandise and farm implements at wholesale price which were kept in a central warehouse to be resold at wholesale prices to stores maintained by the local unions. See Farmers & Laborers Union of Kentucky v. National Union Co., 19 Ky. Law 1235, 42 S. W. 1096.

In the case of Fairview Investment Co. v. Lamberson, 25 Idaho 72, 136 Pac. 606, the Supreme Court of Idaho held that a corporation organized "for agricultural purposes," is authorized to conduct a fair and own buildings and grounds used in connection therewith.

The Court of Civil Appeals of Fort Worth in the case of Ryan v. Witt, 173 S. W. 952, had before it a corporation organized under what is now subdivision 83 of Article 1302. Local and district unions were organized under a state and national union which had been chartered under the law. The control and ownership of a warehouse and cotton yard was in dispute, but no one suggested that the ownership of such facilities was beyond the proper powers of a corporation organized by farmers to protect themselves in their pursuits.

The purpose of the Farmers Marketing Association of America is well within the cases above cited. The method of organization seems to be the usual one for such a corporation. The Marketing Association Act of 1921 appears to be narrower and based upon a somewhat different form of organization. Being a later act we would not be willing to hold that it in

anywise limits subdivision 83 unless the Legislature clearly indicated such a purpose. We think the contrary appears from Article 5760.

We may say in conclusion, however, that although we believe the disclosed purpose of this corporation is within the meaning of subdivision 83 of Article 1302, we doubt the propriety of including paragraph 7 as shown by the tendered charter. This paragraph purports to authorize the corporation to purchase stock in other similar corporations. It is the general rule that a Texas corporation has no power either to subscribe for or purchase shares of stock in another corporation unless such power is expressly given by statute or appears to be necessary to carry on the purpose of the corporation. In the light of the information before us, we see no necessity of this corporation purchasing stock in others when it has the power to organize local unions wherever it may see fit to carry out its own charter purposes.

Respectfully submitted,

D. A. SIMMONS,
First Assistant Attorney General.

Op. No. 2699, Bk. 62, P. 279.

CORPORATIONS—RESIDENCE—PUBLIC CONTRACTS—RESTRICTIONS.

1. A foreign corporation, having a permit to do business in Texas, is not a resident of this State within the meaning of Article 608 of the Revised Civil Statutes of 1925.

2. In the absence of statutory restriction, the successful bidder on State printing, and bidding may perform the mechanical work required by the contract at such place as he may see fit.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, July 21, 1927.

Dr. H. H. Harrington, Chairman State Board of Control, Capitol.

DEAR SIR: This is to acknowledge receipt of your letter of the 15th inst., in which you request an answer to the following questions:

(1) Are corporations chartered in other states with permits to do business in Texas, "Residents" of Texas within the meaning of Article 608 of the Revised Civil Statutes of 1925?

(2) Would a resident of Texas, if awarded a contract thereunder, and after executing required bond for satisfactory performance of work, be permitted to have the work, or any part thereof, done outside of the State?

The applicable part of Article 608 reads as follows:

"The Board shall contract for a term of not exceeding two years with responsible persons, firms, corporations or associations of persons, who shall be residents of Texas, for supplying to the State all printing, binding, stationery and supplies of like character for all Departments, Institutions and Boards, save and except such work as may be done at the various educational and eleemosynary institutions."

Certain other statutory articles have some bearing on this question and we will refer to them briefly. Article 623 provides that the Board shall invite bids upon proposals advertised by the Board in the manner provided by the Board, and it shall not be confined to the residents of this State; that he lowest responsible bidder shall be awarded the contract; and that the Board may reject any and all bids.

By Article 2846 the Chairman of the Textbook Commission is required to notify "all persons, firms or corporations in whose behalf such notice may be requested," whenever bids are to be received on text book contracts. By Article 2864 any such person, firm or corporation who secures a text book contract must designate the Secretary of State as its agent upon whom citation and all legal process may be served in the event of suit. By Article 2871 each such contractor is required to establish and maintain in some city in Texas a book depository either individually or jointly with some other text book contractor.

Article 1532 dealing with foreign corporations which have complied with the laws of Texas and paid the fee to secure a permit to do business in this State, reads as follows:

"Such corporations on obtaining such permit shall have and enjoy all the rights and privileges conferred by the laws of this State on corporations organized under the laws of this State."

In view of this last article quoted, it is apparent that it is the policy of the State of Texas to extend equal rights and privileges to foreign corporations which have complied with our laws and wish to do business in this State. Hence, before a discrimination may be permitted against them of any character, it must clearly appear by law.

The whole question turns on what is the nature of corporate existence and where does this creature of law reside.

A corporation is an artificial person created by the law of some state or nation. Since the law of the creating sovereign can have no force beyond its territory, it follows that a corporation created by law can have no existence beyond the limitation of the State or Nation by which it was created. Since it can have no being beyond the borders of its State, it necessarily follows that its residence must be therein. It must dwell in the place of its creation and cannot migrate to another sovereignty. Its particular residence in the state of its incor-

poration is held to be where its principal office is located or if a place is specified in its charter that specification fixes the residence. It can, however, transact business whenever its charter allows, unless prohibited by local law. Bank of Augusta v. Earle, 13 Peters, 519, 10 L. ed. 274; Insurance Co. v. Francis, 11 Wall. 210. 20 L. ed. 77; Shaw v. Quincy Mining Co., 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. 935; Galveston H. & S. A. Ry. Company v. Gonzales, 151 U. S. 496, 38 L. ed. 248, 14 Sup. Ct. 401; Sanders v. Farmers State Bank, 228 S. W. 635; Kimmerle v. Topeka 88 Kansas, 370, 128 Pac. 367; Railroad Co. v. Koontz, 104 U. S. 5, L. ed. 643.

A natural person may do business where he pleases, and if a citizen of one state, is entitled to all the privileges and immunities of citizens of the several states. Not so with corporations. The exercise of any rights outside of the state of its creation depend, first, upon its charter, and, second, on the permission of the foreign state or nation in which it seeks to do business. A corporation has no absolute right of recognition in any other state than its own. Paul v. Virginia, 8 Wall. 168. And the state which recognizes it may impose such conditions as it may choose on the recognition not inconsistent with the Constitution and laws of the United States. If recognized and permitted to do business without limitation, the corporation carries with it wherever it goes its chartered rights and may claim its chartered privileges. Its charter is the law of its existence and is taken wherever it goes. By doing business away from its legal residence it does not change its citizenship but simply extends the field of its operation. It resides at home, but may do business abroad. Railroad Company v. Koontz, 104 U. S. 5, 26L. Ed 643.

Reverting to the statutes mentioned above, it will be seen that in some instances corporations from any state may bid on supplies and printing but in the particularar article, this privilege is restricted to residents of Texas. We, therefore, answer your first question that a foreign corporation having a permit to do business in Texas is not a resident of Texas, and hence not authorized to bid on the contract authorized by Article 608. The seeming conflict between this article and Article 623 disappears when one considers the original act of 1919. Article 608 refers to contracts generally, while Article 623 refers to contracts for the printing of reports of the Court of Criminal Appeals. The very fact that in the latter article bids are not confined to residents of this State strengthens the view we have of the answer to your first question.

In your second question, you ask if a resident of Texas to whom the contract has been awarded may be permitted to have the work, or any part thereof, done outside of this State. We find no restriction on the right of the contractor in the statutes. If there be one, it must be complied with for there can be no question but that a state in letting public contracts may

attach such terms and conditions thereto as it may deem appropriate. Anyone who contracts with the State does so in full recognition of the fact that the State is the guardian and trustee of its people, and, having control of its affairs, may prescribe the conditions upon which it may permit public work to be done on its behalf. What these regulations and conditions may be is for the Legislature to determine. Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. 124. We take it, therefore, that upon complying with the terms of the statute the successful bidder may do the work at such place and in such manner as he may determine, provided, of course, the work when done must be satisfactory within the terms of the contract and completed within such times and for such price as may be agreed upon.

Respectfully submitted,
D. A. SIMMONS,
First Assistant Attorney General.

Op. No. 2713, Bk. 62, P. 359.

CORPORATIONS—NON PAR VALUE STOCK—INCREASE OF SHARES PROOF OF VALUE.

1. A non par stock corporation is not governed by Articles 1308 to 1311 of the Revised Civil Statutes of 1925 but may be required by the Secretary of State to satisfy that official by affidavits or other evidence of the consideration pair for shares.
2. Article 1538-d requires that at least ten per cent of the number of shares authorized by an amendment to the charter of a non par stock corporation must be in good faith, subscribed and paid for, and that the amount so paid shall in no event be less than twenty-five thousand dollars.

OFFICES OF ATTORNEY GENERAL,
AUSTIN, TEXAS, December 16, 1927.

Mrs. Jane Y. McCallum, Secretary of State, Capitol.

DEAR MADAM: In your letter of November 21, you requested an opinion on the following questions:

(1) Whether a corporation issuing non par value shares is required to furnish in addition to the certificate required by Article 1538-d, an affidavit setting out the matters required by Section 1, 2, 3, and 4 of Article 1308, as to non par value shares and whether Article 1309 applies in such case.
(2) Whether under Article 1538-d of the non par law a corporation issuing an additional number of non par value shares under an amendment authorizing their issuance, is required to show that ten per cent of such additional shares have been subscribed and paid for by an additional consideration of not less than twenty-five thousand dollars.

We have delayed answering your letter awaiting a written

argument which you said the attorneys interested in the question would furnish. This has been forwarded to us today, and has been carefully considered.

With reference to your first question:

Articles 1538-d to 1538-m of the Revised Civil Statutes of 1925 deal with non par stock corporations. These articles are as much a part of the general corporation laws of this State as the other provisions of the title on corporations and the general provisions of that law apply to such corporations except in those instances where a specific exception is made or there is an undoubted conflict. Article 1538-j specifically exempts non par stock corporations from the provisions of Article 1308 to 1311 inclusive and from Article 1338 of the Revised Civil Statutes of 1925.

Since these named articles do not apply to non par stock corporations, your first question depends upon whether any other provisions of the law authorizes the Secretary of State to require additional evidence in the form of affidavits or otherwise from the incorporators of non par stock corporations.

Under Article 12 of the Constitution of Texas, it is provided that private corporations shall be created only by general laws and that laws shall be enacted to provide fully for the adequate protection of the public and the individual stock holders of the corporation. Section 6 of Article 12 states that no corporation shall issue stocks or bonds for money paid, labor done or property actually received and all fictitious increase of stocks or indebtedness shall be void. These provisions apply alike to all corporations. These provisions of the Constitution were unquestionably being carried out by the Legislature in passing the acts which now appear in the Revised Civil Statutes as Articles 1308 and 1309. They apply to corporations having capital stock.

The Secretary of State is the officer to whose care is committed large discretionary powers as well as certain ministerial duties connected with the chartering of corporations. The general rule as established by Article 1308 is that a domestic corporation must have the full amount of its authorized capital stock subscribed and fifty per cent thereof paid in cash, property or labor. The mere statement of the incorporators or directors of a corporation delivered to the Secretary of State in the form of a certificate or affidavit stating these ultimate facts does not exhaust the power of the State to see that the policy outlined in the Constituion is complied with. By Article 1310 certain corporations, largely carriers and utilities, are exempted from the provisions of Articles 1308 and 1309. The mere fact that these corporations are relieved of certain provisions of the two articles does not mean that the Secretary of State has no supervisory or discretionary powers with reference to their incorporation. Article 1311 requires that they

pay in at least one hundred thousand dollars in cash of their authorized capital stock or that they subscribe at least fifty per cent and pay in at least ten per cent of their authorized capital before they are authorized to do business in this State. This article shows very clearly the basis of the exemption of such corporations from the provisions of Article 1308.

By Article 1330 the Secretary of State must be satisfied as to an increase in the authorized capital stock before an amendment to its charter authorizing an increase will be filed.

The rule is the same as to foreign corporations. Article 1530 states that before a permit is issued to a foreign corporation it must show to the satisfaction of the Secretary of State that at least one hundred thousand dollars in case of the authorized capital stock has been paid in, or that fifty per cent of the authorized capital stock has been subscribed and at least ten per cent thereof paid in. The provisions of Article 1538-d are so similar to some of those noted above that it would be strange indeed if the duties of the Secretary of State with reference to these corporations should be held to be purely ministerial whereas to all others, foreign and domestic, large discretionary powers are conferred. Article 1313 contains a general provision that the stockholders of any company shall furnish satisfactory evidence to the Secretary of State of the compliance with the provisions of the law of this State dealing with the creation of corporations. "Satisfactory evidence" was defined by the Legislature in the Acts of the Thirtieth Legislature, 1907, page 309, as follows:

"Satisfactory evidence above mentioned shall consist of the affidavit of those who executed the charter stating therein (1) the name, residence and post office address of each subscriber to the capital stock of such company. (2) the amount subscribed by each and the amount paid by each; (3) the cash value of any property received, giving its description, location and from whom, and the price at which it was received; (4) the amount, character, and value of labor done, from whom and price at which it was received; provided, that 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."

That definition is not brought forward in the identical wording but we think the policy of this State as evidenced by the Constitutional provision and the general incorporation laws necessarily gives to the Secretary of State discretionary power to see that neither the general public nor the individual stockholders of the companies are imposed upon. Beach v. McKay, 191 S. W. 557.

We cannot agree with the statement made by the attorneys who furnished the written argument that it is immaterial to the State whether the certificate of the incorporators or directors shows the actual value of the property or not. It is true that if the company accepts property in exchange for non par

stock the stock is considered fully paid if there is no fraud. It is important, however, that the actual value of the assets should be known both to the corporation and to the State. Upon such value depends the franchise tax, the filing fees, to say nothing of the payment of dividends to the stockholders and the accrual of surplus and undivided profits. The mere fact that the corporation might issue a few or all of its non par shares for property worth twenty-five thousand or a million dollars is beside the point. The property must have an actual value. What that value is must be determined by someone. The State of Texas has designated the Secretary of State as the official to ascertain for it the actual value of the property paid into the corporation. That the mere certificate of the interested party shall be conclusive upon the State when filing fees and franchise taxes are to be collected, is not to be entertained. Our conclusion is that while non par stock corporations are not required to comply with Article 1308, still the Secretary of State can require of the incorporators or directors such evidence in addition to the certificate called for in Article 1538-d as may be necessary to satisfy the Secretary of State as to the actual consideration paid for the shares whether in cash, propertq or labor and such other pertinent facts as may be necessary to show the bonafides of the transaction.

II.

We believe a proper construction of Article 1538-d requires that at least ten per cent of the number of shares authorized by an amendment to the charter of a non par stock corporation must be in good faith subscribed and paid for and that the amount so paid shall in no event be less than twenty-five thousand dollars.

In arriving at this conclusion we will eliminate for the time being those corporations which are authorized to issue both shares with par value and no par value and deal only with the question of those only issuing shares of no par value. This article authorizes the creation of such corporations and the amendment of charters of such corporations to authorize the issuance of additional shares. Bearing in mind that we are dealing with a corporation in existence having shares of no par value, we read the article to ascertain the requirements for amending the charter to authorize an increase of further shares.

"Corporations authorizing the issuance of shares for its (their) stock without nominal or par value shall furnish to and file with the Secretary of State at the time of filing the * * amendment to a charter authorizing the issuance of such stock a certificate authenticating * * by a majority of the directors as to any amendment thereof, in the manner required by the laws of this State as to an original charter of incorporation, setting forth the following:

(d) "The number of shares without nominal or par value subscribed

and the actual consideration received by the corporation for such shares; and upon receiving such certificate it shall be the duty of the Secretary of State, on payment of office fees and franchise tax due, to file and record the * * amendment thereof, of such corporation, and to give his certificate showing the record thereof, provided, however, the stockholders of any corporation authorizing the issuance of shares of its stock without nominal or par value shall be required in good faith to subscribe and pay for at least ten per cent of the authorized shares to be issued without nominal par value before said corporation shall * * have its charter amended so as to authorize the issuance of shares without par or nominal value, provided, further, that in no event the amount so paid shall be less than twenty-five thousand dollars."

Eliminating as we have above these provisions referring to par shares and those referring to the original incorporation of a non par company, it clearly appears that an amendment authorizing the increase of non par value shares must be accompanied by evidence showing the number of such shares subscribed and the actual consideration received by the corporation therefor, and that ten per cent must be subscribed and paid for and the amount so paid to be not less than twenty-five thousand dollars.

We realize that the requirement that ten per cent be subscribed and twenty-five thousand dollars paid in each time a non par stock corporation wishes to increase its authorized number of shares is something of a hardship, but it is clearly no more of a hardship than that placed upon (non) par stock corporations in requiring that one hundred per cent be subscribed and fifty per cent paid in, except in those few instances where Article 1311 requires fifty per cent subscribed and ten per cent paid in, to be not less than one hundred thousand dollars of the authorized capital stock. The burdens of the law must be taken with its benefits.

In arriving at the conclusion as to the necessity of paying in not less than twenty-five thousand dollars we have been influenced, first, by the wording of the statute which says that in no event less than twenty-five thousand dollars shall be paid in, which certainly means in the event of an original charter or an increase in the number of shares, and second, by the similarity of the closing provisions of each paragraph of Article 3914 relating to filing fees wherein it provides that the total filing fees "shall in no event exceed the sum of twenty-five hundred dollars." In a number of opinions this department has held that the twenty-five hundred dollars must be paid on the original charter and on each amendment where the capital stock has been increased in an amount sufficient to make the filing fees as much as twenty-five hundred dollars figured on the statutory basis. St. Louis Railway Company v. Tod, 94 Texas 632, 64 S. W. 778.

Very truly yours,

D. A. SIMMONS,

First Assistant Attorney General.

Op. No. 2738, Bk. 62, P. 494.

CORPORATIONS—FOREIGN OIL COMPANY—STOCK OWNERSHIP IN DOMESTIC PIPE LINE COMPANY.

1. There is no law to prevent a foreign corporation doing a general oil business from obtaining a permit to do such business in this State and at the same time own stock of a domestic pipe line corporation.

OFFICES OF ATTORNEY GENERAL,
AUSTIN, TEXAS, July 3, 1928.

Mrs. Jane Y. McCallum, Secretary of State, Capitol.

DEAR MADAM: On April 28, 1928, you propounded to this Department certain questions relative to an application for permit made by the Continental Oil Company, a corporation created under the laws of Maine. Briefly, you state this foreign corporation desires a permit to do a general oil business in Texas and also to own the stock of the Continental Pipe Line Company, a domestic corporation. Your questions are as follows:

(1) Did the Legislature, in passing the acts embodied in Chapter 15, Title 32, Revised Civil Statutes of 1925, intend to restrict and do said Acts of the Legislature restrict the powers therein conferred to domestic corporations?

(2) Can a foreign corporation, having sufficient charter powers, obtain a permit in Texas to engage in the producing and refining, buying, selling and marketing of petroleum and its products and own the stock of a Texas pipe line corporation the same as a domestic corporation?

(3) Where the application for a permit and the charter of a foreign corporation are broad enough to cover all the powers embodied in subdivision 36 and 37 of Article 1302, Revised Civil Statutes of 1925, together with the power to own the stock of a Texas corporation engaged in the pipe line business, and it desires to engage in the producing and refining business in Texas and to own the stock of the Texas corporation engaged in the pipe line business, should the permit be given under subdivision 36 or under subdivision 37, Article 1302, Revised Statutes, 1925?

It is well established that a corporation exists only in contemplation of law, and by force of law, and can have no legal existence beyond the territorial limits of the State or sovereignty by which it is created. From the State of its creation the corporation receives its powers. While a foreign state may exclude the corporation from doing an intrastate business within its limits, or may restrict the powers and limit the functions of a corporation before granting a permit to do business within such state, it cannot enlarge the powers conferred by the charter and laws of the state which created the corporation. A corporation doing business outside of the state of its creation acts only by agents who are limited by the law of the corporation. It follows that a corporation without power to exercise certain functions in the state of its creation is without power to exercise such functions elsewhere.

When a state permits a foreign corporation to come into the territory of the State, it must be presumed to have consented that the corporation should exercise all the powers conferred by its charter and the general laws appertaining thereto, unless prohibited from so doing by the direct enactments of the State, or by some rule of public policy to be deducted from the general course of legislation. Fletcher's Cyclopedia of Corporations, Volume 8, page 9333.

Under the law of comity, a corporation has no authority to do any act or exercise any powers in a foreign state which a corporation of a similar character created by or organized under the laws of the latter state is not permitted to exercise under its Constitution, laws and policies. It will not be allowed to come into a state and exercise powers, which, although conferred upon it by its charter are denied by the law or public policy of the state to its own corporations. Id. Volume 8, page 9406.

So much for the general principles.

To answer your first two questions, we must first ask and answer three questions of our own.

First—

Does the charter of this foreign corporation authorize it to exercise powers similar to those conferred on domestic corporations by Chapter 15, of the Corporation Title of the Revised Civil Statutes of 1925?

To this question your letter furnishes no answer. An examination of the charter tendered by the Continental Oil Company of Maine, presumably on file in your office will disclose whether this corporation is empowered by the State of its creation to exercise generally the powers described in Chapter 15. If such powers are not conferred, no further discussion is necessary. This State may authorize a foreign corporation to do a particular business and exercise designated powers in this State only if the law of its creation confers those powers upon the corporation. If the charter of this foreign corporation authorizes it to do a general oil business and to own the stock of subsidiary pipe line corporations, then we may pass to our second question.

Second—

Do the statutes of Texas forbid foreign corporations to exercise the powers conferred on domestic corporations by Chapter 15?

We have been unable to find any such prohibition. The general rule is that any corporation for profit organized or created under the laws of any other State, territory or foreign government may be granted a permit to do business in Texas for the period of time set forth in Chapter 19 of the Title on Corporations. Article 1532 provides that such corporations, on obtaining such permit, shall have and enjoy all the rights

and privileges conferred by the laws of this State on corporations organized under the laws of this State. Article 1538 excludes from the benefit of the Chapter, railroad corporations and corporations doing business under the authority of the Insurance Commissioner and the Banking Commissioner.

There are two opinions of this Department which have construed what is now Chapter 15.

An opinion found on page 269 of the 1922-24 Reports of the Attorney General held inferentially that a foreign corporation could not avail itself of the powers granted to a domestic corporation under this Chapter. An opinion found on page 218 of the 1924-26 Reports of the Attorney General, held that foreign oil corporations might be granted a permit under subdivision 37 of Article 1302, and that foreign pipe line companies might be granted a permit under subdivision 36 of Article 1302, but that the provisions of Chapter 15 are limited to domestic corporations. In each of these opinions the reference to Chapter 15 being limited to domestic corporations was casual and not necessary to the particular decision reached. We agree with those opinions that a foreign pipe line corporation desiring a permit to do business in Texas may be given such permit under subdivision 36 of Article 1302, and a foreign oil corporation desiring to do a general oil business may be granted a permit to do business under subdivision 37 of Article 1302. There are two reasons suggested why Chapter 15 is limited to domestic corporations. The first is that the corporation referred to is authorized to organize a subsidiary pipe line corporation by Article 1500. By Article 1502 a corporation is authorized to organize not more than one producing corporation and not more than one pipe line corporation under the laws of any other single state. It is entirely logical to hold that where a foreign corporation has no such powers under its charter these powers could not be added to it by the Texas statute and therefore this statute confers these additional powers only on domestic corporations. The answer, of course, is that where the foreign corporation has been granted similar or identical powers by the state of its creation it does not need them from Texas. The question then becomes simply whether Texas will permit the foreign corporation to exercise powers it already has within the territorial limits of this State.

The other contention is found in the last sentence of Article 1502, which reads as follows: "No corporation organized in any other state or country shall be permitted to own or operate oil pipe lines or engage in the oil producing business in this State when the stock of such corporation is owned in whole or in part by a corporation organized under this Chapter."

We are unable to read into this sentence any general prohibition against foreign corporations. As we understand it it means simply that when a Texas corporation owns the stock of a foreign pipe line corporation or a foreign oil producing

corporation that such foreign corporation shall not be permitted to do business in this State. The restriction has no application to foreign corporations generally, but only to those subsidiary to or controlled by a Texas corporation operated under this Chapter.

Third—

Is it contrary to the public policy of this State for foreign corporations to exercise in Texas the powers conferred on domestic corporations by Chapter 15?

We do not think so. Stock ownership of one corporation by another has always been looked upon with suspicion in Texas as having a tendency to create a monoply or violate the anti-trust laws. When used for that purpose there is just ground for complaint. This Department, however, is not authorized to create a public policy and can only construe this statute as the Legislature has made it. The question specifically is this,—Shall a foreign oil corporation be granted a permit to do a general oil business in Texas with authority to own stock in a domestic pipe line corporation. Articles 1501 and 1502 authorize domestic corporations to go into other states and there organize local pipe line and oil producing corporations. We place the stamp of legislative approval upon such charters and send them forth to other states authorized to do business and given the power if permitted by the other states, to create subsidiary pipe line and oil producing companies in those states. To say that our public policy prohibits in Texas that which we authorize Texas corporations to do elsewhere is not to be entertained. We either send our corporations forth with powers conferred in good faith or we seek to perpetrate a fraud upon our sister states. If we are honest, we must be consistent. That which we ask at the hands of other states, we must grant to them when they ask it of us. Such is comity between states. See, Hyams v. Old Dominion Company, 93 Atl. 747.

Chapter 185 of the Acts of the Regular Session of the Thirty-ninth Legislature, page 455, states that it is lawful for a foreign corporation to own stock in a Texas corporation and authorizes the foreign corporation which has lawfully acquired such stock to vote it in stockholders meetings. This statute declares our state policy.

We come then to the answers to your questions.

(1) In our opinion the Legislature in passing the Acts embodied in Chapter 15 intended to enlarge the powers of domestic corporations but did not intend to prohibit foreign corporations having like authority from the states of their creation, from exercising similar powers within this State.

(2) In our opinion a foreign corporation may be granted a permit to do a general oil business in this State and may then own stock of a domestic pipe line company where such powers are conferred upon the corporation by the state of its creation.

(3) Where a foreign corporation makes application for a permit to do business in Texas solely as an oil pipe line company, a permit should be granted under subdivision 36 of Article 1302. Where such foreign corporation seeks to do a general oil business in Texas a permit should be granted under subdivision 37 of Article 1302, and where the foreign corporation desires to do a general oil business in Texas with authority to own the stock of a domestic pipe line corporation, in our opinion, the permit should be granted under the wording of Chapter 15.

Respectfully yours,
D. A. SIMMONS,
First Assistant Attorney General.

OPINIONS RELATING TO DEPOSITORIES

Op. No. 2697, Bk. 62, P. 271.

DEPOSITORIES—COUNTY TREASURER—SECURITIES.

1. The County Depository Law does not place upon such depository the affirmative duty of being custodian of county bonds and securities purchased with the sinking fund.
2. The County Treasurer is the proper custodian of such securities, and his general bond covers their safe-keeping.
3. Articles 1712 and 2544-54 Revised Civil Statutes of 1925, construed.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 25, 1927.

Hon. H. L. Washburn, County Auditor, Houston, Texas.

DEAR SIR: This is to acknowledge receipt of your letter of the 23rd, inst., delivered to us by Mr. R. W .Adams, Jr., Assistant District Attorney of Harris County, Texas, in which you ask if the County Depository may be required to care for bonds and similar securities which represent investment of sinking funds and whether such securities are protected by the Depository bond given by the bank and its sureties at the time it is appointed County Depository.

This question involves a construction of Chapter Two of Title 47 of the Revised Civil Statutes of 1925 dealing with the subject of County Depositories. The answer to the question turns on whether bonds and other securities are included within the word "funds" as used in this Chapter. The word "funds" appears in practically every article, and we believe a consideration of its use affords a complete answer to the question.

Article 2544 provides for notice to be given to any banking corporation, association or individual banker of the County who may desire to be selected as the depository of the *funds* of the county.

Article 2545 provides that the applicant shall submit a proposal stating the rate of interest offered on the *funds* of the county.

Article 2546 provides that the Commissioners' Court must open the bids and (within their discretion) select as depository the bank offering to pay the largest rate of interest per annum for said *funds.* This article further provides that the interest upon such county *funds* shall be computed upon daily balances to the credit of such county with such depository.

Article 2547 provides among other things that the bonds shall be conditioned for the faithful performance of all the duties and obligations devolved by law upon such depositories, and for the payment upon presentation of all checks drawn on 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.

Article 2548 provides that whenever there shall accrue to the county or any subdivision thereof any funds or moneys from the sale of bonds or otherwise, an additional bond may be required.

Article 2549 provides for the designation of the depository and requires the County Treasurer to transfer to said depository all the *funds* of the county as well as all funds belonging to any district or other municipal subdivision thereof not selecting its own depository and immediately upon *receipt of any money thereafter* to deposit the same with the depository. This article also defines county funds as follows:

"All money subject to the control of the County Treasurer or payable on his order, belonging to districts or other municipal subdivisions selecting no depository are hereby declared to be "county funds" within the meaning of this Chapter and shall be deposited in accordance with its requirements and shall be considered in fixing the amount of the bond of such depository."

Article 2550 provides if for any reason no bids are received it shall be the duty of the Commissioners' Court to deposit the funds of the county with any bank in that or any adjoining county at such rate of interest not less than one and one-half per cent per annum as may be agreed upon by the Court and the Banker.

Article 2552 provides that the depository must pay all checks drawn by the County Treasurer upon the funds.

By Article 2553 a depository not located at the county seat must arrange to pay checks at the county seat so long as the depository has sufficient funds to the credit of the county applicable to the payment.

Undoubtedly the word "funds" is used in the same sense throughout these articles. The word "money" appears to be used as a synonym in places. The term contemplates something to be placed with the bank which will earn interest on the entire amount for the county. In this commercial age, it would be ridiculous to assert that any bank would pay interest to the county for the privilege of holding bonds or other securities which it was not free to sell or dispose of and thus make money for itself. The act is based upon the well known fact that banks can lend money deposited with them and earn interest and they are in turn charged by the county for the use of county money placed with them which they in turn use in the banking business.

In the present instance, you state the County depository desires to be paid something because of the responsibility and expense attached to handling the bonds and securities of the county. If the bond given by the depository includes such service clearly no additional compensation can be given. We

do not wish to be understood as saying that a bank would not be responsible for bonds and securities of the county placed in their care for safekeeping, because in our opinion they would be responsible under other principles of law, but we do not believe that bonds and securities are included with the meaning "county funds" as used in this statute.

In this state of the case, your next question is—Who is the proper party to have custody of such bonds and securities, representing investments by the Commissioners' Court of sinking funds for the county and other subdivision where other provision is not specifically made by law. In our opinion the County Treasurer is the proper custodian. By Article 1712 he is required to deliver to his successor not only the moneys or other property of the county in his hands, but also the securities. His general bond covers responsibility for such securities. Kempner v. County of Galveston, 73 Texas, 216. This case construed a statute in all material respects identical with the one now in force. See also Article 838, sub-section 3.

While the statutes have changed in some minor details, a similar question was presented to this Department in 1915. (Opinions, Attorney General, 1914-1916, 518). A careful consideration of the history of the statute and its plain wording leads us to reaffirm the conclusion then arrived at that the county treasurer is the proper custodian of the bonds and securities of the county; that his general bond covers the faithful performance of his duties as the custodian of the same, and therefore, county depositories, while responsible for the safe-keeping of bonds they have accepted from the county under other rules of law, are not entitled as county depository to extra compensation for keeping same. Where the law casts a duty upon one officer, it would be poor policy for the county to pay extra compensation to a volunteer even if the law permited it.

We wish to acknowledge the assistance of a very able brief prepared by Honorable Horace Soule, District Attorney of Harris County, and by R. W. Adams, Jr., his assistant.

Respectfully submitted,

D. A. SIMMONS,

First Assistant Attorney General.

Op. No. 2708. Bk. 62, P. 332.

DEPOSITORIES—MOTOR VEHICLE REGISTRATION FEES—TAXES.

1. Motor vehicle registration fees are not taxes.
2. Article 2549 does not require the tax collector to deposit motor vehicle registration fees in the county depository.
3. Article 6691, which requires the collector to deposit the county's portion of registration fees in the county depository to the credit of the

road and bridge fund, is to be construed to mean that the same shall be paid to the county treasurer and deposited to the credit of that fund.

4. The tax collector is required to remit on each Monday to the State Highway Department and to the county all motor vehicle registration fees collected during the preceding week.

5. If the tax collector has failed to make weekly remittances to the State and county each week as required by Article 6691 and has deposited the money in the depository or elsewhere and has collected interest on the same, both the State and county are entitled to receive the interest so collected from the time the money was due the State and county.

Construing Articles 1657, 2549, 6691 and 7250.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, November 23, 1927.

Hon. S. H. Terrell, Comptroller of Public Accounts, Capitol.

DEAR SIR: This department acknowledges receipt of your letter of the 9th instant in which you ask if the State is entitled to interest on highway license fees collected by the tax collector and deposited in the county depository the same as it is entitled to interest on the state ad valorem taxes collected and deposited in the depository by the collector

Prior to the adoption of Chapter 11, Page 16, Acts of the Thirty-fifth Legislature (1917), the tax collector was not required to place taxes collected in the depository and, therefore, pending the preparation of his monthly reports, no interest was paid on the money while in his hands. This act of 1917 has been carried forward as Article 2549 of the Revised Statutes of 1925 and reads in part as follows:

"It shall also be the duty of the tax collector of such county to deposit all taxes collected by him, or under his authority, for the State and such county and its various districts and other municipal subdivisions, in such depository or depositories, as soon as collected, pending the preparation of his report of such collections and settlement thereon, which shall bear interest on daily balances at the same rate as such depository or depositories have undertaken to pay for the use of county funds, and the interest accruing thereon shall be apportioned by the tax collector to the various funds earning the same."

Chapter 150, page 416, Acts of the Regular Session of the Thirty-fifth Legislature (1917), was the first act that created the Highway Commission and provided for registration fees for all motor vehicles. This act provided for the registration of all motor vehicles and the payment of fees thereon on and after July 1, 1917. Section 16 of the Act provided for making application to the Highway Department for registration and paying the registration fees directly to the Highway Department.

Chapter 113, page 174, Acts of the Regular Session of the Thirty-sixth Legislature (1919), was the first Act that authorized the county tax collector to collect registration fees for motor vehicles. Section 3 of this Act made it the duty of the tax collector to transmit on Monday of each week to the State

Highway Department at Austin, one-half of the registration fees collected, and the remaining one-half to be deposited by the collector in the county depository to the credit of a special highway fund to be expended under the provisions of law relating thereto. This Act has been amended from time to time, and was carried into the Revised Civil Statutes of 1925 as Article 6691, and amended by Chapter 162, page 235, Acts of the Regular Session of the Fortieth Legislature (1927) to read in part as follows:

"On Monday of each week, each county tax collector shall deposit in the county depository of his county to the credit of the road and bridge fund of that county an amount equal to seventeen and one-half (17½) per horse power of every vehicle registered in such county, together with thirty per cent (30%) of all weight fees collected by such tax collector, and the balance shall be transmitted to the Highway Department."

We see from the history of the above mentioned Acts that at the time of the passage of the present law requiring tax collectors to deposit tax money collected in the depository pending the preparation of the reports of collection, the tax collector was not even authorized to collect registration fees for motor vehicles; it was two years after this Act before the tax collector was authorized to collect these fees. The reports of tax collections are made monthly as provided by Articles 7260 and 7261. The reports of motor vehicle fees are made weekly.

It is noticed that Article 2549 requires the collector to deposit all *taxes* in the depository. The fees collected for the registration of motor vehicles are not taxes. See Atkins v. State Highway Department, 201 S. W. 226. In this case the court upheld the validity of the statute requiring a registration fee of motor vehicles, and held that the fee did not constitute a tax upon ownership, but only a license fee for the privilege of using the highways. Since Article 2549 requires the tax collector only to place taxes in the depository, and does not mention license fees collected for motor vehicles, we are forced to the conclusion that Article 2549 cannot be applied to motor vehicle registration fees. As stated above, at the time of the passage of the depository Act requiring the deposit of taxes in the depository by the collector, there were no motor registration fees. Also, the collector is required to make weekly remittances of the registration fees both to the State and to the county. It might be that the Legislature considered that on account of the short time these fees are in the hands of the collector it would not be worth while to require the placing of this money in the depository.

Article 7250 provides that depositories shall not pay out money deposited by the tax collector except for compensation due the collector as shown by his approved report, and tax money due to be paid treasurers entitled to receive the same.

Since neither the State Highway Department nor motor registration fees are mentioned in this article, we find further support of the view that motor vehicle registration fees are not considered as taxes as provided in Article 2549.

Article 6692 provides for the fees of the tax collector for collecting motor vehicle licenses. Article 3939 provides the collector's fees for collecting taxes. If the motor fees are considered State and county taxes, then why should a separate statute be passed providing for fees for the collector for collecting these licenses? The fact that the Legislature has adopted these two articles further supports the view that the motor vehicle license fees are not taxes as provided by Article 2549.

Article 6691 provides that the collector shall deposit the county's portion of the fee in the depository to the credit of the road and bridge fund. This provision, however, must be construed in the light of Article 1657, which requires that all deposits made in the county treasury shall be upon deposit warrant issued by the county clerk authorizing the treasurer to receive the amount named. Therefore, in effect, this provision is simply construed as requiring the collector to pay this money into the county treasury to be deposited to the credit of the road and bridge fund by the county treasurer.

As stated above, the collector is not required to place motor fees in the depository. However, we are of the opinion that if the collector has failed to make remittances to either the State or the county at the time required by Article 6691, but has placed the money at interest in the depository or elsewhere, then both the State and county are entitled to receive the interest so collected from the time the money was due to be paid and the collector is liable to both the State and county for the interest so collected.

Yours very truly,

H. GRADY CHANDLER,
Assistant Attorney General.

OPINIONS RELATING TO ELECTIONS AND SUFFRAGE

Op. No. 2676, Bk. 62, P. 145.

POLL TAX REQUIREMENTS FOR VOTING IN CITY ELECTIONS.

1. Failure to pay city poll tax does not deprive one of the right to vote in city elections. This does not release men from payment of city poll tax, if liable therefor. The tax remains due but one cannot be denied vote for failure to pay.
2. In addition to other qualifications, one must have paid his State and county poll tax in order to be a qualified voter at a city election, unless especially exempted therefrom by reason of age, disability or other exemption provided in Article 2960 of the Revised Civil Statutes.

OFFICES OF ATTORNEY GENERAL,
AUSTIN, TEXAS, March 29, 1927.

Honorable Hiram G. Brown, City Attorney, Mt. Pleasant, Tex.

DEAR SIR: We acknowledge the receipt of your letter of March 27th requesting advice as to whether or not it is necessary for a voter otherwise qualified to have paid city poll tax, and also a State and county poll tax, in order to vote in a city election for the election of Mayor and other officers of your city.

1. In answer to your inquiry with reference to the necessity of payment of city poll tax in order to vote in city election for the election of mayor and other city officials, you are advised:

Article 1030 of the Revised Civil Statutes, 1925, provides that:

"The city council shall have the power to levy and collect annual poll tax, not to exceed one dollar, of every male inhabitant of said city over the age of 21 and under 60 years, idiots and lunatics excepted, who is a resident thereof at the time of such assessment."

You will note that words *"every male inhabitant"* are used in above statute. This is explained by reference to the fact that this identical statute was enacted in 1875, long before the adoption of the 19th Amendment to the Federal Constitution which granted women the right to vote; and has been brought forward in our law, without change, to the present time. The word *male,* therein, was used to the exclusion of the other sex and under this statute, cities and towns are not empowered to levy a poll tax against women. And since no assessment of such poll tax is authorized, she cannot be required to pay same. She has the constitutional right to vote, and under the present State law, she cannot legally be required by cities and towns to pay poll tax as a prerequisite to voting.

Since a woman cannot be required to pay city poll tax as a prerequisite to vote in city election, neither can it be required of men as a prerequisite of voting in city elections. This would be forcing men to do something as a prerequisite of voting not required of women; and would be a discrimination against (men) on account of sex, and in contravention of the 19th Amendment to the Federal Constitution, which declares that the right of citizens of the United States to vote shall not be denied or abridged, etc., on account of sex.

In this connection, however, we might add that although both men and women may vote in city elections, if otherwise qualified, without payment of poll tax, this, in no way releases *men* from payment of the tax, if liable therefor. The tax (as a tax) remains due just the same; but he cannot be denied the right to vote for failure to pay same. It may be well to call your attention to Article 2955, of the Revised Civil Statutes, 1925, in which it is provided that:

"Any voter who is subject to pay a poll tax under the law of this State or ordinance of any city or town in this State shall have paid same before offering to vote at any election in this State and to hold a receipt showing that said poll tax is paid before first day of February next preceding such election."

This provision cannot have any effect on your question for the reason that under Article 1030, the only article that authorizes cities to levy and collect city poll tax, does not permit levy and collection of city poll tax against women, and they are, therefore, not "subject to pay such city poll tax." It also follows that if women, *who are now voters*, are not required to pay same as prerequisite to voting, neither can men be required to pay same as a prerequisite to voting.

Therefore, you are advised that it is not necessary to pay city poll tax as a prerequisite to voting in a city election.

2. In answer to your inquiry with reference to the necessity for payment of State and county poll tax, you are advised:

Section 3 of Article 6 of the Constitution of Texas, prescribes the qualifications necessary for voting in city elections as follows:

"All qualified electors of the State, as herein described, who shall have resided for six months immediately preceding an election within the limits of any city or corporate town, shall have the right to vote for mayor and all other elective officers, etc."

"Qualified elector" as mentioned in the above section is defined in the foregoing section of the Constitution as follows:

"Every person subject to none of the foregoing disqualifications, who shall have attained the age of 21 years, and who shall be a citizen of the United States, and who shall have resided in this State one year next preceding an election and the last six months within the district or county in which such person offers to vote, shall be deemed a qualified elector;

provided, * * * ; and further provided, that any voter who is subject to pay a poll tax under the laws of the State of Texas, shall have paid said tax before offering to vote **at any election in this State,** and hold a receipt showing said poll tax was paid before the first day of February next preceding such election."

Following the provisions of these sections of the Constitution, Article 2957 of the Revised Civil Statutes, 1925, also prescribes the qualifications necessary for voting in city elections, and in so doing, uses almost the same identical words as are used in the foregoing sections of the Constitution. Article 2957 provides:

"All qualified electors of this State, as described in the two preceding articles, who shall have resided for six months immediately preceding an election within the limits of any city or incorporated town, shall have a right to vote for mayor and all other elective officers; but in all elections to determine the expenditure of money, or assumption of debt, or issuance of bonds, only those shall be qualified to vote who pay taxes on property in such city or incorporated town."

"Qualified elector" as mentioned in the above article, is defined in the two preceding articles, namely: Articles 2954 and 2955. Article 2954, after stating certain qualifications, further provides:

"Provided, that any voter who is subject to pay a poll tax under the laws of this State, etc., shall have paid said tax before offering to vote at any election in this State, and holds a receipt showing that said poll tax was paid before the first day of February next preceding such election.'

This article further provides:

"The provisions of this article as to casting ballots shall apply to all elections, including general, special and primary elections."

From the foregoing sections of the Constitution as well as from the foregoing articles, it seems that a voter must have paid his State and county poll tax in order to be a qualified voter at *any election in this State.*

In an opinion, No. 2172, of this Department, written in 1920 by Honorable C. M. Cureton, then Attorney General, but now Chief Justice of the Supreme Court, it was held, in passing upon the requirements and qualifications of female voters in various elections, that:

"In addition to the above requirements, a female voter must have paid, not only the State and county poll tax, but, if she resides in a city which levies a poll tax upon male voters, she must pay the city poll tax."

From the above, it is the natural inference that payment of State and county poll tax was the first requirement, and then, too, if a city poll tax was levied, that she must also pay said

city poll tax. This, however, was written about the time women were enfranchised, and it was supposed that authority to levy a city poll tax on woman would be given by the statutes, which authority has never yet been granted. But, regardless of what has been done, or omitted by the statutes, Chief Justice Cureton in using the words: *"not only the State and county poll tax,"* named the payment of said State and county poll tax as a prerequisite to voting, even in an election where he evidently thought a city poll tax would be required. In other words, he seemed to hold that one must be a qualified State and county elector before he could be a qualified city elector.

We cannot see how any other conclusion can be arrived at, when the Constitution specifically provides that any voter who is subject to pay a poll tax *under the laws of the State of Texas,* shall have paid said tax before offering to vote *at any election in this State.*

You are, therefore, advised that in addition to other qualifications, one shall have paid his State and county poll tax, in order to be a qualified voter at a city election, unless especially exempted therefrom by reason of age, disability, or other specific exemption, as provided in Article 2960 of the Revised Civil Statutes.

Very truly yours,
GALLOWAY CALHOUN,
Assistant Attorney General.

Op. No. 2734, Bk. 62, P. 473.

ELECTIONS—LAW LIMITING EXPENDITURES IN PRIMARIES.

1. A candidate for United States Senator may expend not exceeding $8,000.00 in a campaign preceding the first primary.

2. It is necessary that a candidate for United States Senator, or any state office, file with the Secretary of State a written appointment of a campaign manager before said manager may authorize any campaign expenditures in behalf of a candidate.

3. It is not necessary to appoint a campaign manager or county campaign manager unless said managers have authority to expend or authorize campaign expenditures in behalf of a candidate.

4. A candidate is not authorized to pay the traveling expenses of speakers who campaign in his behalf.

5. A candidate is authorized to pay the expenses, wages or salary of a person to distribute literature, hand out cards, or tack up cards.

6. A candidate is not authorized to pay a salary or wages to a person who acts as campaign manager, and can pay only the traveling expenses of his manager.

Construing Chapter 14, Title 50, Articles 3168 to 3173, Revised Civil Statutes, 1925.

OFFICES OF ATTORNEY GENERAL,
AUSTIN, TEXAS, May 2, 1928.

Hon. Earle B. Mayfield, United States Senator, Senate Office Building, Washington, D. C.

DEAR SIR: This department acknowledges receipt of your letter in which you ask several questions concerning the law limiting campaign expenses in primary elections. Each question will be separately set out below, together with the answer to the same.

Question a. I understand that candidates for the nomination for United States Senator in the primary elections to be held in July and August 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. Kindly advise if this information is correct.

We presume that the Act of 1913, mentioned by you, is that Act which now comprises Chapter 12, Title 50, Articles 3086 to 3089, inclusive, Revised Civil Statutes, 1925. We do not see any conflict between this chapter and Chapter 14, which includes Articles 3168 to 3173, inclusive, which is the Act of 1919, limiting expenditures in primary elections.

Question b. I understand a candidate for the Democratic nomination for United States Senator, under the law, is limited in expenses to the sum of $8,000.00 in the first primary. Is that correct?

Article 3170 provides that a candidate for the United States Senate may expend ten thousand dollars; that four-fifths of this sum may be expended in the campaign preceding the first primary and the remainder in the campaign preceding the second primary. Therefore, your interpretation of the law is correct, and you may expend only eight thousand dollars for campaign purposes preceding the first primary.

Question c. If a candidate for the Democratic nomination for United States Senator selects a campaign manager, must he file with the Secretary of State a written statement certifying that fact? If so, when must that statement be filed?

In answer to this question, you are advised that if any person acts as a campaign manager, and has anything to do with spending or authorizing the expenditure of funds in behalf of a candidate, it is necessary for a candidate for United States Senator to file with the Secretary of State a written appointment of the campaign manager. Article 3170 provides that no expenditures may lawfully be made or authorized except by a candidate or his designated campaign manager or assistant campaign manager, or by some clerk or other agent authorized in writing by the campaign manager. You see, therefore, that

it is necessary to file a designation of the campaign manager before any expenditures may be authorized by the campaign manager. The statute does not set any specific time for designating a campaign manager, and the only time therefore, that can be stated is that the appointment must be made before the manager authorizes any campaign expenditures.

Question d. If a candidate for the Democratic nomination for United States Senator selects county campaign managers, does the law require him to file a written statement with the county clerk showing the designation of his county campaign managers?

Unless a candidate expects to expend some campaign funds through a county campaign, there is no necessity for appointing a county campaign manager, who is by the statute designated assistant campaign manager for the county. Article 3170 authorizes an assistant manager to make expenditures in his county not to exceed in the aggregate $500.00 for the county. The sum expended by an assistant manager or county manager is to be reported by the candidate in his aggregate expenses over the State, and said amount will be included in the amount he is authorized to expend for all purposes.

Further elaborating on questions "c" and "d", it seems clear that the only purpose of the statute in requiring the appointment of a campaign manager or assistant campaign manager, is to allow some responsible head, other than the candidate, to supervise the expenditure of campaign funds and also to have some persons who are to be responsible for reporting expenditures. Unless a candidate authorizes some person or persons to make expenditures or authorize expenditures, then it is not necessary to have a campaign manager or assistant campaign manager designated as required by the statute. But if a candidate for a state or district nomination allows some other person, or persons, to expend or authorize expenditure of campaign funds, it is necessary that he file a written appointment with the Secretary of State for the campaign manager and with the county clerk for the assistant campaign manager for the county in which the appointment is made. The whole intent and purpose of the Act of 1919, which is now Chapter 14 of Title 50 of the Revised Civil Statutes, was only to limit and control campaign expenditures, and did not otherwise intend to regulate the manner in which a candidate should conduct his campaign. (See caption and emergency clause, Chapter 88, page 139, Acts Regular Session 36th Legislature, 1919.)

Question e. Is a candidate for the Democratic nomination for United States Senator permitted under the law to pay the actual legitimate expenses including hotel bills, automobile hire and railroad traveling expenses of speakers who campaign in his behalf?

In answer to this question, you are advised that it is our

opinion that a candidate is not authorized to pay the expenses of speakers who campaign in his behalf. The first section of Article 3170 provides that expenditures may be made for the traveling expenses of the candidate, or of his campaign manager, or assistant campaign manager, or assistant campaign manager, or of a secretary for such candidate. Article 3171 provides that any person may expend a sum not exceeding $10.00 for postage, telephone, or other lawful purpose where the sum is not to be repaid to him in behalf of the candidate. The same article provides that it shall be lawful for any person to contribute bona fide his own personal service and traveling expenses to the support of any candidacy. This article also provides that any number of citizens in any locality may contribute not exceeding fifty dollars for the purpose of defraying the expense of a political meeting to be held in the locality, such expenses to include the cost of advertising the meeting, etc., or the bona fide traveling expenses of speakers. We believe, therefore, that since Article 3170 does not authorize the payment of traveling expenses of speakers, and since Article 3171 authorizes a speaker to contribute his own traveling expenses or to receive his traveling expenses from contributions of citizens in a locality where he is to speak, that it was the intention of the Legislature in enacting this law that no candidate should be permitted to pay the expenses of speakers, and that the only way that speakers can receive their expenses is to pay the expenses themselves or be reimbursed by citizens in the locality where they speak, the amount of expenses to be paid to the speaker to be within the limit of fifty dollars for all expenses of the meeting.

Question f. Is a candidate for the Democratic nomination of United States Senator, under the law, permitted to pay the expenses of a person distributing literature, tacking up cards, etc., in his behalf?

In our opinion this question should be answered in the affirmative, provided the person employed is acting bona fide in performing this service and no subterfuge is used in paying a person for doing this work, when as a matter of fact he is indirectly employed to perform some other service for which the law does not permit payment.

Question g. Is a candidate for Democratic nomination for United States Senator permitted, under the law, to pay a salary or wages to a person, weekly or monthly, for distributing literature, handing out cards, or tacking up cards, etc.?

In our opinion this question should be answered in the affirmative under the same limitations as stated in answer to question "f".

Question h. Is a candidate for Democratic nomination for United States Senator, under the law, permitted to pay a salary, daily, weekly

or monthly, to a publicity man and the actual legitimate traveling and hotel expenses of said publicity man? What does the item 8 (newspaper and other advertising and publicity) under Section 3, Chapter 88 General Laws, Regular Session, Thirty-sixth Legislature, embrace?

This question is also answered in the affirmative under the same limitations mentioned in answering question "f".

In answer to that part of this question in which you ask to be advised what the item "newspaper and other advertising and publicity" embraces, we beg to advise that it is difficult to state everything that this item embraces, and it would be necessary to have propounded to us questions with statements of facts such as you have given in the three preceding questions, before we can make a definite answer. We believe, however, that the item will include the cost of printing cards, posters, advertisements in newspapers or on signboards, or any of the usual forms of political publicity, and the cost of such incidental service as is necessary to carry out such publicity.

Question i. Is a candidate for the Democratic nomination of United States Senator, under the law, permitted to pay a salary to a state, district, or county campaign manager? Does he violate the law if he offers to pay a man a salary for acting as his district campaign manager, and if so, what is the penalty? Does the penalty in Section 9 of the above law referred to control in the case of where a candidate for the United States Senate offers to pay a man to act as his district manager and the offer is refused?

In answer to this question, you are advised that we do not believe that any of the provisions of Article 3170 will authorize a candidate to pay a salary to a state, district or county campaign manager. Section 1 of this Article provides only for the traveling expenses of the campaign manager, and if it had been intended to allow a salary to be paid it would have been an easy matter to have inserted the word "salary." Section 3 provides for the hire of clerks and stenographers. Therefore, Sections 1 and 3, when construed together, show that it was the intention of the law that no salary, other than traveling expenses, should be paid to the campaign manager. We do not believe that a salary or compensation for a campaign manager is "publicity" as provided by Section 8 of this article.

In reply to the second part of question "i", you are advised that we know of no provision in law making it a penal offense for a candidate merely to offer to pay a man to act as his district manager and the offer is refused.

Very truly yours,

H. GRADY CHANDLER,
Assistant Attorney General.

Opinion 2744, Bk. 62, P. 538.

ELECTIONS—CANDIDATES—PARTY.

1. A person who has been nominated as a candidate for office by an organized political party and has accepted such nomination, is thereby prohibited from having his name appear on the official ballot in the general election as a candidate of any other party or organization, and his name should appear on such official ballot only under the head and in the column designated on such official ballot as that of the particular organized political party with which he affiliates.

OFFICES OF ATTORNEY GENERAL,
AUSTIN, TEXAS, August 22, 1928.

Hon. R. J. Beasley, County Judge, Bee County, Beeville, Texas.

MY DEAR SIR: Under date of August 16th, you submit the following to Honorable Claude Pollard, Attorney General, for an opinion:

"The County Clerk of Bee County has received the nomination for said office, at the Democratic Primary held on the 28th day of July, last, and also on the same day he was nominated for the same office by the Citizens Party, a local county organization in Bee County. Can he accept both nominations and have his name printed on the official ballot at the General Election to be held in November as the candidate of both the Democratic Party and the Citizens Party for the office of County Clerk?"

The statutes of this State governing and controlling your question are Articles 2978 and 2980 of the Revised Civil Statutes, 1925. A portion of Article 2978 provides that:

"The name of no candidate shall appear more than once upon the official ballot, except as a candidate for two or more offices permitted by the Constitution to be held by the same person."

The Legislature has here provided that no name shall appear on the ballot more than once, and the only exception made is in a case where, under the Constitution, a man might hold two offices at the same time. (See Article 16, Section 40 of the Constitution of Texas). Had the Legislature intended to permit the name of a candidate to appear on the ballot more than once, in case he was the nominee of more than one party, or had it intended to make any other exception, it could easily have included same. But this, it did not do. Therefore, we are justified in the belief that the Legislature never intended that the name of a candidate should appear on the official ballot as the nominee of more than one political party.

You are further referred to another portion of Article 2978, which provides:

"No name shall appear on the official ballot except that of a candidate who was actually nominated (either as a party nominee or a nonpartisan 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, except in the column designated for the political party of which he is the nominee.

You will also note that in the above quotation the Legislature provided that name must go on the ballot, either as *a party nominee*, or as a nonpartisan or independent candidate. It must appear one way or the other. And the fact that the Legislature used the words "a party nominee" seems to confine the word "party" to the singular, and would indicate that it was the intention of the Legislature that a person would be prohibited from having his name appear on the official ballot as a candidate of more than one political party. It would further seem that a party who affiliates with a particular party should be the nominee of such party, only, and should 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 another portion of Article 2978, which reads as follows:

"The name shall appear on the ballot under the head of the party that nominates them, except as otherwise provided by this title."

The use of the words "except as otherwise provided by this title" simply makes provision for cases where persons are not members of any organized political party, and gives such person the right to have their name placed upon the official ballot as nonpartisan or independent candidates for a certain office, as provided by statute. You will again note that the word "party" is herein used in the singular.

You might also refer to the provisions of Article 2980 with reference to the form of the ballot, which, among other things, provides:

"The tickets of each political party shall be placed or printed on one ballot, arranged side by side in column, separated by a parallel rule, * * * At the head of each ticket shall be printed the name of the party."

This clearly indicates that the various parties are separate and distinct organizations or institutions, and are, in a sense, opposing one another.

The lawmakers of Texas have provided for primary elections and nominating conventions, and in so doing have adopted the policy of allowing each political party to select its own candidate. Any one qualified by statute to fill an office may be a candidate for nomination or election to that office, but it is the opinion of the writer that if such a person affiliates with a political party, such person can only be the candidate

of such political party, and his name can only appear on the official ballot in the column designated for such political party.

The provisions of our statutes, which we have quoted and referred to, clearly indicate that the Legislature, when they made such provisions, never intended nor contemplated that a member of a political party, desiring to be a candidate, should ever have his name placed upon the official ballot as a candidate of more than one party, and then his name should be placed only in the column under the name of such political party as the candidate affiliates with.

The fact that the Legislature has made it possible for those who do not belong to any political party to be candidates for office and have their names appear on the official ballot through the provisions made for nonpartisan and independent candidates, seems to support the view taken herein.

It is, therefore, the opinion of the writer that the name of a candidate for county clerk in your county should not appear on the official ballot, both as the nominee of the Democratic party and as the nominee of the Citizens Party. His name should appear on the ballot but one time. In this connection, we might add, that if his name appears on the ballot as a nominee of the Democratic Party, the Citizens Party can give their indorsement to him by not causing any one else to be nominated for said office on their ticket, in which event no name would appear on the ballot opposing him, as the Democratic Nominee, for said office.

Yours very truly,

GALLOWAY CALHOUN.

First Assistant Attorney General.

OPINIONS RELATING TO HIGHWAYS

Op. No. 2683, Bk. 62, P. 185.

HIGHWAYS—ARRESTS FOR SPEEDING—FEES OF ARRESTING OFFICERS—UNIFORM AND BADGE.

1. In any case wherein it is shown that an arrest for speeding was made by designedly remaining in hiding, or lying in wait unobserved in order to trap those suspected of violating the speed laws of this State, the prosecution should be dismissed.

2. No officer has authority to make an arrest for violation of the laws of this State relating to the speed of motor vehicles unless he is at the time of such arrest wearing a uniform, consisting of a cap, coat and trousers of dark grey color, and a diamond shaped badge, clearly distinguishing such officer from an ordinary civilian or private citizen. An arrest made by an officer in any other garb or uniform is invalid.

3. No fee for the arrest or commitment of a person for violation of the laws of this State relating to the speed of motor vehicles may be taxed against such person.

OFFICES OF ATTORNEY GENERAL,
AUSTIN, TEXAS, April 20, 1927.

Honorable Wayne Somerville, County Attorney, Wichita County, Wichita Falls, Texas.

DEAR SIR: On April 2, 1927, you wrote the Attorney General the following letter:

"Wichita Falls, Texas, April 2, 1927.

Attorney General, Austin, Texas.

Dear Sir: Kindly give me a construction on House Bill No. 326 passed by the last Legislature, relative to motor vehicle speed enforcement, relative to requiring officers to make arrests without pay, which is in direct conflict with the fee bills heretofore passed and now in force.

Also, in the event the facts show a person was violating the speed laws, as testified to by persons on the highway, who are not officers, and the arrest is made by an officer who was hidden or lying in wait, who did nothing to induce the violation of the law, should this kind of a case be dismissed?

Also, in case the arrest is made by an officer wearing a hat and khaki clothes without a badge, would that invalidate the arrest?

Also, should the fees for arresting and committing a person charged with speeding, be taxed against him and collected by the Justice of the Peace for the benefit of the county, or should such fees be disregarded?

Thanking you in advance, I remain,

Yours very truly,
(Signed) WAYNE SOMERVILLE."

House Bill No. 326 passed by the Fortieth Legislature at its regular session, reads in part as follows:

"It shall be the duty of the district or county attorney, as the case may be, to dismiss any and all prosecutions wherein it is shown that the arrest was made by designedly remaining in hiding or lying in wait

unobserved, in order to trap those suspected of violating such speed law * * *'

This language is broad and inclusive. It makes no exception but provides for the dismissal of "any and all prosecutions" where the arrest is made by hiding or lying in wait. The fact that persons not officers may testify to the violation of the speed law, cannot effect the duty of the county or district attorney in the premises. Accordingly, we answer your first question in the affirmative, and advise you under the facts stated by you, all prosecutions should be dismissed.

House Bill 326 reads in part as follows:

"No officer shall have authority to make any arrests for violation of the laws of this State relating to the speed of motor vehicles, unless he is at the time of such arrest wearing a uniform and badge, clearly distinguishing him from ordinary civilians or private citizens * * *"

Said Bill further provides that:

"The badge herein required to be worn by any officer making arrests shall be diamond shaped, and the uniform prescribed to be worn by such officer or officers shall consist of a cap, coat and trousers of dark grey color."

Again, the language of the Act is broad, inclusive and definite. It admits of no construction. The purpose of this Act is so to amend our laws that a citizen of this State may at all times be enabled to know that a person seeking to halt his progress on highways of this State is an officer of the law. Accordingly, the law provides that arrests shall be made only by persons who by their costume and badge are clearly distinguishable from private parties having no right to stop persons traveling the road. Had the law stopped by providing that the uniform and badge should clearly distinguish the arresting officer from a private citizen, then an arrest made by an officer dressed as you describe might be legal, but this the Act did not do. It continued, and provided *specifically* the uniform and badge to be worn. An arrest made by an officer wearing a hat and khaki clothes without a badge would be invalid, because (a) the officer wears a hat, and not a cap; (b) khaki clothes are not necessarily or usually of "dark grey color," and (c) because said officer does not wear a diamond shaped badge. Accordingly, we answer your second question in the affirmative, and advise you that an arrest made by an officer wearing a hat and khaki clothes without a badge would be invalid.

House Bill 326 reads in part as follows:

"No such officer, and no sheriff or constable, marshal, policeman, traffic officer or other officer shall be entitled to any fee for making an arrest, or serving a warrant of arrest, or claim, demand or receive

any witness fee, or commitment fee for an alleged violation of any law of this State relative to such speeding."

Accordingly, you are advised that no fees for arresting or committing a person charged with speeding can be taxed against any person so charged.

You call our attention to the fact that this Act "is in direct conflict with the fee bill heretofore passed and now in force."

Section 2 of House Bill 326 reads as follows:

"All laws and parts of laws in conflict with this Act are hereby repealed."

The fee bills, of course, are general, and yield to the specific prohibition contained in Section 1 of House Bill 326 even if Section 2 had been omitted in that bill.

We advise you further that this law, both as to uniform and badge, and as to fees, applies to all officers in this State.

Some question has been raised as to the constitutionality of this law if it be construed to affect a sheriff. Section 23, of Article 5 of the Constitution provides in part that the Sheriff's "duties and perquisites and fees of office shall be prescribed by the Legislature." Under this constitutional provision the sheriff is entitled only to such fees as the Legislature may prescribe. Under House Bill 326 he is entitled to no fees for arresting or committing a person charged with a violation of the laws of this State relative to the speed of motor vehicles. Further, the Legislature may make it the duty of the sheriff to wear any uniform which it may see fit to prescribe, within reason, when the sheriff is arresting persons for violation of the speed laws.

Very truly yours,

PAUL D. PAGE, JR.,
H. GRADY CHANDLER,
Assistant Attorneys General.

Op. No. 2702, Bk. 62, P. 294.

HIGHWAYS—ARRESTS FOR SPEEDING—MUNICIPAL ORDINANCES—UNIFORMS OF MUNICIPAL TRAFFIC OFFICERS

House Bill 326, Regular Session, Fortieth Legislature, construed.

1. A municipal ordinance which conflicts with a general law passed by the Legislature is void.

2. A municipal ordinance fixing a speed limit in a town or city, which speed limit is greater or less than that fixed by Article 789 of the Penal Code of this State, conflicts with said Article 789 and is void.

3. A municipal ordinance providing a penalty greater or less than that fixed by Article 789 of the Penal Code of this State for the same offense conflicts with said Article 789 and is void.

4. The phrase "laws of this State relating to the speed of motor

vehicles," as used in Section 1 of House Bill 326, passed by the Fortieth Legislature of this State at its Regular Session, comprehends and includes municipal ordinances fixing speed limits within the territorial limits of cities and towns.

5. No sheriff, constable, marshal, policeman, traffic officer, or any officer of this State has any authority to make arrests for violation of city ordinances fixing the speed of motor vehicles within the territorial limits of towns or cities unless he is at the time of making such arrests wearing a diamond shaped badge and a uniform consisting of a cap, coat and trousers of dark grey color, clearly distinguishing him from ordinary civilians or private citizens.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, August 25, 1927.

Hon. James J. Collins, City Attorney, Dallas, Texas.

DEAR SIR: A number of letters addressed to the Attorney General requesting a ruling from this Department as to the application to city traffic officers of House Bill No. 326, passed by the Fortieth Legislature at its Regular Session, have been referred to me for attention.

Succinctly stated the question presented is as follows:

"In order to have authority to make arrests for violation of a city ordinance prescribing the rate of speed of motor vehicles, must a city officer, at the time of making such arrests, wear the uniform and badge prescribed by said House Bill 326?"

It is clear that a municipal ordinance which conflicts with a general law of the State is void. This has been distinctly held with particular reference to "speeding laws" by the courts of this State. See Ex Parte Mooney, 291 S. W. 246, in which presiding Justice Morrow said:

"In its charter the City of San Antonio is vested with the authority to control the use of the streets and highways within the city. **This power, of course, is to be exerted in a manner not to bring it in conflict with the State law upon the subject."**

It is to be noted that the City of San Antonio operates under the so-called "Home Rule" law. That a city ordinance fixing a greater or less rate of speed than that fixed by the statute conflicts therewith has been held repeatedly. Ex Parte Curry, 255 S. W. 730.

It is likewise true that if the penalty fixed by a city ordinance be greater or less than the penalty fixed by a general law of the State for the same offense the ordinance conflicts with the statute and is void. See Vol. 2, Vernon's Annotated Civil Statutes, page 309, Note 20.

Article 789 of the Penal Code of this State fixes the speed limit in towns and villages at twenty miles per hour.

Accordingly, it appears that a municipal speeding ordinance, to be valid, must fix the speed limit at twenty miles per hour.

Further, said ordinance, to be valid, must prescribe as penalty for a violation thereof a fine of not less than five nor more than two hundred dollars.

In other words, any speeding ordinance not a *reaffirmance* of Article 789 is invalid.

You are accordingly advised that no arrests should be made for violation of ordinances prescribing a speed limit greater or less than twenty miles per hour within a town or city, or prescribing a greater or less penalty than a fine of from five to two hundred dollars, irrespective of the uniform worn by city officers.

We now proceed to determine the application, if any, of Section 1 of House Bill 326 to officers making arrests under *valid* municipal speeding ordinances.

If the phrase "laws of this State relating to the speed of motor vehicles," as used in Section 1 of House Bill 326, be construed as comprehending and including municipal speeding ordinances, then *"no officer"* has authority to arrest for violation of such ordinances unless he is at the time of making the arrest wearing the uniform and badge prescribed by House Bill 326.

The phrase "law of this State" may be and has been so construed. In the case of Cumberland Telephone and Telegraph Company vs. City of Memphis, 198 Fed. 955, a city ordinance was held to be a law of the State within the constitutional provision prohibiting the State from passing laws impairing the obligation of contracts. In the cases of Plumas County against Wheeler, 87 Pac. 909; Sierra County against Flanigan, 87 Pac. 913; Ex Parte Sweetman, 90 Pac. 1069, and Ex Parte Bagshaw, 93 Pac. 864, and other cases, it was held that municipal ordinances were "laws of the State" within the provision of an article of the Penal Code of California making it a misdemeanor for a person to carry on any calling for the transaction of which a license was required by any law of the State without taking out or procuring the prescribed license. It is clear to our minds that there are two constructions which may be placed upon the "phrase of this State." In a narrow and restricted sense it may be construed to mean only a *statute,* a part of the Civil or Criminal Codes of the State, in other words, a general law passed by the Legislature. In a more general and popular sense it may be construed to mean a law authorized by the general laws of this State and deriving its sanction from said general law. From a careful consideration of the entire Act, including its caption, to which we are entitled to look (see Commonwealth Insurance Co. of New York vs. Finegold, 183 S. W. 838), the intention of the Legislature, which is the essence of the law and contemporary history and well known facts which led to the passage of said law, to which also we are entitled to look (see McLelland vs. Shaw, 15 Texas 319), we conclude that the phrase above

referred to was not used as a word or phrase "of art," but in a sense which includes city ordinances. As stated by Justice Wheeler in the above cited case "they" (the heads of State departments) "were required to look not only to the words of the Act but to the notorious facts which led to its enactment; so to construe its provisions in reference to those facts as to carry out and give effect to its well known meaning and intention in the just and true spirit of the enactment."

The facts which led up to the passage of this Act are widely known. The Act was designed to prevent the abuse of authority *not* by any particular group of officers but by *all officers authorized by the laws of this State to make arrests for violations of the speeding laws.* It was designed to prevent the commercialization of those officers in charge of the enforcement of speeding laws over the whole State, *or any section thereof.*

The municipalities of this State are parts of the State. Many more arrests for speeding are probably made within the jurisdiction of cities and towns than are made upon the public highways outside of such jurisdiction. There was a further and a very cogent reason for the provision as to a particular uniform to be worn by the officer making arrests for speeding. It was the purpose of this provision to prescribe a means, i. e., the wearing of the uniform described by which a citizen of this State in whatever portion of the State he might be could determine instantly whether the man appearing before him was attempting to *enforce* or *break* the law. It may be responded that certain cities uniform their traffic officers in a distinctive manner. This, of course, is true, but there is no law other than House Bill 326 which makes this obligatory, and in our smaller towns it is emphatically not done. The advantages of a distinctive uniform to be worn throughout the State are too numerous to be recounted here, but it is amply evident that these were considered by the Legislature when it passed this Act.

The Act, when it wipes out the witness and commitment fees, uses the language, "no sheriff, constable, marshal, policeman, traffic officer, or other officer." It is impossible to argue that this language does not include the officers of cities and towns, and it is not reasonable to believe that this provision was limited to officers making arrests for violation of the *statutes* of this State. The provision seeking to prevent the entrapment of persons suspected of violating the speed laws applies in its terms to "any highway officer, sheriff, deputy sheriff, constable, marshal, policeman, or any other officer of this State, *or political subdivision thereof.*" The same reasoning which applies to the fee prevention applies to this provision.

It is submitted that the Legislature in passing a general law to accomplish a particular purpose, namely, the safety of

citizens of this State traveling over its highways and through its municipalities would not make one or two provisions apply to the officers of municipalities and leave them free to disregard another equally important provision.

It has been stated that the expense to which the towns and cities of this State would be put by complying with the terms of this Act constitutes an argument against the application of the Act to such towns and cities. In the first place, the Legislature is empowered to pass such an Act irrespective of the expense involved. The Legislature has undoubtedly considered that the safety of the men and women traversing the highways of this State is of sufficient importance to justify the outlay of money here involved.

You are advised that in the opinion of this Department no officer has authority to make any arrests for violation of a municipal ordinance relative to the speed of motor vehicles unless he is at the time of making such arrests wearing a diamond shaped badge and a uniform consisting of a cap, coat and trousers of dark grey color, clearly distinguishing him from ordinary civilians or private citizens.

Yours very truly,
PAUL D. PAGE, JR.,
Assistant Attorney General.

Op. No. 2703, Bk. 62, P. 300.

HIGHWAYS—COUNTY AID—WARRANTS.

1. Chapter 186, Page 456 of the Acts of the Regular Session of the 39th Legislature authorizing a county to grant aid in the construction of State highways is not a contract for building roads and for which the county may create a debt and issue warrants therefor.
2. Under the provisions of this Act, any funds appropriated for county aid must be cash on hand or sufficient amount in current taxes which have been levied.
3. Warrants for the payment of county aid cannot be issued in advance of the work done, but can be issued only in partial payments as the improvement progresses.

Chapter 186, Page 456, of the Acts of the Regular Session of the Thirty-ninth Legislature construed.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, September 13, 1927.

Hon. W. T. Davis, County Judge, Presidio County, Marfa, Tex.

DEAR SIR: This department acknowledges receipt of your request for an opinion as to whether your county may legally issue warrants against the road and bridge fund for work already contracted for with the State Highway Department.

In a letter from your county attorney, it is stated that the Highway Commission has proposed to expend a certain amount on a designated highway in your county, provided the county will aid in the project to the extent of ten thousand dollars;

that the county does not have this amount of money in the road and bridge fund at the present time, but the current taxes assessed for the road and bridge fund for 1927, which will soon be collected, will be sufficient to pay the ten thousand dollars; that before the Highway Commission will aid in this project, it is necessary for the county to deposit warrants in a bank to the amount of ten thousand dollars, subject to the order of the Highway Commission as the work on the road progresses.

There is no question as to the right of the commissioners' court to build roads and levy a tax to pay for the same out of the road and bridge fund, just so the tax does not exceed the limit of fifteen cents or an additional fifteen cents when voted by the people of the county. It is also well settled that the court may create a debt for building roads and may issue interest bearing warrants to pay said debts, just so the court makes provision as provided under Article 11, Section 7, of the Constitution, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent sinking fund. See Lasater v. Lopez, 217 S. W. 373. But a county cannot issue warrants in advance of the debt created and sell same in the manner in which bonds are sold. There must be a legal obligation due by the county before a warrant or warrants can be issued. See Ashby vs. Gaines, 226 S. W. 732.

However, in order to create a legal debt for building roads and to issue warrants to pay for the same as mentioned above, it is necessary that the contract creating the debt be a valid contract. Such contract must be made according to the provisions of Article 2368, which requires all contracts by the county calling for an expenditure of two thousand dollars or more out of any county fund to be submitted to competitive bids. The contract proposed to be entered into with the Highway Commission is not made under competitive bids, and, therefore, the same cannot be construed as a legal debt created by the county for building roads so as to authorize the issuance of warrants to pay the same. The general law and the decisions of the courts construing the same with reference to the issuance of warrants for the purpose of paying debts cannot be made applicable to a contract of this nature. It is necessary, therefore, to see if there exists any particular provision of law authorizing a contract of this nature.

Chapter 186, page 456, of the Acts of the Regular Session of the Thirty-ninth Legislature, authorizes the commissioners' court of each county to aid in the construction and maintenance of any part of the State highway system in the county, and provides that the county may enter into contracts or agreements with the State Highway Commission for that purpose. Section 3 of this Act contains this provision:

"Any moneys in the available road fund of the county or any political subdivision or defined district thereof may be appropriated for the purpose of granting such aid, hereinafter designated as 'county aid'."

Section 6 of this Act provides that the total cost of all improvement of State highways made with county aid shall be paid out of the State highway fund, and that the county in which such improvement is made shall reimburse said fund in such amounts and in such proportion of the total cost of improvement as may be agreed upon between the Highway Department and the commissioners' court.

Section 7 of this Act reads as follows:

"Said county aid shall be paid to the State Highway Department for deposit in the State Treasury to the credit of the State Highway Fund in partial payments as the improvement progresses. It shall be paid by warrants issued by the county clerk and countersigned by the county judge and approved by the commissioners' court upon accounts of the State Highway Department certified by the State Highway Engineer. Said accounts rendered by the State Highway Department shall be based on certified accounts of contractors, laborers and material-men previously paid by the department, copies of which accounts shall be filed in the county with the accounts rendered by the department; the purpose of issuing said county warrants being to reimburse or partially reimburse the State Highway Fund for moneys paid out of same in improving the section or sections of highway for which county aid has been granted."

We see from the above that the statute provides that the money which the county appropriates as county aid must be in the available road fund. However, we are of the opinion that if the current taxes soon to be collected are sufficient to take care of the amount of county aid granted, as well as other obligations of that fund, the amount will be considered as within the available fund upon which warrants may be issued under the provisions of Section 7 of the Act. In the case of Tackett v. Middleton, 280 S. W. 563, it is held that the provisions of Article 11, Section 7, of the Constitution which requires that provision be made for taking care of debts does not apply to expenses payable within a year out of the incoming revenue; it applies only to debts for the payment of which funds are not in sight. As the taxpaying period begins within a few days, and as the amount of the road and bridge fund is due from the taxpayers, we believe that this can be considered an available fund within the meaning of this Act; that it was the intention of the Legislature that no debt should be created for the county aid. However, we see from Section 7 of the Act that the aid should be paid to the Highway Department in partial payments as the improvement progresses and that the manner of payment is by warrants issued by the clerk and countersigned by the county judge and approved by the commissioners' court upon accounts of the Highway Department, certified by the State Highway Engineer. This

section also states the items upon which these accounts shall be based.

Since county aid granted by the provisions of this Act is not a debt within the meaning of the law authorizing the commissioners' court to issue warrants, but is simply a special law authorizing a county to pay money to the Highway Department, the term of the statute must be followed and the proposed conract submitted by you does not come within the provision of this statute for the reason that the contract provides for issuing the warrants in advance while the statute provides for issuing the warrants in partial payments as the improvement progresses.

Very truly yours,
H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2710, Bk. 62, P. 340.

REGISTRATION OF MOTOR VEHICLES—HOUSE BILL 109, ACTS OF THE FORTIETH LEGISLATURE, REGULAR SESSION, AND ARTICLE 6677, REVISED CIVIL STATUTES OF 1925, CONSTRUED.

1. House Bill 109, Acts of the Fortieth Legislature, Regular Session, governs all registration fees for motor vehicles for the year 1928.
2. No motor vehicle may be registered for the year 1928 prior to January 1st, 1928.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, November 30, 1927.

State Highway Commission, Austin, Texas.

GENTLEMEN: Your letter of the 29th inst. addressed to the Attorney General has been referred to me for attention.

You first request to be advised if the registration fees for motor vehicles for the year 1928 are governed by the provisions of House Bill 109, passed by the Fortieth Legislature at its Regular Session.

House Bill 109 amends Article 6691 of the Revised Statutes of 1925, which governs registration fees at all times prior to the effective date of the amendatory act. Article 6691 reads as follows:

"Apportionment of funds.—On Monday of each week each county tax collector shall deposit in the county depository of his county to the credit of the road and bridge fund of that county an amount equal to seventeen and one-half cents per horsepower of every vehicle registered in such county, such amount to be deducted from the gross registration fees collected during the preceding week, and transmit the balance of such fees to the Department. Each county may use the tax so apportioned to it on any county roads that it may deem necessary or expedient."

House Bill 109, which supplants the old article, is brief, and we quote it in full:

"An Act to amend Article 6691, Revised Civil Statutes of Texas, 1925, providing for the apportionment of automobile registration fees to the several counties of the State, and to the State Highway Department, providing how the money alloted to the counties may be used; declaring an emergency.

"Be it enacted by the Legislature of the State of Texas:

"Section 1. That Article 6691 of the Revised Civil Statutes of Texas, 1925, be amended so as hereafter to read as follows:

"Article 6691: Apportionment of Funds. On Monday of each week, each county tax collector shall deposit in the county depository of his county to the credit of the road and bridge fund of that county an emount equal to seventeen and one-half cents (17½) per horse power of every vehicle registered in such county, together with thirty per cent (30%) of all weight fees collected by such tax collector, by virtue of Article 6678, 6679, 6680, and 6681 of the Revised Civil Statutes of Texas, 1925; provided, however, that no tax collector of any one county shall deposit in the County Depository of his county exceeding in any one calendar year Fifty Thousand Dollars, ($50,000.00) of such weight fees. The amount so deposited in the County Depository hereunder to be deducted from the gross registration fees collected during the preceding week, and the balance shall be transmitted to the Highway Department. None of said moneys so placed to the credit of the road and bridge fund shall be used to pay the salary or compensation of any county judge or county commissioner, but all said moneys shall be used for the construction and maintenance of lateral roads in such county under the supervision of the county engineer, if there be one, and if there is no such engineer then the county commissioners' court shall have authority to command the services of the Division Engineer of the State Highway Department for the purpose of supervising the construction and surveying of lateral roads in their respective counties.

"Sec. 2. This Act shall be in force from and after January 1, 1928.

"Sec. 3. The fact that the commissioners' courts of the several counties of the State are requesting that provision be made for the distribution to the counties of a larger proportion of the registration fees of motor vehicles, and the nearness to the close of this Session creates an emergency and an imperative public necessity, that the Constitutional Rule requiring bills to be read in each House on three several days should be suspended, and the same is hereby suspended."

It is readily apparent that the essential distinction between the original and amended statute lies in the additional percentage (30% of that part of the total computed upon the gross weight of the vehicle) of the registration fee alloted to the counties of this State.

That the Legislature intended all fees for 1927 registrations to be governed by the provisions of the old article is clear for the new act becomes effective (see Sec. 2 thereof) on January 1, 1928, *at the exact moment when the legal period for* 1927 *registrations ceases to exist.* (See Article 6677, Revised Civil Statutes of 1925). That the Legislature intended all fees for 1928 registrations to be governed by the provisions of House Bill 109 is equally apparent, for as stated above, the new act becomes effective on Jaunary 1, 1928, *at the precise instant*

when the legal period for 1928 *registrations comes into existence,* (See again Article 6677, Revised Civil Statutes, 1925) and "The intention of the Legislature in enacting a law is the law itself, and must be enforced when ascertained—" (Edwards vs. Martin, 92 Texas 152).

You are accordingly advised that the registration fees for the year 1928 are governed by the provisions of House Bill 109, passed by the Fortieth Legislature at its Regular Session.

We cannot, however, stop with this advice. We are not ignorant of the state of facts which prompts your inquiry. These facts are:

It has been and is customary for tax collectors in this State to collect these fees and issue license plates during the month of December prior to the year for which the motor vehicle is sought to be registered. The question which has arisen, and which (judging from letters now before the writer) is agitating the minds of our county officers, is whether registration fees for 1928, *collected in December,* 1927, are to be divided between State and county on the basis fixed by Article 6691, as it stands in the codification of 1925, or on the basis fixed by House Bill 109.

Many of our best county officers take the position that these fees are governed by the old article upon the theory that the new act by its terms does not become effective until January 1st, and these fees are collected for registrations prior to that date. The argument is logical. Registrations in 1927 cannot be governed by the provisions of a statute which does not become effective until 1928. So, if the premise be granted the conclusion is correct, but the premise is false, and the conclusion invalid. The false premise to which we refer is found in the assumption that motor vehicles may be registered for 1928 in the year 1927. This cannot be done.

The period for registration of motor vehicles is clearly and definitely prescribed by law. Article 6677 of the Revised Civil Statutes of 1925 states that "The registration for all vehicles and chauffeurs hereunder shall begin with the first day of January and end with the 31st day of December of each year." No slightest color of authority for registration at any other time can be found in the laws of this state. The statute above quoted further provides for registration in the *four quarters* of the year. There is no intimation that a vehicle can be registered *in any other year.* In addition to the plain terms of the statute it is proper to consider the possible results of any other rule. If one may register his car for 1928 on December 31, 1927, the conclusion follows inexorably that he may register it for 1928 on June 31st, or January 1st, 1927, and upon such registration be it remembered, he is entitled to a receipt which "shall be a protection to the holder against prosecution under any provision of the Highway Law regulating the registration of motor vehicles until the receipt by him

of the number plates and seals, or badge and certificate." (Cf. Art. 6690, Revised Civil Statutes, 1925). Certainly it was never contemplated that this provision should apply to registrations made one, two, or twelve months in advance, according to the taste, fancy and financial condition of the registrant. Further confusion is added when we consider that the registration contemplated is annual. (Art. 6675, Revised Civil Statutes of 1925).

The practical results of permitting the registration of cars prior to the date set by law are worthy of consideration. Suppose that prior to January 1, 1928, the citizens of this State pay into the Treasury and the County Depositories through regular channels registration fees amounting to One Hundred Thousand Dollars, and subsequent to such payment, but prior to January 1st, the Legislature changes the amount of fees or altogether abolishes them. The result is chaos. Or presume (a remote contingency) that a large percentage of the moneys so paid is embezzled and never reaches the Treasury or the County Depositories. The rights of State, county and registrants, and the liability of the tax collector, and/or his bondsmen, present painful problems.

We are of opinion, and so advise you, that no such haphazard system was contemplated, and that no registrations for 1928 may legally be made prior to January 1st of that year.

Summing up our conclusions, are and our advice to you is as follows:

First: The intention of the Legislature in enacting House Bill 109 was that the provisions of that Act should govern all registrations of motor vehicles for the year 1928.

Second: No motor vehicle may legally be registered for 1928 prior to January 1, 1928.

Third: The provisions of House Bill 109 govern all registrations of motor vehicles on and after January 1, 1928.

Fourth: The provisions of House Bill 109 accordingly govern *all* registrations of motor vehicles for 1928. This is the intention of the Legislature and the law of this State.

It will be observed that the conclusions which we express give effect to the Legislative intent and harmonize the various statutes bearing upon the point at issue. It may be stated here that by no other conclusion could this result be achieved. We regret the inconvenience which will result from the overcrowding of the tax collectors' offices on and immediately after January 1st. This inconvenience, however, is the direct and unavoidable result of legislative enactment, and the convenient if somewhat free-and-easy method of prepayment is a laudable attempt to advantage the forehanded registrant, which attempt is found to be in unfortunate collision with the law.

In your letter you ask also for a construction of Article

6692 of the Revised Civil Statutes of 1925. We will consider this article in another opinion.

Yours very truly,
PAUL D. PAGE, JR.,
Assistant Attorney General.

Op. No. 2732, Bk. 62, P. 461.

TRAFFIC OFFICERS—COMMISSIONERS' COURT—MOTOR REGISTRATION FEES—ROAD AND BRIDGE FUND.

1. A county is without authority to use any part of the funds derived from the registration of motor vehicles to pay the expense of county traffic officers.
2. The expense of county traffic officers is payable out of the general fund.
3. Money derived from fines collected for violations of the highway laws may be used to help defray the expense of county traffic officers.

Construing Articles 6691, 6699, 6699a, 6700, and Chapter 162, Page 235, Acts of the Regular Session of the Fortieth Legislature.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 20, 1928.

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

DEAR SIR: Receipt is acknowledged of your letter in which you ask to be advised if the commissioners' court of your county may, under Articles 6699 and 6700, Revised Civil Statutes, transfer to the general fund from the road and bridge fund a portion of the funds derived from the registration of motor vehicles to pay the expense of county traffic officers.

It is well settled that the commissioners' court is without authority to transfer money from the road and bridge fund to the general fund, or to transfer money from any of the constitutional funds. Carroll v. Williams, 202 S. W. 504. This rule, however, applies only to taxes collected for the four constitutional funds, to-wit: general, road and bridge, permanent improvement and jury. But funds derived from registration of motor vehicles are not taxes. Atkins v. State Highway Department, 201 S. W. 226. Therefore, the only remaining question is whether under our present statutes it is the intention of the Legislature to permit the county to use any part of the funds derived from the registration of motor vehicles to pay the expense of county traffic officers.

Section 4, Chapter 127, Page 228, Acts of the Regular Session of the 36th Legislature (1919) provided that the compensation of the deputies shall be fixed by the commissioners' court. This article did not provide out of which fund the salary should be paid and, therefore, taking this section alone,

we would conclude that the same should be paid out of the general fund. But Section 5 of the same act provided that a certain percentage of the funds derived from the registration of motor vehicles might be used for this purpose, thus indicating the sole source of the funds for this purpose.

Chapter 58, Page 202, Acts of the Regular Session of the 39th Legislature (1925) amended Section 4 of the above act and provided that the deputies shall be paid a salary out of the general fund not to exceed one hundred fifty dollars per month, and also made provisions relating to the wearing of uniforms. This act did not affect Section 5 of the 1919 Act. However, the fact that this Act specifically named the general fund in the face of the Act which provided for payment out of the motor fee fund, indicates a legislative intent that the expense should be paid solely out of the general fund.

The identical provisions of amended Section 4 of the 1919 Act were carried forward as a part of Article 6699, Revised Civil Statutes for 1925. (See fifth and sixth sentences of Article 6699.) The unamended provisions of Section 5 of the 1919 Act are also found in said Article 6699. The entire Act of 1925 is carried forward as Article 6699a.

We find, therefore, that we have standing in the latest statutes Article 6699a which provides that the deputies shall be paid out of the general fund, and a part of Article 6699 which provides that for the purposes of the law that the commissioners' courts of the various counties may use a certain per centage of the funds derived from motor registration fees. In one statute or article, it seems that the Legislature intended that a part of the motor registration fees can be used for this purpose, but in another article, it is specifically stated that the expnses must be paid out of the general fund. Since there is no provision in our statutes for placing any registration fees in the general fund, and since Article 6699a is the latest expression of the Legislature outside of the codification, it seems that it was the intention that the expense should be paid solely out of the general fund. As a matter of fact Article 6699a, which is an act of the Thirty-ninth Legislature, is a later expression of the Legislature than Article 6699, since Section 21 of the Final Title of the Revised Civil Statutes provides that nothing therein shall be construed to repeal or in anywise affect the validity of any law passed by the Regular Session of the Thirty-ninth Legislature. Therefore, we believe that the 1925 Act will control and that it was the intention of the same that the general fund alone should pay this expense, with the exception that the money derived from fines as provided by Article 6700 may be used to supplement the general fund for this purpose.

We believe that our view is strengthened by Chapter 162, Page 235, Acts of the Regular Session of the Fortieth Legislature, which amends Article 6691. This Act is the provision

of law that creates the county's portion of the motor registration fees, and this Act specifically provides that none of the money derived from the registration fees shall be used to pay the salary or compensation of any county judge or county commissioner, but all of the same shall be used for the construction and maintenance of lateral roads in the county. Therefore, we seem to have a legislative interpretation of the Act of 1925 by this act of 1927 which says that all of the money must be used for the construction and maintenance of lateral roads.

You are advised, therefore, in answer to your question that the commissioners' court is without authority to transfer from the road and bridge fund to the general fund any part of the money derived from the registration of motor vehicles for any purpose, but the money derived from fines for violation of highway laws may be used to help defray the expenses of county traffic officers.

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

Op. No. 2736, Bk. 62, P. 484.

MOTOR VEHICLES—REGISTRATION—MOTOR BUS LICENSE PLATES.

1. Where a motor vehicle bearing a motor bus license is sold or transferred, the license goes with the vehicle and the license plates issued for said vehicle may not be placed upon any other motor vehicle.
2. Whoever operates, or as owner permits to be operated on a public highway, a motor vehicle with a motor bus license plate issued for a different motor vehicle attached thereto, violates Article 811 of the Penal Code, and is liable for a fine in any amount not exceeding $200.00.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 19, 1928.

Hon. Gibb Gilchrist, State Highway Engineer, State Office Building, Austin, Texas.

DEAR SIR: This office has received several letters with reference to the alleged transfer of motor bus license plates. It has been alleged that the State Highway Commission has authorized tax collectors in cases where operators of motor vehicles for hire have traded in vehicles as part payment upon a new vehicle, to authorize the use of the old motor bus license upon the new car obtained by the operator. A conference with your Mr. Lloyd indicates that such is not the case, and we have been requested to furnish your department with a departmental opinion setting out the practice proper to be followed in such cases.

Article 6685, Revised Civil Statutes, provides in part, that

"When any person other than a dealer sells a vehicle subject to registration hereunder, he shall indorse upon his certificate of registration a written transfer of the same."

Article 811 of the Penal Code provides that "Whoever shall operate, or as owner permit to be operated upon a public highway a motor vehicle with a number plate or seal issued for a different motor vehicle attached thereto, shall be fined not exceeding $200.00."

Under these provisions of the law you are now advised that the tax collector is without authority to issue a motor bus license at any time without collecting the $4.00 seat tax provided by Article 820 of the Penal Code.

You are advised further that any person operating a motor vehicle on the public highways of this State, which motor vehicle bears a motor bus license previously issued for a different motor vehicle, violates Article 811 of the Penal Code, and is liable to a fine in any amount not exceeding $200.00.

There exists no authority in law for the practice which is alleged to exist.

Very truly yours,
PAUL D. PAGE, JR.,
Assistant Attorney General.

OPINIONS RELATING TO INSURANCE

Op. No. 2681. Bk. 62, P. 174.

INSURANCE COMPANIES—DEPOSITS—DUTY OF INSURANCE COMMISSIONER TO APPROVE—DUTY OF TREASURER TO ACCEPT.

1. The duty rests upon the Insurance Commissioner to inspect and approve or disapprove securities offered by insurance companies for deposit under any of the laws of the State requiring deposits with the State Treasurer.

2. When securities have been approved by the Commissioner of Insurance, it is the duty of the State Treasurer to accept the same when offered for deposit, and, in doing so, the Treasurer will be fully protected under the law. In these particulars, the Treasurer is a custodian.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 11, 1927.

Hon. R. L. Daniel, Commissioner of Insurance, Austin, Texas.

MY DEAR MR. DANIEL: A letter from your department under recent date directing our attention particularly to Article 4993, Revised Statutes, 1925, brings up a question which seems to have recurred frequently and in view of the fact, we are taking the liberty to go somewhat more extensively into the matter suggested, and express our opinion upon this and other similar articles in the law. The question you ask is:

"Upon whom does the responsibility rest and whose is the duty to approve securities offered for deposit with the State Treasurer under various sections of the law requiring the making of deposits?"

Generally speaking, it is the opinion of this department that the Commissioner of Insurance should inspect and approve all securities offered for deposit by insurance companies under the laws of this State requiring deposits, and that when that officer shall have approved such securities the Treasurer should accept the same without futher question, and in doing so he will have performed his entire duty and will be fully protected under the law.

The articles of the statute which are applicable to the matter under consideration are numerous and set out below:

"Art. 4739. Deposit of securities.—Any life insurance company, accident insurance company, life and accident, health and accident, or life, health and accident insurance company, organized under the laws of this State, may at its option, deposit with the State Treasurer securities equal to the amount of its capital stock, and may, at its option, withdraw the same or any part thereof, first having deposited in the treasury in lieu thereof other securities equal in value to those withdrawn. **Any such securities, before being so originally deposited or substituted, shall be approved by the Commissioner.** * * *"

"Art. 4759. Alien companies to deposit.—No foreign life insurance company or accident insurance company, or life and accident, health and

accident, or life, health and accident insurance company incorporated by or organized under the laws of any foreign government, shall transact business in this State, unless it shall first deposit and keep deposited with the Treasurer of this State, for the benefit of the policy holders of such company, citizens or residents of the United States, bonds or securities of the United States or the State of Texas to the amount of one hundred thousand dollars."

The articles last above quoted are portions of the present chapter of life, health and accident insurance, and were brought over from the life insurance law of 1909.

"Art. 4925. Shall file bond.—Every fire insurance company, not organized under the laws of this State, applying for a certificate of authority to transact any kind of insurance business in this State shall, before obtaining such certificate, file with the Commissioner a bond, etc. * * * Any company desiring to do so may, in lieu of giving the bond required by this article, deposit securities of any kind in which it may lawfully invest its funds with the State Treasurer upon such terms and conditions as will in all respects afford the same protection and indemnity as herein provided for to be afforded by said bond."

This article is incorporated in the general provisions with reference to fire and marine companies, and is a part of the Act of 1909.

Art. 4971. Requirements to be complied with.—* * * Such company must also have on deposit with the Treasurer of this State at least fifty thousand dollars in good securities worth at par and market value, at least that sum, **of the value of which securities the commissioner shall judge, held** for the benefit of the holders of all the obligations of such company wheresoever incurred; * * * Such company at all times, however, to have the right * * * from time to time to withdraw such securities, or portion thereof, substituting therefor others of equally good character and value, to the satisfaction of said Treasurer. * * *."

This is the requirement in the statute for surety and trust companies.

"Art. 4993. Capital and deposits.—Such companies with two hundred thousand dollars of capital stock subscribed and fully paid in in cash shall be authorized to transact all and every kind of insurance specified in the first article of this chapter; all of which said capital stock shall be paid up or invested in bonds of the United States, or of this State, or of any county or municipality of this State or in bonds or first liens upon unencumbered real estate in this State worth at least twice the amount loaned thereon. **Upon such company furnishing evidence satisfactory to the Commissioner** that the capital stock as herein prescribed has been all subscribed and paid up in cash in good faith, and that such capital has been invested as herein prescribed, and upon the **deposit of the sum of fifty thousand dollars of** such securities or in cash with the State Treasurer, then said Commissioner shall issue to said company a certificate authorizing it to do business."

Art. 5000. Change of securities.—Such companies shall have the right at any time to change their securities on deposit with the State Treasurer by substituting for those withdrawn a like amount in other securities of the character provided for in this law."

It will be noted from the reading of the foregoing excerpts

from the statute that in the law with reference to deposits for life insurance companies and in the law with reference to the original deposit for life insurance companies surety and trust companies, there is a specific provision that these securities must be approved by the Commissioner.

There can, therefore, be no question about the authority of the Commissioner to approve securities offered under the provisions of these two Statutes. The only question that can arise is in those instances where no specific authority is granted either to the Commissioner or to the Treasurer which instances are fire insurance companies and causalty companies.

Article 4993 refers to casualty companies. They are required before obtaining certificate of authority to do business, to make investments of their capital stock in such securities as the law specifically permits and they are also required to satisfy the Commission of insurance that such investments have been made. They are then required to deposit $50,000.00 of "such securities" with the treasurer; such securities must then mean those about which the Commissioner of Insurance has already been satisfied. It, therefore, appears that the necessary construction of this Article places the authority for approval of deposited securities with the Comissioner of Insurance. There is only one other case of companies and that is fire insurance companies. This question is wide open so far as they are concerned. They are required to file a certain bond with the Commissioner of Insurance having conditions which the law prescribes and which presumptively the Commissioner must approve. At their option they may deposit with the treasurer securities in the amount of the face of the bond required upon such terms and conditions as will afford the same protection as the bond.

Supervision of the solvency of insurance companies is placed in the hands of the Commissioner of Insurance. The solvency of an insurance company depends upon the soundness of its investments. The Commissioner is authorized by law to make exhaustive investigations of securities in which an insurance company has invested its funds and is provided by law with ample machinery for making those investigations. If he determines in any instance that investments which have been made do not come within the terms of the Statute, he must immediately require that such securities be disposed of and that the funds be re-invested in admissible assets. His is the responsibility in all these matters.

These securities which may be deposited with the Treasurer are such as the Commisioner of Insurance must in the course of his examination of a company investigate and either approve or disapprove. If the treasurer accepted a deposit of securities which the Commissioner refused to accept, the Commissioner could require that they be disposed of and that other securities which he approved be purchased for the account of the

company. The treasurer of the State is primarily a custodian which, of course, is a highly important function. The law, however, does not give to that officer any character of power or any machinery for making investigations as to the soundness of securities offered for deposits by an insurance company. To require the treasurer to go over the work of the Insurance Commissioner and re-check the value of the securities offered for deposit by insurance companies, would introduce into the scheme of insurance supervision, not only would a duplication of effort, but also the possibility of confusion and conflict of oppinion, which, in our judgement, the law does not contemplate. We think that the construction most condusive to the orderly conduct of the affairs of the state and to the coordination of the functions of the various State officials, is the construction which the Statute should recieve where the language admits.

In view of the specific language in two of the cases where deposits are required and in view of the necessary construction of a third case and in view of the general purpose and tenor of the laws regulating the conduct of insurance business in Texas, we are of the opinion that it is primarily the duty of the Insurance Commissioner to approve securities offered for deposit and that when such securities have been approved by the Commissioner of Insurance, the treasurer will be fully protected. If he accepts them without futher question, his duty then is merely that of a custodian.

The only question which is introduced into this conclusion comes about by virtue of the concluding language which we have quoted from Article 4971 wherein it is provided that in case of substitution of securities the new securities shall be of equally good value to the satisfaction of the Treasurer. We are confident that if the Treasurer acts upon the advice of the Insurance Commissioner, even in this isolated transaction, he will be fully protected no matter what may happen to the securities he accepts and indeed it may be that in view of the general purpose and effect of our regulatory laws with reference to the insurance companies, the Treasurer might be under the duty of accepting such securities as the Commissioner had approved.

Very truly yours,

R. B. COUSINS, JR.

Assistant Attorney General.

Op. No. 2690, Bk. 62, P. 222.

INSURANCE—FIRE PREMIUMS RATES—COMMISSION'S DUTY IN MAKING RATES:

1. An insurance company may not write a fire policy covering property in various locations at an arbitrary rate having no relation to the

scheduled rate promulgated by the Commission for similar property in those same locations.

2. The Commission may not approve policies or rates which operate to discriminate as between individuals.

3. The Commission may classify property for fire insurance rating purposes, but cannot do so on an arbitrary basis. There must be a reason in or incident to the property itself on which classification must be made. Classification may not be made on the basis of ownership.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, APRIL 21, 1927.

Hon. T. M. Campbell, Jr., Secretary State Insurance Commission:

DEAR MR. CAMPBELL: This department sometime ago received from your office an inquiry relative to the right of certain fire insurance companies to write a character of insurance cover not heretofore recognized by the department. It seems that the companies are asking permission to file form of policies and rates and are asking your approval of the same. The facts are these:

A building and loan association in one of the cities of this State lends a large amount of money upon the security of improved real estate. On each loan it is required that a policy of fire insurance be obtained covering the property mortgaged with a loss payable clause in favor of the association. The association desires to be protected against the possibility that through oversight or omission the owner of the property shall fail to cover the property at the right time. It also desires to be protected against loss by fire in the event the owner of the property should not have taken out sufficent insurance to cover the interest of the association.

An insurance company desires to write a blanket policy to cover the interest of this association in all of the property it has at mortgage wherever the same may be situated in this city, such insurance to attach only after specific insurance shall have been exhausted in case there is any specific insurance, or in case there is no specific insurance, then such insurance to protect the association on this entire loss. The amount of the insurance at risk carried by the company will naturally vary every month and it is intended that the association will report perodically its interest in various pieces of real estate as evidenced by the balances on its mortgages so that the company will be informed as to the amount and locality of its risk. It is, however, the intention and desire of the parties in this case that the policy be written at a flat rate to be arrived at by some method of approximation and upon agreement between the company and the association without specific or particular reference to the published or schedule rates on the individual pieces of property covered by the policy.

You have also submitted another instance of a very similar nature involving a general cover policy wherein a company

desires to issue a policy to cover the interest of a large furniture company in all of the personal property which it sells and upon which it retains a mortgage to secure an unpaid purchase price. The rate in this instance, to be arrived at by agreement, is to be a flat rate covering all locations within the city without specific reference to the locations in which the property happens to be. It also involves periodical reports as to the value or amount at risk carried by the company on these mortgages.

It seems that there is a growing demand for a cover of this sort and it is to be admitted that there are certain obvious conveniences connected therewith. In view of this fact, it is with considerable regret that we must advise that there seems to be no place in the law for a practice and procedure of this sort and on the contrary, it, in our judgment, is in plain violation of the law.

We may notice in this discussion the following applicable portions of the Statutes:

"Art. 4878. The State Insurance Commission shall * * * prescribe, fix, determine and promulgate the rates of premiums to be charged and collected by fire insurance companies transacting business in this State * * * Said Commission shall ascertain as soon as practicable the annual fire loss in this State; obtain, make and maintain a record thereof and collect such data with respect thereto as will enable said Commission to classify the fire losses of this State, the causes thereof, and the amount of premiums collected therefor for such class of risks and the amount paid thereon, in such manner as will aid in determining equitable insurance rates, methods of reducing such fire losses and reducing the insurance rates of the State * * *."

"Art. 4881. Said Commission is authorized and empowered to require * * * statements showing all necessary facts and information to enable said Commission to make, amend and maintain the general basis schedules provided for in this law and the rules and regulations for applying same and to determine reasonable and proper maximum specific rates and to determine and assist in the enforcement of the provisions of this law * * *."

"Art. 4882. The rates of premium fixed by said Commission * * * shall be at all times reasonable and the schedules thereof made and promulgated by said Commission shall * * * show all charges, credits, terms, privileges and conditions which in anywise affect such rates * * * The State Insurance Commission, and any inspector or other agent or employe thereof, who shall inspect any risk for the purpose of enabling the Commission to fix and determine the reasonable rate to be charged thereon, shall furnish to the owner of such risk at the date of such inspection, a copy of the inspection report, showing all defects that may operate as charges to increase the insurance rate."

"Art. 4883. When a policy of fire insurance shall be issued by any company transacting the business of fire insurance in this State, such company shall furnish the policyholder with a written or printed analysis of the rate or premium charged for such policy showing the items of charge and credit which determine the rate * * *"

"Art. 4894. No company shall engage or participate in the insuring or reinsuring of any property in this State against loss or damage by fire except in compliance with the terms and provisions of this law; nor shall any such company knowingly write insurance at any lesser rate than the rates herein provided for, and it shall be unlawful for any company so to do, unless it shall thereafter file an analysis of same with the Commission and it shall be unlawful for any company * * * Any

company doing any of the acts in this article prohibited, shall be deemed guilty of unjust discrimination. * * *"

"Art. 4879. A maximum rate of premiums to be charged or collected by all companies transacting in this State the business of fire insurance, as herein defined, shall be exclusively fixed and determined and promulgated by the State Insurance Commission, and no such fire insurance company shall charge or collect any premium or other compensation for or on account of any policy or contract of fire insurance as herein defined in excess of the maximum rate as herein provided for, but may write insurance at a less rate than the maximum rate as herein provided for. When insurance is written for less than the maximum rate, such lesser rate shall be applicable to all risks of the same character situated in the same community."

The emergency clause appended to the act of 1909, which was the original fire rating board act, authorizing the regulation of fire insurance rates by state authority, reads as follows:

"The fact that there is now no law in this State prohibiting unjust discrimination in the collection of fire insurance rates as between citizens of this State, constitutes an emergency, etc."

It will be seen that the law requires that in making fire insurance rates your commission shall promulgate a *schedule* which will take into consideration the physical condition of the property to be insured and the fire hazards incident thereto. It also requires that a schedule or general analysis be constructed so that a person can figure the rate at which a risk must be written by applying the schedule to the property. See Art. 4882. It requires that when a policy of insurance is delivered to an insured, an analysis of the rate must also be delivered. See Art. 4883. It requires that when any rate is used different from that promulgated, the company must deliver to the Commission an analysis of the new rate at which it intends to write or has written the business and it is required that thereafter all business written by that company in that community on all risks of the same character be written at the same rate. See Art. 4894 and 4879.

It, therefore, appears that the rate at which a policy may be written must be determined from the property itself. A rate to be defended or justified must be capable of analysis when applied to specific property. The rate must measure the hazard, and must measure it accurately and must measure each hazard uniformly wherever found. And the hazard to be measured must be an incident of the property such as its location, its construction, its use, its occupancy; must be susceptible of discovery on inspection, and must have some relation to the danger of a fire loss. The Commission is not authorized to promulgate an arbitrary rate, having no relation to its published schedule applied to particular property. It can not arbitrarily fix a rate as an approximation upon property to which the schedule can be applied. Since the Commission can not do this, we see no authority by which it can authorize a company

to do the same thing. In either one of the instances given it would be impossible to make an analysis of the rate. It might by chance accurately measure the hazard at one location and be wholly inadequate or unjust at another.

We think it clear that a policy written in this maner would be at a rate different from the established Commission rate. This can only be done upon one condition and that is that an analysis of the lower rate be filed. It is only in those cases where a rate used may be analyzed and filed that a variation is permitted. Futhermore, it is specifically provided that all rates and schedules which your Commission promulgates are maximum rates. If in any instance the flat rate used in these policies should exceed the published rate, there would be a violation of this express provision and prohibition in the law.

The law under which your Commision promulgates premium rates for fire insurance policies seems to have as its primary objective the establishment of an equality in insurance rates as between assureds. The only inequality which can lawfully be introduced into rate is that which comes about from difference in the hazards inherent in the physical condition of the porportion to be insured. The history of this legislation teaches us that a condition of inequality in rates, wherein a man having considerable property was given an advantage of a man having but little property, first called attention to the necessity for regulation of this type. This concern of the law for equality of fire insurance burdens expresses itself in the rigid prohibition against discrimination on the part of ten companies and as between assureds. These restrictions in the matter of discriminations certainly operate on the Commission as well as on the companies. It cannot be said that the Commission can authorize a discriminatory rate which would otherwise be unlawful. The prohibition against such a rate operates upon the Commission as well as a company. With this in mind let us see whether the situation in hand operates necessarily to discriminate in rates.

We may take, for instance, in the case of contract to cover real estate, a condition where two houses occupied by owner are situated side by side and are in all particulars identical except that in one case a mortgage is held by this building and loan association and in the other there is no mortgage. The approximated rate in the instance where the building and loan association is involved may well be very materially lower than the rate on the other property which is computed by the schedule which your department has promulgated; vice versa, the situation might be reversed and the building and loan association would be charged the higher rate.

Now, in our judgement, it matters not that the ultimate result to the insurance company in the matter of premiums collected would be the same. The rate being lower in some instances and higher in others, might by chance equalize

exactly and produce the total revenue which would be derived from correct rates, but this would not cure the discrimination as between assureds.

The same observation might be made in the case of the general contract on furniture supplied by the insured and upon which a mortgage is retained to secure a purchase money contract. A piano, for instance, sold to a man would be placed in his home and the rate on that property paid by the company holding the mortgage might be much less than the rate paid by the same man upon the balance of the furniture in his house. This would operate to discriminate in favor of the furniture company and against the individual. As we see it, this condition could not possibly be avoided, as it would hardly happen that the blanket and specific rate would be the same.

It follows from what we have just said that, in our judgment, the plan of insurance suggested by your letter and these contracts, would of necessity introduce an unlawful discrimination into the business done by these companies which the law does not sanction and which you could not approve.

From your letter we take it that it is suggested by the insurance companies that these plans might be justified under the provisions of Article 4884, which reads as follows:

"Said Commission shall have full power and authority to alter, amend, modify or change any rate fixed and determined by it on thirty days' notice, or to prescribe that any such rate or rates shall be in effect for a limited time, and said Commission shall also have full power and authority to prescribe reasonable rules whereby in cases where no rate of premium shall have been fixed and determined by the Commission, for certain risks or classes of risks, policies may be written thereon at rates to be determined by the company. Such company or companies shall immediately report to said Commission such risk so written, and the rates collected therefor, and such rates shall always be subject to review by the Commission."

The theory upon which this suggestion is made is that this character of insurance can be set apart into a separate class and a rate can be fixed by the Commission to cover these risks as a separate class. While it is true that the Commission has the authority to fix rates, we feel that there must be a fair and just basis for any classification that may be and as suggested above that classification must be based upon physical property, modified to some extent by the use and occupation to which it is put. In the case in hand, for instance, a house covered by a mortgage in favor of building and loan association, should belong to the same class as a house not covered by any mortgage or covered by a mortgage to some other concern and that an attempt to put one house into one class and the other house into another class carrying different fire insurance rates, would be entirely unjustifiable and not authorized by law.

To make a classification on the basis contended for by the

companies, would not be a classification of risk but a classification of persons owning or interested in risks.

We have suggested above that the primary purpose of this whole law is to get away from the individual or personal factor in making rates so as to avoid discrimination as between individuals. As we see it, there is no more justification for this sort of classification than there would be for a classification of property based upon the amount that any one individual owned and if property could be classified for fire insurance rate purposes because it belonged to man owning considerable property without respect to the physicial condition or physicial hazard of the property itself, we would soon destroy and undermine the entire purpose of this whole law.

We still think that for the purpose of making fire insurance rates, a piano in a certain house belongs to the same class as another piano in the same house, even though they may be owned by different individuals.

Trusting that this letter will sufficiently answer your inquiry and that we may have the privilege of serving you futher, we are,

Yours very truly,
R. B. Cousins, Jr.,
Assistant Attorney General.

Op. No. 2691, Bk. 62, P. 231.

INSURANCE—CORPORATIONS—TRUST COMPANIES—BONDING COMPANIES—CAPITAL STOCK REQUIRED AND DEPOSITS REQUIRED.

1. Any company organizing at this time to do the business as contemplated under the language of what was formerly Subdivision 37, Article 1121, Revised Statutes, 1911, which is now Article 4969, Revised Statutes, 1925, must organize with and maintain a capital stock of $100,000.00 whether such corporation organizes merely to do a fiduciary and depository business, or a guaranty and fidelity business as well.

A corporation which was organized under the provisions of Article 1121, Subdivision 37, prior to the codification of 1925, is not required to have a capital stock of $100,000.00 if it does not do a fidelity and guaranty business.

2. A trust company organized under the subdivision mentioned, prior to the codification of 1925, is not required to make and maintain with the State Treasurer a deposit if it does only a fiduciary and depository business, but it must make a deposit with the State Treasurer and maintain the same if it does in addition to its fiduciary and depository business a fidelity and guaranty business.

Under the provisions of Article 4982, et seq., Revised Statutes, 1925, a company organized under the provisions of Article 1121, Subdivision 37, Revised Statutes, 1911, or under the provisions of Article 4969, Revised Statutes, 1925, to do a fiduciary and depository business, or any of the lines mentioned in those articles other than fidelity and guaranty business, may make a deposit at their election with the State Treasurer, and

by doing so, relieve themselves of the necessity of making a bond in each individual case wherein they assume a fiduciary or depository relation. This, however, is not a requirement, but a matter to be determined by the company in its discretion.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 2, 1927.

Hon. R. L. Daniel, Commissioner of Insurance, Austin, Texas.

MY DEAR MR. DANIEL: I have before me your letter of recent date enclosing correspondence with Mr. C. L. Bass, of Ft. Worth, in reference to a corporation doing a trust and depository business in that city. The questions which you submit for our opinion are as follows:

"1.—Does a trust company organized under subdivision 37 Article 1121 of the 1911 Statute 'to act as trustee, assignee, executor, administrator, guardian or receiver, when designated by any person, corporation or court so to do and to do a general fiduciary and depository business' have to organize with and maintain a capital stock of not less than $100,000.00, whether such company does a fidelity and guaranty business or not? If such company does a fidelity and guaranty business must it maintain such capital?

"2.—If such a trust company organized as above stated undertakes to act as trustee, assignee, executor, administrator, guardian or receiver, when designated by any person, corporation or court so to do and to do a general fiduciary business have to make a deposit with the State Treasurer whether it does a fidelity and guaranty business or not, and must such company make such a deposit when it undertakes to do a fiduciary and guaranty business in connection with the other undertakings above named?"

The history of the subdivision of the statutes under which the charter of the concern in question was originally granted is very interesting. It first appeared in the Acts of 1891, in a re-enactment of Article 566, Subdivision 37 of the Revision of 1879. The subdivision as enacted at that time was further amended in 1893, in 1895 and in 1897, it being carried into the Revision of 1895 as Subdivision 37, Article 642. In 1903 it was again amended and the material portions as contained in that enactment read as follows:

"To act as trustee, assignee, executor, administrator, guardian or receiver, when designated by any person, corporation or court so to do, and to do a general fiduciary and depository business; to act as surety and guarantor of the fidelity of employees, trustees, **provided, that each corporation organized under this section,** shall publish in some newspaper of general circulation in the County where such company is organized, on the first day of February of each year, a statement of its condition on the previous thirty-first day of December, showing under oath its assets and liabilities, that a copy of this statement be filed with the Commissioner of Insurance, Statistics and History, . . . **provided, the guaranty and fidelity companies organized under the provisions** of this section shall have a paid up capital stock of not less than one hundred thousand dollars, and shall keep on deposit with the State Treasurer money, bonds, or other securities, in an amount not less than fifty thousand dollars."

While the law was in this condition, the corporation in question was organized to do a general fiduciary and deposiory business but not to act as surety and guarantor. It thus appears that while it was required to file an annual report with the Commissioner of Insurance it was not required to have one hundred thousand dollars capital stock and to deposit a fifty thousand dollar bond, but in this matter was subject to the general rules regulating corporations.

The Legislature, in 1911, recodified the statutes again and the article appeared in that codification as Subdivision 37, Article 1121, in the exact language above quoted, from the act of 1903. It was at that time carried also into Chapter 13, Title 71 on Insurance, so that it appeared in two places in the law.

In 1913 this law was amended again and the subdivision was re-enacted. No change was made in the purpose for which corporations could be formed. The regulatory provisos were however changed so as to read:

"provided that a corporation asking or offering to make a bond under this article shall publish in some newspaper a statement; * * * * provided that said corporation organized under the provisions of this article shall have a paid up capital stock of not less than one hundred thousand dollars and shall keep on deposit with the Treasurer not less than fifty thousand dollars, etc."

It thus appears that while formerly a fiduciary and depository company was required to make its report and not required to file a bond and have a one hundred thousand dollar capital stock, it was changed by this amendment so as to require the filing of reports only by companies offering to make bond and to require all "said corporations organized under the article" to have one hundred thousand dollars capital stock and to make the required deposit.

The 1913 law was carried unchanged into the 1925 codification and became Article 4969. It is now a part of Chapter 16 of the Title on Insurance. It was however omitted entirely from the general corporation statute. It therefore appears that any corporation organized at this time under the provisions of the article which was formerly Subdivision 37 of Article 1121, may be incorporated only under the general provisions of the Insurance Title authorizing the creation of corporations. The general provisions of this Title for the creation of new corporations require them to have a capital stock of $100,000., but there is no general requirement for any deposit with the State Treasurer. This is required only in certain individual cases. The article does however specifically require a $100,000. capital stock, and a $50,000. deposit of any company organized thereunder, organizing for the purpose of doing a fidelity and guaranty business.

It will be seen that from the language of the article referred

to, and from a history of its development, that a careful distinction has been preserved by the Legislature between fidelity and guaranty companies, and fiduciary and depository companies, and in addition to the preservation of this distinction in this article it is to be found at other places in the law. Article 4982, Revised Statutes, 1925, divides corporations into two classes for the purposes of regulation, one class being authorized to do typically fiduciary business, and the other, a guaranty and surety business. In this article fiduciary and depository companies are given an option in the matter of submitting themselves to regulation, while bond companies are subjected to regulation without option.

The distinction is preserved also in Article 5038, which provides that insurance companies may assume certain corporate powers, and makes no requirement as to capital stock, except that $200,000 paid up is required of fidelity and surety companies.

The situation which you submit involves the question of whether a change in the initial requirements for the incorporation of a certain character of companies involves a similar change or requirement for the operation of companies already organized. We take it that there is no question that the Legislature could, if it thought proper, require any corporation organized under the provisions of Subdivision 37, Article 1121, to increase its capital stock to any amount that it should name, and to meet any other demands looking to the protection of the public which it required of new companies thereafter organized. All corporations which have been chartered under general acts since 1874 are subject to legislative control inasmuch as the law has specifically reserved the right in the Legislature to alter or amend any charter granted. That provision, together with all other regulatory laws, is a part of the corporate charter, and the Legislature may, at its election, subject such corporations to new regulations and restrictions after their organization.

The question, however, that gives us concern is whether the Legislature intended to make applicable to corporations previuosly organized under the provisions of the said Subdivision 37, Article 1121, the same requirements which it makes of new corporations which are organized under that same article as it now appears in the Revised Statutes. It is our opinion that the Legislature did not so intend. We therefore answer your question as follows:

1. Any company organizing at this time to do the business as contemplated under the language of what was formerly Subdivision 37, Article 1121, Revised Statutes, 1911, which is now Article 4969, Revised Statutes, 1925, must organize with and maintain a capital stock of $100,000. whether such corporation organizes merely to do a fiduciary and depository business, or a guaranty and fidelity business as well.

A corporation which was organized under the provisions of Article

1121, Subdivision 37, prior to the codification of 1925, is not required to have a capital stock of $100,000. if it does not do a fidelity and guaranty business.

2. A trust company organized under the subdivision mentioned, prior to the codification of 1925, is not required to make and maintain with the State Treasurer a deposit if it does only a fiduciary and depository business but it must make even under the provisions of Article 1121 a deposit with the State Treasurer and maintain the same if it does in addition to its fiduciary and depository business a fidelity and guaranty business.

Under the provisions of Article 4982, et seq., Revised Statutes, 1925, a company organized under the provisions of Article 1121, Subdivision 37. Revised Statutes, 1911, or under the provisions of Article 4969, Revised Statutes, 1925, to do a fiduciary and depository business, or any of the lines mentioned in those articles other than fidelity and guaranty business, may make a deposit at their election with the State Treasurer, and by doing so, relieve themselves of the necessity of making a bond in each individual case wherein they assume a fiduciary or depository relation. This, however, is not a requirement, but a matter to be determined by the company in its discretion.

Very truly yours,

R. B. COUSINS, JR.,
Assistant Attorney General.

Op. No. 2714, Bk. 62, P. 366.

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

1. The State Insurance Commission is without authority to make, establish and promulgate a rule that fixes the per cent of the earned premium for the year as an adequate reserve to meet anticipated losses, carry all claims to maturity and policies to termination, and require its observance by all insurance carries writing Workmen's Compensation Insurance before application to declare dividends to subscribers will be approved by theCommission.

2. A reserve adequate to meet anticipated losses, carry all claims to maturity and policies to termination is all that the law requires of insurance carriers writing workmen's compensation insurance, and this can only be measured by the consideration of the experience in losses in the nature of accidents sustained by each individual subscriber of the insurance carrier, and cannot be determined by the State Insurance Commission in advance of the subscriber's experience.

3. The State Insurance Commission is unauthorized to require insurance carriers writing workmen's compensation insurance to maintain a certain percent of the earned premium for the year as a reserve to insure solvency, as such a rule is a surplus requirement for which there is no legal basis.

4. It is not within the power of the State Insurance Commission to determine the length of time insurance carriers writing workmen's compensation insurance must maintain reserves to meet anticipated losses, carry all claims to maturity and policies to termination. When these contingencies have been met and discharged, the purpose of the reserve has been accomplished.

ATTORNEY GENERAL'S DEPARTMENT,
AUSTIN, TEXAS, December, 19, 1927.

Mr. R. B. Cousins, Jr., Chairman of Board of Insurance Commissioners, State Office Building, Austin, Texas.

DEAR MR. COUSINS: In your letter of the 1st ultimo, you request an opinion of this Department as to whether or not the State Insurance Commission is within its legal rights in requiring all insurance carriers writing workmen's compensation insurance to observe the following rules before the Commission will approve applications for the paying of dividends to subscribers:

1. No applications for the payment of dividends to subscribers will be approved by the State Insurance Commission, unless a minimum of sixty-five (65%) per cent of the earned premium for the year is held in reserve by the insurance carrier to take care of anticipated losses, carry all claims to maturity and policies to termination.

2. If the amount necessary to take care of anticipated losses, carry all claims to maturity and policies to termination is more than sixty-five (65%) per cent of the earned premium for the year, then the reserve is to be calculated on the per case basis.

3. Twenty (20%) per cent of the earned premium for the year must be set up as a reserve to insure solvency.

4. These reserves must be maintained so long as the individual losses making up the reserve are unpaid, and at least for a period of three years.

Please be advised that it is the opinion of this Department that under the provisions of the law governing the setting up of reserves by insurance carriers writing workmen's compensation insurance, the State Insurance Commission is without authority to formulate and put into effect the above rules. Our conclusion is based upon the following reasons:

The authority insurance carriers have to write workman's compensation insurance is derived from, and the terms and condition of such policies are governed by the provisions of the Workmen's Compensation Act—Section 2, Article 8309, Revised Civil Statutes.

The only provisions of the Workmen's Compensation Act that has reference to the maintaining of reserves by insurance carriers is section 23 of Article 8308, Revised Civil Statutes, reading as follows:

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

The State Insurance Commission is authorized and required by law to make, establish and promulgate classification of hazards and rates of premium under the Workmen's Compensation Act, and to perscribe a standard workmen's compensation policy form, and to require all companies and associations writing workmen's compensation insurance to use the classification, rates and policy form established, promulgated and prescribed by the Commission. The dividends that are paid to subscribers by insurance carriers writing workmen's compensation insurance must also be approved by the Commission—— Articles 4905 to 4918, inclusive, Revised Civil Statutes.

The only reference in the above articles to reserves required to be held by insurance carriers writing workmen's compensation insurance before dividends can be declared to subscribers is in Article 4914, reading as follows:

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

Insurance carriers writing workmen's compensation insurance must set up and maintain reserves adequate to meet anticipated losses, carry all claims to maturity and policies to termination—Section, 23, Article 8308 supra.

In order to protect injured employes of the subscribers, as well as the subscribers themselves, insurance carriers cannot declare dividends to its subscribers until approved by the Insurance Commission; and adequate reserves must be provided to meet the above three contingences before the Insurance Commission is authorized to approve the payment of dividends —Article 4914 supra.

The above provisions of the statutes requiring insurance carriers writing workmen's compensation insurance to provide a reserve to meet the anticipated losses, carry all claims to maturity and policies to termination do not fix the amount of reserve to be held, nor provide a basis or a rule as a guide in arriving at the amount, but simply says the reserve shall be adequate for the above purpose.

It is not difficult to understand why the Legislature did not attempt to fix the amount of the reserve the insurance carrier should set up and maintain when it is considered that a reserve is required to be set up and maintained only in the event of losses sustained by the subscriber in the nature of accidents and since the incurring of losses through accidents is a condition precedent to the necessity of setting up and maintain-

ing a reserve, it neccessarily follows that this event must come to pass before it can be determined what amount of reserve of the earned premium for the year would be adequate to take care of these losses and the claims that grow out of them. Sixty-five (*65%*) per cent of the earned premium for the year, as required by the Commission's rule, may be adequate, or it may be more than adequate, or it may be inadequate. The experience of the subscriber in the nature of accidents must alone determine the percent of the earned premium for the year necessary and adequate to care for losses through accidents, and there is no authority in the law permitting the State Insurance Commission to fix in advance a definite amount of reserve to be held by carriers, regardless of the experience of subscriber of the carrier during the year in losses incured through accidents, whether few or many.

Under the Workmen's Compensation Act, passed in 1917, the State Insurance Commission was only authorized to *approve* the acts of the insurance carriers writing workmen's compensation insurance. The fixing of rates of premium, classification of hazards, creation of adequate reserves and declaration of dividends to be paid to subscribers were prerogatives belonging exclusively to and only authorized to be exercised by the insurance carriers—Section 16-c and 17, Part 3, Chapter 103, General Laws 35th Legislature, 1917. Subsequently, the Legislature took the two prerogatives of classification of hazards and fixing of rates of premium away from the insurance carriers and lodged them in the State Insurance Commission—Chapter 182, General Laws 38th Legislature, 1923. But in so doing the Legislature was very careful to prescribe in detail the method to pursue and the manner of regulating the amount of rates to be put into effect in order that they might be just, reasonable and adequate and not confiscatory as to any class of insurance carriers writing workmen's compensation insurance —Section 6, Chapter 182, General Laws 38th Legislature, 1923, Article 4911, Revised Civil Statutes. This precautionary measure on the part of the Legislature in laying out the plan to be followed in arriving at the amount to be fixed as an adequate rate, and the absence of a provision prescribing the method to be pursued in arriving at a fixed amount as the adequate reserve is very persuasive that it was not the intention of the Legislature to give the State Insurance Commission authority to make, establish and promulgate a rule fixing the amount of reserve to be held by the carrier.

The losses sustained by subscribers through accidents governs the amount of dividends available for payment to the subscribers at the end of the policy year. Dividends cannot be paid to subscribers without first providing a reserve adequate to meet anticipated losses, carry all claims to maturity and policies to termination—Article 4914 and Section 23, Article 8308, Revised Civil Statutes. Consequently, the basis

upon which dividends are determined is the same basis that must be used to measure the amount of reserve required in order to be adequate. The Workmen's Compensation Act contemplated that the experience of a subscriber in losses in the nature of accidents sustained should be considered, and provided for the arrangement of subscribers into groups by the insurance carriers for that purpose.—Section 13, Article 8308, Revised Civil Statutes. The rule made, established and promulgated by the State Insurance Commission standardizes the reserve to be held by carriers to a fixed amount, applicable to and required to be observed by all insurance carriers alike, and removes this element of individual Carrier's experience in calculating adequate reserve, and makes the experience of one Carrier the experience of all Carriers up to the amount of sixty-five (65%) per cent of the earned premium for the year. To sustain such a plan would render the provisions of the above statute nugatory.

Aside from the inconsistency of such a rule by the State Insurance Commission with the terms of the statutes governing insurance carriers writing workmen's compensation insurance, its effect would have a tendency to discourage the insurance carriers' subscribers in the promotion of the habit of precaution or "safety first" among their employes, as such a rule disregards the experience of a subscriber in losses through accidents in calculating adequate reserve, unless losses exceed sixty-five (65%) per cent of the earned premium for the year. It is true that this consideration is somewhat beside the question raised, but it does indicate that the rule of the Commission affects human welfare, and to that extent places the practicability of such a rule in an unfavorable light and adds strength to the idea that the State Insurance Commission is without authority to make, establish and promulgate such an order.

The only intimation in the statutes that the State Insurance Commission is authorized to fix the per cent of the earned premium for the year as an adequate reserve to meet anticipated losses, carry all claims to maturity and policies to termination and to require its observance by all insurance carriers writing workmen's compensation insurance before applications to declare dividinds to subscribers will be approved by the Commission is found under Article 4914, wherein it is said:

> "No such dividends shall be approved until adequate reserve has been provided, said reserves to be computed on the same basis for all classes of companies or associations operating under this chapter as prescribed under the insurance laws of the State of Texas."

Our construction of this expression is that it has reference to the method of computing reserves to be held by the insurance carriers, and not the fixing of the amount.

There is no authority in the statutes governing insurance carriers writing workmen's compensation insurance that per-

mits the State Insurance Commission to require insurance carriers to hold a certain per cent of the earned premium for the year as a reserve to insure solvency of the carrier. Only one reserve is required, and its purpose as given is to meet anticipated losses, carry all claims to maturity and policies to termitniaon.—Section 23, Article 8308, Revised Civil Statutes. The solvency of the insurance carrier has to be provided for by the State Insurance Commission in the fixing of rates of premium, and such rates are required to be sufficiently adequate as to be consistent with the maintenance of solvency of the carrier, and the method to be pursued by the Commission in arriving at adequate rates is fully detailed in the statutes.—Article 4911, Revised Civil Statutes.

It is not within the power of the State Insurance Commission to determine the length of time insurance carriers writing workmen's compensation insurance must maintain reserves to meet anticipated losses, carry all claims to maturity and policies to termination. When these contingencies have been met and discharged, the purpose of the reserve has been accomplished. The nature of the injuries that constitute the losses sustained by the individual subscriber is the determining factor in the consideration of the length of time that will be required to be covered in providing adequate reserves to care for such losses.

Very truly yours,

BRANN FULLER,
Assistant Attorney General.

Op. No. 2720, Bk. 62, P. 398.

FRATERNAL BENEFICIARY ASSOCIATIONS MISUSER OR NON-USER OF CORPORATE FRANCHISES—LAW GOVERNING.

1. The principle of law that a corporation is not to be deemed dissolved by reason of any misuser or non-user of its franchises until the default has been judicially ascertained and declared has been adopted as the law in this State. So where a corporation is guilty of acts of misurer or non-user of its franchises it does not ipso facto pass out of existence but possesses its franchise until resumed by the state in a judicial proceeding brought for that purpose.

2. Fraternal beneficiary associations incorporated under authority of the Fraternal Beneficiary Associations Act of 1899 were required to secure a license or a certificate of authority to do business in this State from the Commissioner of Insurance.

3. Fraternal beneficiary associations organized under authority of the Fraternal Beneficiary Associations Act of 1899, and all fraternal beneficiary associations incorporated and brought into existence by virtue of subsequent acts of the Legislature continue to enjoy all the rights, powers and franchises conferred upon them by the act under which they were created in so far as such rights, powers, and franchises are not inconsistent with Chapter 8, Title 78 Revised Civil Statutes.

4. Fraternal beneficiary associations organized under the authority of the Fraternal Beneficiary Associations Act of 1899 were not granted

such franchises by said act, and a charter obtained by a fraternal beneficiary association under said act, and a charter obtained by a fraternal beneficiary association under said act did not constitute a contract between the incorporators and the state to such an extent that the State cannot, by subsequent legislation resume the franchise granted or change the rule of law governing fraternal beneficiary associations within this State.

Construing Chap. 115, Act, Regular Session Twenty-Sixth Legislature, 1899, and Chap. 8, Title 78, R. C. S.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 20, 1928.

Hon. R. B. Cousins, Jr., Chairman Board of Insurance Commissioners, State Office Building, Austin, Texas.

DEAR MR. COUSINS: Your letter of the 17th inst, addressed to this Department advises that the National Fraternal Association, Dallas, Texas, filed its charter in the office of the Secretary of State of Texas under date of June 27, 1902, and came into existence as a corporation pursuant to and under the provisions of S. H. B. No. 497, Chapter 115, Acts of the Regular Session, Twenty-Sixth Legislature, 1899, which was the law authorizing the creation of and governing the fraternal beneficiary associations at that time, being authorized to exist for a period of fifty years from the date of its incorporation. The purpose clause of the charter of the association authorizes the incorporators to engage in a form of life insurance business, generally known as the Assessment Plan, and there is evidence that the association did actually engage in its authorized activities for an indefinite period of time, but that for a number of years between the day of its incorporation and the latter part of 1927, and particularly some seven or eight years previous to 1927, its activities ceased to such an extent as to probably reach the state of dormancy as the records of the association have been lost for that many years, and it has been without officers for at least that length of time. In the latter part of 1927, a number of gentlemen, residents of Dallas, Texas, purporting to act as a board of directors of the association, met and elected a secretary and commenced operating under the charter of the association and in accordance with the assessment plan of insurance as authorized by the charter.

Since the passage of the above referred to law the Legislature has passed laws changing the rules that govern fraternal beneficiary associations, so that our present law governing these associations is materially inconsistent with the act as passed in 1899, and in view of this fact, together with the insistence of the National Fraternal Association that it should operate under and be governed by the provisions of its charter as authorized by the Act of 1899, which created it, you desire an opinion of this Department on the following questions:

(1) Has the charter been lost or forfeited by virtue of its non-user or through its failure to comply or measure up to the provisions of the specific act under which it was originally created?

(2) If the association is entitled to continue to operate at this time is it necessary that it obtain a license or certificate of authority from this Department?

(3) Do the provisions of the present statute of this state on the subject of fraternal beneficiary associations, which is now to be found in Chapter 8, Title 78, Revised Statutes of 1925, apply to this association, with particular reference to the rates of contribution to be charged, the amount of benefits to be paid, and such other requirements of the present law as are inconsistent with the plan of operation originally contemplated by the charter of this association?

(4) Is the charter filed under the statute above referred to a contract between the incorporators and the state to such an extent that the state cannot by subsequent legislation, change the right of the incorporators with reference to the type or character of insurance business in which the association was originally authorized to engage?

The brief furnished by Honorable Lindsey M. Brown, attorney for the National Fraternal Association, to assist us in reaching our conclusion on the above questions, has been duly received, carefully considered, and appreciated by the Department.

Our answer to these questions can probably be made simple and stated more clearly by discussing them in the order in which they are given, and this is the plan we will follow.

In answer to Question No. 1, you are respectfully advised that it is the opinion of this Department that the charter of this association has not been lost or forfeited by virtue of non-user. The rule that a corporation is not to be deemed dissolved by reason of any misuser or non-user of its franchises until the default has been judicially ascertained and declared has been adopted by the Supreme Court as the law of this State. Mosby vs. Barrow, 52 T. 396; City of Houston vs. Houston B. & M. P. Ry. Co., 84 T. 581, 19 S. W. 786, following the well established principle of law as stated by Chancellor Kent in Vol. 2, page 312 of his Commentaries on the American Law. The courts of this State even go further than the principle just announced as where the statutes expressly provide that the failure of a corporation to pay a franchise tax required of it, shall because of such failure, forfeit its charter, did not operate to cause the corporation to ipso facto pass out of existence upon such failure, but the statutes merely establish a ground for forfeiting the charter which could only be taken advantage of by the State and used as a basis for a judicial forfeiture. Bunn vs. City of Laredo, 213 S. W. 320; Canadian County Club vs. Johnson, 176, S. W. 835; Favorite Oil Oompany vs. Jeff Chaison Townsite Company, 162 S. W. 423; Millsap vs. Johnson 196, S. W. 202. But the right of a State to forfeit the charter of a corporation under the doctrine of non-user of its franchise is so well established in all of the jurisdictions of this country that citation of such authority is unnecessary. As

to what acts, the nature thereof and the extent to which they must be indulged in order to constitute and place a corporation in the status of a non-user of its franchises sufficient to operate as a forfeiture of its charter, is a question to be determined by a judicial proceeding, as it has never been determined as a matter of law the degree of conduct necessary to declare the forfeiture of a corporation's charter because of non-user of its franchises. The failure to elect directors or officers or to hold any meeting of directors or officers, or perform any corporate act for nearly eight years, and the attempted sale and surrender of its property to another association has been held to be a sufficient violation of the duties of a corporation as to entitle the State to a forfeiture of its charter. City Water Company vs. State, 33 S. W. 259). So where facts are presented which conclusively show that the high public trust involved in a franchise granted to an association has been grossly abused to the public's detriment, or that the corporation has placed itself, or is placed in such an irretrievable embarrassment as to be unable to progress with the enterprise as contemplated by the charter, the State has the right to resume the franchise granted (State vs. Ry. Co. 24 T. 80.) Whether or not the past conduct of the association under discussion is such that its franchises could be resumed by the State could only be determined in a judicial proceeding brought for that purpose.

It is the opinion of this department that Question No. 2 should be answered in the affirmative. It was clearly within the contemplation of the Legislature when it passed the Fraternity Beneficiary Associations Act in 1899, and under which the association now being considered was incorporated and brought into existence that these associations should receive a license or certificate of authority from the Commissioner of Insurance as a prerequisite to the right to pursue the purposes for which they were organized. The only expression in the act that could reasonably be construed to be inconsistent with this idea is the closing sentence of Section 1 of the act, which reads:

"Such association shall be governed by this act, and shall be exempt from the provisions of the Insurance laws of this State, and no law hereafter passed shall apply to this unless they be expressly designated therein."

Our construction of this sentence is that it has reference to the laws that govern insurance companies generally, as to capital stock, reserves, filing of reports, owning and disposing of real estate, taxes, etc., and not the law that created the office of Insurance Commissioner and clothed that officer with authority to supervise insurance companies and require of them the securing of a license or certificate of authority to do business in this State. The logic of this reasoning is apparent when the act is considered as a whole in arriving at the intent of the Legislature, which is the true rule of construction

(Moore vs. Commissioner's Court, Bell County, 175 S. W. 849; Hodges vs. Swastika Oil Company, 185 S. W. 369.) It is provided in the act that both domestic and foreign associations operating under the law must file an annual report with the Insurance Commissioner showing the manner in which it is conducting its business. (Secs. 2 and 5.) A foreign association must file certified copy of its charter and a copy of its constitution and by-laws with the Insurance Commissioner, and must appoint that officer as a person upon whom process may be served in any suit in which the association may be a party, and must pay a fee of five dollars for filing its charter, and it is expressly provided that such foreign association must secure a certificate of authority to do business in this State from the Insurance Commissioner, and pay therefor a fee of one dollar. (Secs. 3 and 7.) The Insurance Commissioner is required to examine into the affairs of the association, whether domestic or foreign, and must report to the Attorney General the delinquencies of the association as to failure to file annual report; exceeding its franchise powers, conducting its business fraudulently, etc., and the Commissioner is required to furnish the association all necessary blanks for making the report. The Attorney General can take action against such association only at the request of the Insurance Commissioner, and when the association is enjoined from doing business it cannot resume business until reinstated by the Insurance Commissioner. (Secs. 5 and 6.) It is also provided under Section 8 of said Act that any person who solicits for or organizes lodges of such association without first obtaining from the Commissioner of Insurance a certificate of authority showing that the association has complied with the provisions of the law, and is entitled to do business in this State, shall be deemed guilty of a misdemeanor, and a penalty is provided for the violation of this section. The detailed enumeration by the Legislature in the act of the above duties imposed upon the Insurance Commissioner and the association, and the consequences that follow an omission of the duties imposed upon the association, and the power given the Commissioner to act in such an event, and the conclusiveness placed upon the Commissioner's action, considered in the light of the fact that this relationship between the association and the commissioner as to supervision is for all practical purposes identical with the relationship between the Insurance Commissioner and an ordinary insurance company, which is required to secure a certificate of authority from the Commissioner, persuades us to believe that these associations were required under the Act of 1899 to secure a license or certificate of authority from the Insurance Commissioner to do business in this State.

Asking your question No. 3, you are respectfully advised that it is the opinion of this Department that fraternal beneficiary associations incorporated under the authority of the Fraternal

Beneficiary Associations Act of 1899, and associations that have been incorporated under subsequent acts of the Legislature, are now operating under and governed by the terms and provisions of Chapter 8, Title 78, Revised Civil Statutes, and any right, power, or privilege that was conferred upon the association by the act under which it was created that is inconsistent with the provisions of Chapter 8, Title 78, Revised Civil Statutes, have been lost to the association. All fraternal beneficiary associations in existence on July 1st, 1913, became amenable to Senate Bill No. 246, Chapter 113, Acts, Regular Session Thirty-third Legislature, 1913, which was a general law defining, regulating and controlling all fraternal beneficiary associations in the State, and superseded all previous acts of the Legislatures on the subject. Section 33 of said Acts reads as follows:

"Chapter 36, Acts of the First Called Session of the Thirty-first Legislature and Chapter 22, Acts of the Second Called Session of the Thirty-first Legislature, and Chapter 92 Acts of the Regular Session of the Thirty-second Legislature, and all other laws in conflict with this Act are hereby repealed."

But under Section 13 of said Act all associations then in existence retained all of the rights, powers, and priviliges they possessed or exercised under the act of their creation not *inconsistent* with the above act. The provisions of the above act, together with three amendments to the same by the Legislature in 1917 and 1923 have been incorporated in the Revised Civil Statutes of 1925 under Chapter 8, Title 78 thereof, and is the present law governing fraternal beneficiary associations in this State. The right to retain all privileges enjoyed by the association not inconsistent with the Act of 1913, as declared under Section 13 thereof, was preserved by the Legislature in its adoption of the Revised Civil Statutes as codified in 1925 under Article 4834 thereof.

Section 1 of the Fraternal Beneficiary Associations Act of 1899, and under which the National Fraternal Association was organized provides that now law subsequently passed shall apply to such associations unless they be expressly designated therein. This clearly indicates that the Legislature contemplated that there would be subsequent legislation on the subject, and that the associations would be subject to the power of the Legislature to alter, reform, or amend their charters or amendments to charters, as such a reservation is consistent with the general policy of the Legislature of this State to retain power over corporations operating in Texas. This answers your Question No. 4.

Very truly yours,

BRANN FULLER,
Assistant Attorney General.

Op. No. 2723, Bk. 62, P. 413.

MUTUAL HAIL ASSOCIATIONS—FUNDS—POWER TO PURCHASE HOME OFFICE BUILDING.

1. Mutual Hail Insurance Associations incorporated and operating under Chapter 13, Title 78, Revised Civil Statutes, have power to purchase a home office building.

2. Mutual Hail Insurance Associations incorporated and operating under Chapter 13, Title 78, Revised Civil Statutes, are without power to purchase a home office building that is sufficiently large to be more than adequate for that purpose.

Construing: Chapter 13, Title 78, Revised Civil Statutes.

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

Mr. R. B. Cousins, Jr., Chairman State Insurance Commission, State Office Building, Austin, Texas.

DEAR MR. COUSINS: Your letter of the 20th ultimo advises that the Groom Mutual Hail Association, Groom, Texas, was incorporated and is operating under the provisions of Chapter 13, Title 78 of the Revised Civil Statutes. The Association desires to invest a part of its assets in a brick building to be used as a home office and has asked whether or not it may properly do so under the law. In view of this inquiry you request an opinion of this department on the following questions:

(1) "May this association invest any portion of its funds in real estate with improvements thereon sufficient for its home office purposes, but not more?

(2) "May this association invest a portion of its funds in real estate with improvements thereon sufficient, not only for its home office purposes, but also to furnish space it may rent to the tenants to yield revenue."

The brief prepared by Messrs. Stone and Guleke of Amarillo, Texas, attorneys for the association, to assist us in arriving at a solution of these questions has been duly received, carefully considered and appreciated by the department.

You are respectfully advised that it is the opinion of this department that question Number 1 should be answered in the affirmative. The following reasons form the basis of our conclusions:

The rule that corporations are the creatures of the law and can only exercise such powers as are granted by the law of their creation is a very familiar one, but an express grant is not necessary, as in every express grant there is implied a power to do whatever is necessary or reasonably appropriate to the exercise of the authority expressly conferred. (Northside Ry. Co. vs. Worthington, 88 T. 562, 30 S. W. 1055; Roaring

Springs Town Site Co. vs. Paducah Telephone Co. 109 T. 451; Country Club vs. State, 110 T. 49; Bowman vs. Pierson, 110 T. 543.) This principle of law also operates upon corporations possessing the element of mutuality as a part of their nature and is applicable to the association under consideration. (Union Ins. Co. vs. Hoge, 21 How. 35, 16 L. ed. 61; Berry vs. Anchor Mutual Fire Ins. Co., 94, Ia. 135, 62 N. W. 681.) While there is no express power given this association to invest a portion of its funds in the purchase of a brick building to be used as its home office in the Act of the Legislature that created it (Ch. 22, Regular Session Thirty-third Legislature, 1913) nor in the article of the Revised Civil Statutes by which it is governed (Articles 4950-4959) but a careful analysis of the provisions of these laws together with the invocation of the rule of law above announced as an aid to the solution of the problem persuades us to believe that the association has the implied power to make such a purchase. Under the provision of the law that discusses the expenditure of its funds the association is absolutely free to use 40% of the gross premiums collected each year on policies issued to pay the expenses of the company, the only requirement being that the expense be necessary. (Articles 4955-4956 Revised Civil Statutes.) There is no undertaking by the Legislature to enumerate what might be classed as necessary expenses of the company, but that determination is left entirely with those administering its affairs. It is certainly necessary that the association maintain an office If a brick building is to be erected to accomplish that end, that would be a necessary expense. Whether or not it is necessary to erect a brick building in order to maintain an office is, by the terms of the statute governing the association, left to the judgment of its officers. The fact that 40% of the gross premiums collected each year is authorized to be set aside and used in the payment of expenses argues strongly in favor of the association having the power to purchase an office building, when it is considered that some insurance associations operating on the mutual plan are restricted to a margin of 10% of the gross premiums collected each year to be used in payment of expenses.

This association, as well as all insurance companies incorporated in this State, is amenable to the laws governing corporations in general in Texas in so far as such general laws are not inconsistent with the provision of the law governing insurance companies as laid down in Title 78, Revised Civil Statutes, Art. 4715. The law governing corporations in general provides that every private corporation as such has power to purchase, hold, sell, mortgage or otherwise convey such real estate and personal estate as the purpose of the corporation shall require. (Subd. 4, Article 1320, Revised Civil Statutes.) This being true, and since there are no provisions in Title 78 relative to associations of the kind being considered inconsistent with

the power enjoyed by corporations generally as above provided, it would seem that the authority this association has to purchase a home office building does not depend entirely upon implied power, but that such right may reasonably be said to rest upon express statutory authority.

Even if we were to hold that this association is without power to purchase an office building for its home it would not prevent it from owning a brick building and occupying it, since it may invest that portion of the 40% of the gross premiums collected each year not necessary or needed in the payment of expenses in first mortgage notes on land. (Article 4956 Revised Civil Statutes.) Having the power to accept land as security for the loan of its surplus money, it would have the right to foreclose on the note and take the land should default be made in re-payment of the loan. (Article 4956, Subd. 4, Article 1320, Revised Civil Statutes.) Through this process it could easily come into possession of and own a brick building and no one could object that it occupied it as its home office. The fact that it could come into possession of and occupy a brick building as its home office through the ordinary course of its business, as illustrated, serves to strengthen the idea that it has the power to purchase a building direct, as it would be illogical to reason that an advantage acquired directly by the association would be unlawful, but lawful if acquired indirectly.

It is the opinion of this department that Question Number 2 should be answered in the negative. The officers of the association are only authorized to spend the 40% of the gross premiums collected each year in payment of *necessary* expenses if the entire 40% is needed for the purpose, but if the entire 40% is not needed for that purpose then the remaining portion not so used shall be added to the policy-holder's fund at the end of the current year and may be invested in first mortgage notes on land or in bonds of this State or in county, state, town or school district bonds which have been approved by the Attorney General, if such fund is not needed in payment of losses to policy-holders. (Article 4956 Revised Civil Statutes.) This expressly prohibits the association from investing its funds in an office building sufficiently large to sub-lease a part of it for a small hotel or professional offices as suggested by the association, as such additional space would be more than adequate for its office requirement and the building of this surplus space would be *unnecessary* expense and unauthorized.

Very truly yours,

BRANN FULLER,
Assistant Attorney General.

Op. No. 2741, Bk. 62, P. 521.

INSURANCE—DISCRIMINATION.

Article 5053, Revised Statutes, Construed.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, July 27, 1928.

Hon. R. B. Cousins, Jr., Chairman State Insurance Commission, Austin, Texas.

DEAR SIR: In a recent communication you informed this Department of the two following conditions:

(1) "A mutual legal reserve life insurance company organized under the provisions of Chapter 7 is engaged in this state at this time in selling life insurance policies in $5,000.00 denominations at a premium rate which is calculated to accumulate a reserve of $200.00 which may, after the payment of the sixth premium, be withdrawn in cash by the policyholder. They are representing in the sale of the policy that the officers and directors of the present mutual organization have in mind the organization of a capital stock company which will take over the business of the mutual company so that it will be owned by the stockholders of the new concern. It is proposed to these prospective policyholders that they may, at the maturity of the reserve above referred to, withdraw the said reserve and invest it in the stock of the capital stock company then to be organized. When the policy is delivered, or at the time the application for the same is taken, the prospective policyholder signs an instrument having the general characteristics of a power of attorney, assigning to a trust company the withdrawable reserve mentioned and authorizing the trust company to subscribe for one share of the capital stock of the proposed company and to pay the sum so withdrawn to said company for the one share of stock. No mention is made in the policy form itself, nor in the application for the policy, of the proposed capital stock company. This representation is made by the agents selling the policy and there is no writing evidencing the arrangement except the power of attorney referred to."

(2) "A capital stock life insurance company organized under the provisions of Chapter 3, Title 78 is desirous of selling a policy of insurance to its prospective policyholders and, in addition, a share of stock, the plan being to the same substantial effect as the one above described; that is to say, after a certain period of time the policy will have accumulated a withdrawable reserve which may be used for the purchase of a share of the capital stock of the company. This whole arrangement, however, will be set out by this company in the policy which it intends to issue."

You desire to be advised as to whether or not either of these companies is violating the provisions of Article 5053 of the Revised Statutes of Texas wherein matters of discrimination between insurants of the same class and of equal expectation of life; the giving of any rebate of premiums payable on insurance policies, or any special favor or advantage in the dividends or other benefits accruing thereon; or the giving, selling, or purchasing of any stocks, bonds or other securities—as an inducement to insurance, are regulated by law.

In order to clearly state our interpretation of the above article in the most simple manner in its application to the cases you have presented, the same is herewith quoted in its entirety:

"No insurance company doing business in this State shall make or permit any distinction or discrimination in favor of individuals between the insured of the same class and of equal expectation of life in the amount of, or payment of, premiums or rates charged for policies of life or endowment insurance ,or in the dividends or other benefits payable thereon; nor shall any such company or agent thereof make any contract of insurance or agreement as to such contract other than as expressed in the policy issued thereon; nor shall any such company, or any officer, agent, solicitor or representative thereof, pay, allow or give, or offer to pay, allow or give, directly or indirectly, as an inducement to insurance, any rebate of premiums payable on the policy or any special favor or advantage in the dividends or other benefits to accrue thereon, or any paid employment or contract for service of any kind, or any valuable consideration or inducement whatever not specified in the policy or contract of insurance; or give, sell or purchase, or offer to give, sell or purchase, as an inducement to insurance, or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, association or partnership, or any dividends or profits to accrue thereon, or anything of value whatsoever not specified in the policy, or issue any policy containing any special or board contract or similar provision, by the terms of which said policy will share or participate in any special fund derived from a tax or a charge against any portion of the premium on any other policy. Any company or agent violating the provisions of this article shall be deemed, guilty of a misdemeanor, and, upon conviction thereof, shall be punished as provided in the Penal Code; and the said company shall, as an additional penalty, forfeit its certificate of authority to do business in this State, and the said agent shall, as an additional penalty, forfeit his license to do business in this State for one year. The company shall not be held liable under this article for any act of its agent, unless such act was authorized by its president, one of its vice presidents, its secretary or an assistant secretary, or by its board of directors."

The particular provision of this article pertinent to your inquiry as pointed out by you is that part wherein it is stated that no insurance company doing business in this State shall * * * give, sell, purchase, or offer to give, sell, or purchase, as an inducement to insurance or in connection therewith any stocks, bonds, or other securities or any insurance company, or other corporation, association, or partnership, or any dividends or profits to accrue thereon, or anything of value whatsoever not specified in the policy * * *. The position heretofore taken by your department being that the actual selling of any stock in any corporation in connection with a life insurance policy was in violation of the above quoted statute.

After a careful reading of this article, together with a consideration of its grammatical construction, as well as its relationship to and effect upon the entire act as passed by the Legislature of which it is a part, we find no difficulty in reaching a conclusion as to what, in our opinion, the Legislature meant by making the same a part of the insurance laws

of this State. It is absolutely free from inconsistency as to other provisions of the general insurance law of which it is a part, and does as to them, convey a clear, definite, and sensible meaning without any doubt of ambiguity. This being true it is unnecessary for us to resort to any rule of construction requiring the comparison of different provisions of the same act to determine the meaning of a particular one. But is there a conflict of ambiguity in the words employed in expressing the different terms provided for in the article itself, either real or apparent, so as to distort and confuse its meaning, leaving it equally open to two constructions each of which is perfectly consistent with the rules of grammar and the ordinary use of language? We do not think so.

There are three sentences in the article, but the first one only is pertinent to our problem, and for that reason the other two will not be considered or discussed. This sentence, in grammatical parlance as to form, is a compound one. There are five separate and distinct thoughts embodied therein. Though somewhat closely related, each or all of these thoughts could be separated one from the other without injury to either. Accordingly, they are independent of one another, and not being dependent one on the other they are co-ordinate or of equal rank.

The first thought in the sentence declares against discrimination. This prohibition is absolute and unqualified.

The second thought requires that any contract of insurance or agreement as to such contract be expressed in the insurance policy.

The third thought requires that any rebate of premiums payable on the insurance policy, or any special favor or advantage in the dividends or other benefits to accrue on the policy, or any paid employment or contract of service of any kind, or any valuable consideration as an inducement to insurance be specified in the policy or contract of insurance.

The fourth thought requires that any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, given, sold, or purchased as an inducement to insurance; or any dividends or profits to accrue thereon, or anything of value whatsoever, given, sold, or purchased as an inducement to insurance be specified in the policy.

The fifth and last thought in the sentence absolutely and unqualifiedly prohibits the issuance of any insurance policy containing any special or board contract or similar provision, by the terms of which said policy will share or participate in any special fund derived from a tax or a charge against any portion of the premium on any other policy.

The absolute prohibitions contained in divisions one and five of this sentence do not extend to nor have any effect upon divisions two, three, and four of the same. These three divisions are each complete within themselves, and the im-

port of each is to require the acts enumerated therein to be done in a particular manner—namely, be specified in the policy or contract of insurance.

The provisions of the article of the Revised Statutes under discussion are not of ancient origin in the insurance laws of this State, not having made their appearance until 1909, in which year the Thirty-first Legislature at its Regular Session passed an elaborate act known as Senate Bill No. 291, Chapter 108 of the acts of said session, authorizing the incorporation of life, accident, and health insurance companies. This act not only defined these companies and the duties and powers of the Insurance Commissioner in relation thereto, but thoroughly covered and minutely detailed the manner in which practically every material phase of such business was to be conducted, which included several features necessarily incident to the insurance business theretofore unregulated by law, among which was this article. This act is incorporated in the present Revised Statutes of Texas, particularly under Chapters 3 and 21 of Title 78 thereof.

Other provisions of this act—namely, Sections 22 and 23, declare, as far as the Legislature desired to do so, in our opinion, what provisions shall be included in life insurance policies of such companies, or what shall not be included therein. These provisions are in the present Revised Statutes as Articles 4732 and 4733. The purpose and office of Article 5053, quoted above, being directed against discrimination rather than prohibitions against agreements that might properly be the subject matter of contract. The following extraneous considerations, which we think are properly admissible, further convinces us of the correctness of our view in construing this article.

On two different occasions subsequent to the passage of the bill containing this article, the Legislature has had before it for consideration bills covering fire insurance companies providing for the making, promulgation, and regulation of the same; the insurance rates, premiums, and forms of insurance policies to be used by them. Each of these bills contained a clause identical with the one you have submitted to us for consideration as part of Article 5053, to the effect that "no insurance company shall * * * give, offer, or purchase, or offer to give, sell or purchase, as an inducement to insurance, or in connection therewith, any stocks, bonds or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits to accrue thereon, or anything of value whatsoever"—and the Legislature again, in both instances, qualified this prohibition by adding the words—"not specified in the policy"—see Section 21, Chapter 8, General Laws, Fourth Called Session Thirty-first Legislature; Section 22, Chapter 106, General Laws, Regular Session, Thirty-third Legislature; Article 4894, Revised Statutes of Texas. This repetition by the law-making body of this particular clause on

two different occasions unchanged is indicative that the Legislature considered the same as expressing a clear thought, and so worded as to convey a precise and single meaning.

Turning from the consideration of the grammatical composition of this article, and the position it occupies in the entire body of the insurance laws, as well as subsequent acts of the Legislature on the same subject to expressions of the courts in their construction of the same, we find that in the case of Morris vs. Fort Worth Life Insurance Company, 200 S. W. 1114, the agent of the insurance company offered to secure, as an inducement to insurance, for the insured, a loan from his company for five thousand or six thousand dollars at a much lower rate of interest than the insured could get at the bank, provided the insured would cancel certain insurance policies he held in another company and become insured in the said agent's company in the sum of ten thousand dollars. This the insured did, but the insurance company failed to make the loan as the agent promised, and the insuer sued the company for the cancellation of notes aggregating three hundred seventy-three dollars and eighty-four cents, the cancellation of the insurance policy and damage in the sum of one thousand dollars. The insurance company defended on the ground that such promise and agreement as made by the agent was void and of no effect since it violated Article 4954 of the Revised Statutes (now Article 5053) as the said promise and agreement did not appear as a part of the written contract of insurance. The court agreed with the defendant insurance company and gave judgment for it, saying that the promise made by the agent to the insured was an offer to give, as an inducement to insurance, something of value, as contemplated in the article referred to, and should have been *specified in the policy.* The court further remarked: "It is one of the evident purposes of the statute above quoted (meaning Article 5053) to prevent discrimination and *secret agreements* by which certain policyholders may be enabled to secure special favors as a consideration for their contract of insurance." This conclusion by the court of the effect of this article being in line with the construction we have placed upon the same.

The case of Gause vs. Security Life Insurance Company of America, 207 S. W. 346, is also to the same effect as to the intent and purpose of this statute.

In the case of McGee vs. Felter, 135 N. Y. S. 267 it was necessary for the court to place its construction upon an article in the New York laws identical in substance with the above article of our statutes. The remarks of the court are: "* * * the operation of the statute is directed only against considerations or inducements not specified in the policy. The object of the statute is to require life insurance companies to give equal terms to insurers of the same class, and to give no special favor to any particular person or persons. The vice is not in

the giving of a rebate, inducement, or consideration, but the giving of any rebate, inducement, or consideration not specified in the policy."

In discussing the meaning of this article as it appears in the Kentucky statute, the court in the case of Equitable Life Assurance Society of the United States of America vs. Commonwealth, 113 Ky. 126; 67 S. W. 388, said that: "The demand of the statutes are satisfied when the regular rate of premium is charged, and that rates, etc., is stated in the policy." Intimating strongly the primary purpose of the act to be to prevent discrimination and not in restraint of agreements not invading that realm, and to require all agreements in relation to policies of insurance be stated in the policy to prevent secret dealings.

Considering your first statement of facts relative to the activities of the mutual legal reserve life insurance company in the light of our construction of this article as given above, we are of the opinion, and you are so advised, that said company is violating the provisions of this statute in that it is making agreements in respect to contracts of insurance that are not expressed in the policy issued thereon, as well as giving an advantage as an inducement to insurance that is not specified in the policy or contract of insurance.

Considering your second statement of facts relative to the proposed undertaking of the capital stock life insurance company in the light of our construction of this article as given above, we are of the opinion, and you are so advised that said company is not violating any of the terms of this statute in that such proposed activities would not involve discrimination, and meets the other provisions of the act in that all agreements relative to the sale of such policies of insurance will be specified in the policy.

Very truly yours,

BRANN FULLER,
Assistant Attorney General.

OPINIONS RELATING TO PUBLIC LANDS

Op. 2698, Bk. 62, P. 275.

PUBLIC LANDS—RIVER BEDS NOT INCLUDED IN MEXICAN GRANTS.

1. A grant of land made by the Mexican Government on November 23, 1833, embracing within its boundaries the bed of a stream, whether navigable or not, did not pass to the grantee title to the bed of such stream, but on the contrary same remained the property of that sovereignty and its successor, the State of Texas.

OFFICES OF THE ATTORNEY GENERAL,
July 21, 1927.

Honorable J. T. Robison, Commissioner, General Land Office, Capitol.

DEAR SIR: In your letter of July 14, you submit the question as to whether a Mexican grant legally appropriates the bed of a river, crossed but not called for in the field notes of such grant. More specifically your question is whether the grant of November 23, 1833, made by the Government of Mexico to Pedro Varela, covering eleven leagues of land in Limestone County, Texas, which grant crossed the Navasota River, and in doing so makes no reference to that fact, included as a part of the land granted the bed of said river.

We believe that your question is answered, if not by the direct holding, at least by the reasonable effect of such holding, by the Supreme Court in the case of the State of Texas vs. Grubstake Investment Association, just recently decided. In that case the question was whether a grant to land bordering on a river made by the Mexican Government in 1835, carried title to the medial line of the stream. The Supreme Court held that the civil law in force in Mexico at the date of such grant was correctly shown in the Partidas and that it made no distinction as between navigable and non-navigable streams. It further held that under the terms of the Partidas the owner of riparian land granted by Coahuila and Texas in 1835 became invested with no title to any portion of the river bed. In the course of the opinion it is said:

"The determination of the case of Phillips v. Ayres, 45 Texas 609, 611, depended upon the location of a boundary line of a grant made in 1833 by the State of Coahulia and Texas. In locating the line, the Court rejected a certain call for course because such course could not be followed without crossing and re-crossing the Leon River. Speaking of running the line in a course which would require the river to be crossed,

the court said: "As it was then and still is contrary to law for the surveyor to so run it, the court should not presume that it was in fact thus run, or take it as the proper basis upon which to construct the survey." In a previous part of the opinion the Court had said that if a line were run from a certain point "in the course called for in the grant, it will cross and re-cross the Leon River * * * But to so run it would conflict with the call for a survey on the left margin of the river and would violate the law forbidding the crossing of streams of this character.

"It would seem from the holdings in Phillips vs. Ayres that our Texas statutes defining navigable streams and limiting the frontage of surveys thereon and forbidding the inclusion of lands on both sides of the streams, were but adaptations of the former Mexican Laws.

"Treating the statutes of Texas as mere adaptations of the previous laws of Mexico, then we should give to the laws of Mexico the same efficacy in reserving title to the river beds in the sovereign as we give to the Texas statutes."

Examination of the Partidas, which is set out in full in the Court of Civil Appeals decision in this case, 272 S. W., 528, discloses no distinction in ownership of a river bed area as based on the facts that it is interior to a grant.

We do not consider the recent decision of the Supreme Court in the case of Anderson vs. Polk, the opinion in said case being written by Judge Greenwood, who wrote the opinion in the Grubstake Case, indicative of a different intent as applicable to river bed areas interior to Mexican grants. This suit was an attempt to compel the county surveyor of Bexar County to make a survey of an area from which the San Antonio River was artificially diverted. The petition was held by all three courts to be subject to general demurrer, the plaintif having "wholly failed to plead facts sufficient to negative that title had passed out of the Spanish Government to the land granted to the City of San Antonio and confirmed by the Texas Republic and State". The sovereign, it was said, could grant land under navigable or tide waters, and without discussion of the terms of the grant from Spain to the city indeed has been lost, attention was called to the broad terms of the Confirmation Act of the Congress of the Republic, to its broad application by the Supreme Court in Dittmar vs. Dignowitty, 78 Texas, 27, and to the terms of the charter of the City of San Antonio, expressly authorizing it to alter and establish the channels of any streams, waters or water courses within the limits of the city; and it was futher said.

"Nor are we concerned here with the character of right or title held by San Antonio under the ancient grant to part of the river bed. It suffices to uphold the action of the courts below in declaring the petition had on general demurrer to say that the specific facts plead by plaintiff were wholly inadequate to overturn the action of the Commissioner of the General Land Office."

We think that while the court in the Grubstake Case laid down general principles having a broad application, in the

Anderson Case it merely declared the law under special and peculiar state of facts.

In view of the fact that the Supreme Court in the Grubstake Case, declares the act of 1837, now Article 5302, forbidding the inslusion of land on both sides of a stream, an adaptation of the previous Mexican Law, there in authority for applying this statute to the case before us. Largely on the basis of this statute, it has been held twice before in opinion of this department that grants of land, made by the State of Texas since its enactment, embracing within their boundaries the bed of a stream maintaining an average width of thirty feet or more, did not pass to the grantees title to the bed of such stream but on the contrary, title to same remained in the State and subject to its disposition. Opinions 1922-24, page 423, 1914-16 page 811.

We accordingly answer your question in the negative and advise you that river bed area interior to a Mexican grant in the absence of special circumstances, is reserved to the sovereign.

Besides the matter herein discussed, you ask our advice on whether a mineral permit should be issued on such river bed area, and call attention to the cases of Fitzgerald vs. Robison 220 S. W. 768, and Mackey vs. Robison, 291 S. W. 1102; to which we might add the Supreme Court's own decision in O'Keefe vs. Robison 292 S. W. 854. These are all mandamus cases, and in them it is held that the Land Commissioner cannot be compelled to grant a permit inconsistent with a former patent by the State to any of its lands. Whether under such circumstances you would have the power to grant a permit has never been squarely determined, and though it is a matter of considerable concern to you, it probably never could be determined if we advise you not to issue a permit. In pursuance of our conversation with you, we therefore, leave this question open and trust that a test case may bring about its correct solution.

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

Op. No. 2727, Bk. 62, P. 432.

PUBLIC LANDS—FORFEITURE AND REINSTATEMENT.

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1. No notice is required as a prerequisite to forfeiture of land owned by non-residents of the state.

2. An informal letter signifying wish of the owner to reinstate his contract is a sufficient request for reinstatement.

3. Until the 1925 amendment of the Sales Law, a sale based upon advertisement made by the Land Office prior to the entry of forfeiture

was void.

4. Such sales were validated retroactively by Sec. 4 of Chap. 130 of the Acts of the Regular Session of the Thirty-Ninth Legislature, and said Act is constitutional as affecting a right to reinstate, especially in view of the fact that the forfeited owner is given six months after taking effect of the Act in which to reinstate.

5. If however, this special act could not apply, then any right of reinstatement is cut off after one year from the date of the intervening sale with respect to land sold without condition of settlement. (Chap. 57, Acts of 1921).

6. A failure by the Land Commissioner within a reasonable time to act upon a request for reinstatement is, in legal effect, a denial of same.

7. No constructive fraud can be predicated upon the non action of the Land Commissioner, particularly as affecting the rights of a subsequent purchaser.

8. Under the facts considered the Land Commissioner has no power to reinstate the original purchase and cancel the second purchase of the tract in question.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 25, 1928.

Hon. J. T. Robison, Land Commissioner, State Office Building
Austin, Texas.

DEAR SIRS By your letter of March 8, 1927, to the Attorney General, you make inquiry whether under a concrete statement of facts set forth you could reinstate the original purchase of J. C. Lovett of Section 36, Block 26, Winkler County, and cancel the second purchase of said tract as made by J. A. Simmons. We answer your question in the negative.

Our long delay in repyling is due to the request of Messrs. Brasted and Griffin, representing Mr. Lovett, for time in preparation of a brief to meet the point of inquiry, and in addition to this we have given the attorney for Mr. Simmons time to answer Mr. Brasted's brief. And in this connection, we desire to say that the thorough and capable manner in which Mr. Brasted's brief was prepared has been the occasion of our going into the matter somewhat more deeply than ordinarily before reaching the conclusion stated.

The facts are in brief as follows: Lovett, having theretofore purchased the section in question from the State without condition of settlement but on deferred payment, was in default on interest upon the purchase money from November 1, 1920, through November 1, 1923. On May 5, 1924, the Land Office mailed him, notice, addressed to his home in Clifton, Arizona, informing him of delinquent interest in the sum of $74.88, which would have to be paid in order to prevent a forfeiture by August, 1924. On August 20, 1924, forfeiture was duly entered by the Land Commissioner by endorsement upon the obligation and entry upon the purchaser's account, there being then considerably more than $74.88 due. Prior to this act of forfeiture the land had been advertised as subject to forfeiture and if not paid would be forfeited and be on the market

for sale September 1, 1924; and on September 2, 1924, J. A. Simmons filed the highest bid and the land thereupon awarded to him without condition of settlement. On Sepetmber 11, 1924, the Land Office received a letter from Lovett enclosing exchange for $74.88 as interest on his purchase, advising that if it was possible to redeem the land, he would be glad to have it done and if the amount enclosed would not redeem it to write him what could be done to that end. No action was taken upon this letter and same remained without answer, except that Lovett was formally notified of the refund of $74.88, which notice also stated when the land had been forfeited and when it had been resold. In response to a futher inquiry from Lovett, he was informed by the Land Office on October 3, 1924, that the land had been sold to J. A. Simmons of Decatur, Texas, that no notice of forfeiture was required and that no interest had been paid by him since November 1, 1919.

Subsequent to this no negotiations were had with the Land Office by Lovett until January 1, 1927, when his attorney wrote the Commissioner and later made formal demand for reinstatement as based upon the claim that the sale to Simmons was illegal. Since his purchase, Simmons has been in possession of the land and no action of trespass to try title has ever been brought against him by Lovett nor has the latter sought a mandamus against the Commissioner.

In our opinion the forfeiture of Lovett's purchase was in all respects regular and effectual. The notice to Lovett of May 5, 1924, was sufficient to call to his attention the prospective forfeiture, but even if it were not, no notice to a defaulting purchaser is required by the law as a predicate for forfeiture. Mound Oil Company vs. Terrell, 99 Tex. 625; Weaver vs. Robison, 114 Tex. 272, 287. Nor in the absence of statutory requirement, could any such duty on the part of the Land Commissioner be implied because of the fact that Lovett's being a non-resident of the State of Texas. When he dealt with Texas land, he would necessarily be chargeable with knowledge of the laws controlling such land, and when he undertook by his contract with the State to pay interest by the first of November each year, he must live up to his contract or suffer the consequences. Furthermore, the manner of forfeiture was in all respects regular as to endorsement on obligation and entry on account, so that there was a valid forfeiture of the purchase under Article 5423 of Vernon's 1920 Statutes.

Under the terms of the said article a forfeited purchaser "may have their claim reinstated on their written request by paying into the treasury the full amount of interest due on such claim up to the date of reinstatement, provided no rights of a third party may have intervened."

We believe that Lovett's letter of September 10, 1924, constituted a sufficient written request for reinstatement. No formal application was necessary and he certainly signified

his wish to reinstate his contract with the State and resume his obligation thereunder, and the language of the law is broad enough to admit the construction that the Commissioner upon receipt of such a letter should allow to applicant a reasonable time within which to ascertain the full amount due and to make payment into the treasury. Anderson vs. Neighbors, 94 Tex. 236.

The serious question arises upon the condition precedent to the privilege of reinstatement, "that no right of a third person may have intervened." Such intervening right must be a vested right, entitling the third person to enforcement thereof in court. Anderson vs. Neighbors, 94 Tex. 236.

There can be no doubt that on September 10, 1924, there was no valid and enforceable intervening right in Simmons through sale to him on September 2nd, preceding, for the reason that this second sale was based upon advertisement made by the Land Office prior to the entry of forfeiture against the first purchase. Weaver vs. Robison, 114 Tex. 272. It was an attempted resale of land not on the market and was a void proceeding. Weaver Case, page 290.

On March 28, 1925, by Section 4 of Chapter 130 of the Acts of the Regular Session of that year, the Legislature undertook to validate sale awards, such as that to Simmons, that had been held invalid in the Weaver case. Since the Legislature could in the first instance have put public lands on the market by advertisement before forfeiture and when the land was merely subject to forfeiture, it could do the same thing retroactively, except as affecting prior vested rights, and to that extent this law validating prior purchases affected by the Weaver decision is valid. In other words, though Lovett, between September 10, 1924, and March 28, 1925, which was the effective date of this act, might have compelled the Commissioner by mandamus to reinstate his purchase, he could not have done so thereafter, for the reason that on the latter date the Simmons purchase had become a valid and enforceable intervening right.

As affecting this basis of our holding the question arises whether before the validation of the Simmons purchase there existed a vested right of reinstatement in Lovett, and also whether to bar reinstatement the intervening right must necessarily have been existing and enforceable at the time reinstatement was first sought. It must be conceded that the opinion of the San Antonio Court of Appeals in Gulf Production Company vs. State, 231 S. W. 124, in which writ of error was refused, tends to support Lovett in these particulars. On the other hand, the Commission of Appeals in Boykin vs. Southwest Texas Oil and Gas Company, 256 S. W. 581, holds that a forfeiture restores the land to the public purchaser leaving simply a preferential right to repurchase—no right in the

land,—and this decision finds strong support in other authorities therein reviewed.

In addition to this validation provision, Section 4 of Chapter 130 of the Act of 1925, provides that if such validated award has not stood one year, the forfeitee shall have the right of reinstatement upon payment of past due interest at any time during six months after taking effect of the Act. In other words, if there were any vested right of reinstatement affected by the retroactive validation of the intervening right of the second purchaser, then, it was not cut off, but given a reasonable time for enforcement, such time terminating September 28, 1925. We say it terminated because this is the natural implication of the legislative language without the necessity of an express negative against later reinstatement. Foster vs. City of Waco, 113 Tex. 352; Weaver vs. Robison, 114 Tex. 272, 289. Such a law is valid as affecting the remedy for a vested right, since it affords a reasonable time after its enactment for redress. Cathey vs. Weaver, 11 Tex. 515. In this instance, after enacted law had the effect, instead of shortening the time for action, of lengthening it from Sept. 2, 1925 to Sept. 28, 1925, for under Chapter 57 of the Acts of 1921, it was already provided:

"No sale heretofore made or hereafter made without condition of settlement shall be questioned by the State nor any person after one year from the date of such sale."

If the Act of 1925 does not cover the special condition here presented to the exclusion of this provision, then there is no reason why this statute, in its purely prospective effect, should not apply against Lovett under the construction that to "quesion" the sale made to Simmons without condition of settlement means to effectively question same by court proceeding. Under this statute of limitation Lovett was barred within one year after September 2, 1924, having slept on his rights.

In Herndon vs. Robison, 114 Tex. 446, mandamus was sought to compel the Commissioner to reinstate a forfeited purchaser and to cancel an intervening sale of the land to another, which was invalid under the Weaver case. The case not coming under the 1925 Act, the court passes upon the former one year statute of limitation as expressed in Articles 5458 and 5459 and also the provision just referred to from the Acts of 1921, remarks that these provisions furnish not only a rule of limitation but a substantive rule of repose, invoked without pleading, and holds that the relator:

"Cannot be reinstated if for no other reason because before he has taken any steps in his own behalf his opponent's rights have come in and ripened; whereas the statute that gives the privilege of reinstatement only does so where no right of a third party has intervened."

This holding is emphasized in its application to the case under consideration by the fact that the Court expressly says that these one year statutes apply in favor of a void sale.

Articles 5458 and 5459 of the Revised Statutes of 1911, generally known as the one year statute of limitation, were omitted from the 1925 codification, and since that codification became effective September 1, 1925, one year had not by then expired from the award to Simmons on September 2, 1924, so these Articles can here have no application. But Chapter 57 of the Acts of 1921 and Chapter 130 of the Acts of 1925, one or the other would apply and the Herndon case, rather than Gattison vs. Meyer, 297 S. W. 900, and Nations vs. Miller, 107 Tex. 616, controls.

It has been suggested by counsel for Lovett that since his request for reinstatement of September 10, 1924, remained thereafter on file in the Land Office and undenied, he was not called upon to take action by way of an ouster against Simmons or by way of enforcement of reinstatement against the Commissioner. Lovett's want of insistence between October 3, 1924, and January 1, 1927, must certainly find some practical explanation in the difference in the value of the land involved due to the discovery of oil in Winkler County shortly before the latter date, and it is not reasonable to believe that during that long period he was simply waiting upon the Commissioner to act upon his request for reinstatement. Indeed, he never replied to the Commissioner's letter of October 3, 1924. In contemplation of law a failure on the part of the Commissioner to act within a reasonable time was in effect a refusal of Lovett's request, and he was thereby called upon to enforce his right of reinstatement against the Commissioner by mandamus.

It is also insisted that Lovett was misled by the Commissioner with respect to his rights in the premises; that there was in effect a constructive fraud perpetrated upon him. If so, Lovett with the use of reasonable diligence should have discovered his rights more than a year before January 1, 1927. Furthermore, the State is not bound for the default of its agent beyond the powers granted him; nor would estoppel apply. Jones vs. Robison, 104 Tex. 70. And, as heretofore remarked, Lovett cannot invoke his ignorance of the law as a non-resident of the State. Limitation applies against a non-resident, unless an exception is made in his behalf in the terms of the law. Maverick vs. Salinas, 15 Tex. 57; Griffith vs. Shannon, 284 S. W. 598.

The most conclusive answer to the last two mentioned contentions of Lovett's attorney is that Simmons, the second purchaser, stands utterly unaffected by either. If it is conceded that the Commissioner before March 28, 1925, or else Sept. 2, 1925, or at least Sept. 28, 1925, should have granted Lovett's request for reinstatement, the fact remains that after the last of these dates the Commissioner had not power under the law to reinstate Lovett's purchase, thereby cancelling out the vested rights of Simmons. The Commissioner now has no power to reinstate Lovett and cancel the second purchase, and therefore

he should not undertake to do so, and if he did undertake to do so, in our opinion, his action would be utterly ineffectual, either to the prejudice of Simmons or the benefit of Lovett. Nations vs. Miller, 107 Tex. 616. In other words, the question presented is primarily a judicial one, and if we are wrong in suggesting the proper course for you, Mr. Lovett will still have his due process of law by way of action of trespass to try title against Mr. Simmons, unaffected by what course you may take.

You are therefore advised that you cannot reinstate the former forfeiture and cancel the second purchase.

Yours very truly,

C. W. TRUEHEART,
Assistant Attorney General.

Op. No. 2743, Bk. 62, P. 535.

PUBLIC LANDS—RIGHTS OF MINERAL LESSEE WITH RESPECT TO EXCESS ACREAGE IN UNIVERSITY LANDS.

1. Mineral lessee under 1925 University Leasing Act has right to make survey for the purpose of determining fact of excess acreage, to make payment as based thereon and to obtain from the Land Commissioner supplemental lease for further acreage thereby determined.
2. Such purchaser has the privilege of acquiring by paying for such excess, but if such privilege is not exercised within a reasonable time after development of excess, the purchaser has not a valid lease for the entire acreage.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, August 14, 1928.

Honorable J. T. Robison, General Land Office, State Office Building, City.

DEAR SIR: In your letter of the 10th instant you state that under the 1883 legislative donation to the University of Texas of a million acres of land, there was in 1886 a survey made in Hudspeth County of land in blocks of 33,798 acres each, same being called blocks "E" and "F". You further state that your department arbitrarily divided these blocks on the map into forty-eight (48) equal sections, numbering them and listing them as containing 640 acres each. Subsequently it seems that under the University mineral leasing act of 1925 you advertised and sold the minerals in certain sections by section number and block description, also stating that each section contained 640 acres, upon which basis a rental of ten cents per acre was paid by the purchaser.

Your first inquiry is whether these mineral purchasers can have an actual survey made ascertaining the real acreage in each of the forty-eight sections appearing on the Land Office maps, pay the same rate per acre on such excess as was offered and paid in the original bid, and receive a supplemental

lease for the entire acreage in each section, with or without cancellation of the original lease. Your second inquiry is whether the leases already issued are valid for the entire acreage in each section, even though it is alleged in the application and in the lease as containing 640 acres, or whether the lease is valid for the 640 acres only.

You are advised that such survey, payment and supplemental lease may be made for the entire acreage, and without the cancellation of the original lease. You are further advised that though the original lease would give to the purchaser, upon development of excess acreage, the privilege of acquiring by paying for such excess, at the same rate, yet if such privilege is not exercised within a reasonable time after development of excess, the purchaser has not a valid lease for the entire acreage.

There is nothing in the terms either of this mineral leasing law or other statutes to control your discretion as to the acreage of tracts offered for sale, nor is there anything creating in a purchaser a preferential right to buy upon development of an excess acreage. These matters may, however, be properly determined upon general principles, such as would control sales between individuals. In our opinion the situation presented is similar to that found to exist in the case of Willoughby vs. Long, 96 Tex. 194, the intention being to purchase the minerals in the whole section and the sale being a sale of the minerals in the entire tract. In upholding the right of a purchaser from the State to acquire, under such conditions, an excess acreage it was there said:

"We have ruled, in effect that when the State makes a sale of its land its rights and those of its vendee, when neither restricted nor enlarged by statute, are the same as those of vendor and purchaser both of whom are natural persons. In this case the sale was clearly by the acre and there was a large excess of the survey over the estimated quantity. If the sale had been male by a natural person the right of the vendor would have been to demand pay for the excess at the stipulated price per acre, and in default of such payment to have the surplus set apart to him by a partition."

Again in the case of Findley vs. State, 238 S. W. 956, 973, it was said:

"If the purchaser desires to retain such excess and can show an equitable reason why he should be permitted to do so upon his tendering payment for same, he should be adjudged to be the owner of such excess."

The equitable reason that can be shown by the mineral purchaser of University land under the 1925 Leasing Act is that while the sale was in gross for the section, whether more or less than 640 acres, yet the consideration both in fact and in law was upon a per acre basis. Under such conditions the

mutual mistake of the parties as to quantity furnishes ground for relief alike to vendor and to vendee, to the latter by way of option to buy the additional acreage and to the former by way of added compensation or alternatively partition.

Very truly yours,

C. W. TRUEHEART,
Assistant Attorney General.

OPINIONS RELATING TO PUBLIC OFFICERS

FEES AND COMPENSATION

Op. No. 2668, Bk. 62, P. 85.

FEES OF OFFICE—MAXIMUM FEE BILL—ANNUAL REPORTS OF FEES—EX-OFFICIO COMPENSATION.

1. Counties of 25,000 population or less are not under the provisions of the maximum fee bill.
2. The commissioners' court cannot require officers in counties of 25,000 population or less to make any reports concerning fees, except as a matter of information to guide the court in determining the amount of ex officio compensation.
3. The amount of ex officio compensation paid to an officer should not be taken into consideration in determining the amount of excess fees due the county.

Construing Articles 3890, 3891, 3892, 3895, 3896, 3897.

Construing Articles 3890, 3891, 3892, 3895, 3896, 3897.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 4, 1927.

Honorable C. H. Cane, County Judge, Tahoka, Texas.

DEAR SIR: Your letter of February 25th addressed to the Attorney General, has been referred to me for attention. You ask several questions which may be summarized as follows:

1. Are officers in counties having less than 25,000 inhabitants under a maximum fee bill as provided by Article 3883?
2. What reports can be legally required of officers in counties with less than 25,000 population in order to determine the amount of excess fees they have received?
3. Should the amount of the ex officio salary paid to the officer be taken into consideration in determining the amount of excess fees due the county?

An answer to the above questions will necessitate a construction of the provisions of Chapter 2, Title 61, of the Revised Civil Statutes for 1925, especially Articles 3883, 3895, 3896, 3897 and 3900.

Acts of the Special Session, 1897, page 5 Gammel's Laws, Volume 10, page 1445), sets the fees for various county officers and provides for the maximum amount of fees that the officers may retain. Section 17 of this Act provides that in counties having a population of 15,000 or less the officers shall not be required to make a report of fees as provided in Sections 11 and 16 of the act. Section 17 of this act was carried forward as Article 3898 of the Revised Statutes of 1911 and was amended under the Acts of 1913, page 248, making the same

apply to counties of 25,000 or less. Under Acts of 1919, page 301, old Article 3898 was repealed entirely. The same article was re-enacted as a law under Acts of 1923, page 399, and has been carried forward in the 1925 Statutes as Article 3900, except there was evidently a typographical error in new Article 3900 wherein it referred to Article 3879, which should have been Article 3897, as Article 3879, deals with the subject of adulterated feed stuff. Also the fact that the article refers to Acts of 1923, page 399, shows that it was the intention to refer to new Article 3897 instead of 3879.

Let us return to the above mentioned Act of 1897 and trace the history of Section 11 of that act. As stated above, Section 17 provided that in certain counties the provisions of Section 11 did not apply. Section 11 of the Act of 1897 provided for the amount of fees that an officer might retain, provided for making an annual sworn statement showing amount of fees collected during the fiscal year, procided for paying excess fees into the county treasury, and made provision for officers failing to collect the maximum amount of fees. Thus we clearly see that under the provisions of Section 17 of the 1897 Act it was the intention of the Legislature that the maximum fee law should not apply to officers in counties less than 15,000 population. The provisions of Section 11 of the above mentioned act were carried forward into the 1911 Revised Civil Statutes as Articles 3888, 3889, 3890 and 3895. The respective articles were carried forward into the 1925 Statutes as Articles 3890, 3891, 3892 and 3897.

Section 11 of the above mentioned Act of 1897 provided for the officers to keep a correct statement of the fees and commissions collected in a book to be provided for that purpose. This section was carried forward as Article 3894 of the 1911 Statutes and is now Article 3896.

Thus we see that under the provisions of Article 3900 of the 1925 Statutes the officers in counties under 25,000 population are not required to make the annual report of fees provided by Article 3897 or to keep the statement provided for in Article 3896. Under the original Act of 1897, such officers were not under the provisions of present Articles 3890, 3891 and 3892.

Thus we see that Article 3900 of the 1925 Statutes construed in the light of the original Acts with the amendments thereto clearly shows that the officers in counties under 25,000 population are not subject to the provisions of the maximum fee bill. The same opinion was rendered by this department on April 9, 1914, in opinion No. 1180, which is not printed in the Report and Opinions of the Attorney General. In this opinion of the department, various opinions written during the administrations of Attorneys General Davidson and Lightfoot were cited. But you refer to a contrary opinion of this department written October 20, 1915, and printed on page 654

of the Reports and Opinions of the Attorney General for 1914 and 1916.

It was stated that this department has ruled that all counties without regard to population are under the fee bill. The opinion referred to does not state any reasons for so holding nor does it state when the opinion was written. The writer has been unable to find a contrary opinion to that expressed in this opinion except one written after the present Article 3900 was repealed by the Act of 1919 and before it was reenacted by the Act of 1923. Therefore the opinion of this department heretofore rendered and printed on page 654 of the Reports and Opinions for 1914 to 1916 is overruled wherein it states that all counties without regard to population are under the fee bill. You are advised, therefore, that the answer to the first question is that the officers in counties under 25,000 population are not subject to the provisions of the maximum fee bill.

In answer to your second question, you are advised that the Commissioners' Court cannot require officers in any county under 25,000 population to make any reports whatever with reference to the fees of office collected by them, as under the answer to your first question it was held that these officers are not subject to the provisions of Article 3896, which requires the officers to keep a book containing the list of fees collected. However, it is the opinion of this department that before a commissioners' court allows any officer in such counties ex-officio compensation as provided by Article 3895, that the commissioners' court can require these officers to make such proof as the court may deem necessary with reference to the amount of fees they have collected and outside of this no other reports can be required.

In reply to your third question, you are advised that Article 3895 of the Revised Statutes for 1925 provides that the Commissioners' Court may grant compensation for ex-officio services. This compensation is not regarded as fees of office. The case of Anderson County vs. Hopkins, 187 S. W. 1019 may be considered as authority on this question. But the plain word- not to be considered as fees of office. You refer to an opinion ing of the Statutes shows that the ex-officio compensation is of this department written by Attorney General Looney and printed on page 217 of the Reports and Opinions of the Attorney General for 1914 to 1916. The decision in the Anderson County case above mentioned has been rendered since the above opinion by General Looney, and as the court decision is contrary to the opinion, the opinion above mentioned is therefore overruled.

You are, therefore, advised that in the opinion of this department the maximum fee bill does not apply to officers in counties of 25,000 or less; that the Commissioners' Court cannot require officers to file any reports with reference to their fees

of office, unless as a matter of information to guide the court in allowing ex-officio compensation; and that the amount of ex-officio compensation granted an officer is not to be taken into consideration in determining the amount of excess fees due the county.

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

Op. No. 2670, Bk. 62, P. 105.

OFFICERS—HOLDING MORE THAN ONE OFFICE—SCHOOL TRUSTEES—CITY COMMISSIONERS—HOLDING THAT ONE PERSON CAN HOLD OFFICE OF CITY COMMISSIONER AND SCHOOL TRUSTEE IF CITY NOT WITHIN THE SCHOOL DISTRICT, AND IF DUTIES NOT INCOMPATIBLE.

AUSTIN, TEXAS, March 10, 1927.

Hon. F. E. Gillett, Mayor of the City of Alpine, Alpine, Texas.

MY DEAR MR. GILLETT: Your letter of the 7th inst. addressed to the Attorney General's Department has been referred to me for reply.

You advise that a member of your City Commission duly elected is also a member of the Board of Trustees of the Alpine Independent School District, and that you would like to have a ruling as to the eligibility of such person to hold both positions; advising that the School Trustee serves without any emolument of office but the City Commissioner is paid five dollars per month.

Article 16, Section 40 of the Constitution of this State reads as follows:

"No person shall hold or exercise at the same time more than one civil office of emolument except that of justice of the peace, county commissioner, notary public and postmaster, unless otherwise specially provided herein."

"A school trustee is a public officer." Kembro vs. Barnett, 55 S. W. 120; Hendricks vs. The State, 49 S. W. 705.

It does not follow from this, however, that a School Trustee holds a "civil office of emolument." Bouvier's Law Dictionary defines "emolument" as follows:

"The profit arising from office or employment; that which is received as compensation for services or which is annexed to the possession of office as a salary, fees and perquisites; advantage, gain, public or private. It imports any perquisite, advantage, profit or gain, arising from the possession of an office."

"An office cannot be said to be one of profit when those appointed

thereto are not entitled to any pay nor to any perquisites or any emoluments." 22 R. C. L. 383.

"And the profit or advantage as contemplated by the Constitution must be pecuniary in character." Reals, County Treasurer, vs. Smith, 56 Pac. 690.

In Hoyt vs. United States, 13 Lawyers Edition, 359, Justice Nelson of the Supreme Court defines the term "emoluments" as "embracing every species of compensation or pecuniary profit from a discharge of the duties of the office."

The word "emolument" in the constitutional provision above quoted forbidding any person to hold more than one civil office of emolument, manifestly, we think should be interpreted to mean to pecuniary profit, gain, or advantage; and, therefore a School Trustee who receives no pay or compensation, or pecuniary gain for his services does not hold a civil office of emolument such as is inhibited by the Constitution, and hence holding the position of City Commissioner of the City of Alpine would not prohibit him from also holding the office of School Trustee.

189 S. W. 778.
196 S. W. 1157.
198 S. W. 1007.
218 S. W. 106.
221 S. W. 623.
230 S. W. 1090.
240 S. W. 91.
275 S. W. 617.
278 S. W. 312.
108 Texas 452.
93 Appeals 69.

However, the principle of law set out in the above paragraph is subject to one exception, and that is if the offices of School Trustee and City Commissioner are incompatible then the two offices cannot be held by one person, and upon qualifying as City Commissioner, one would automatically vacate the office of School Trustee.

I do not have the necessary facts before me to advise you as to just whether or not the person mentioned in your letter can legally hold the two offices, and cannot do so without copy of your city charter, or your advising me under what law your city is incorporated, but I do advise you this; that in our opinion the offices of School Trustee and City Commissioner are incompatible if under your system of government there are in the City Council various directory or supervisory powers exertable in respect to school property located within the city or town, and in respect to the duties of School Trustee performable within its limits. For example, there might well arise that conflict of discretion or duty in respect to health, quarantine, sanitary and fire prevention regulations.

Article 1015, R. S. 1925, sets out certain powers of the City

Council, giving the right to regulate quarantine, health promotion, dangerous buildings and various other things.

Article 1067 gives the City Council the right to provide for fire protection, and Article 1071 authorizes it to create a Sanitary and Health Department, which duties might necessarily conflict with those of School Trustees where such Trustees are acting within a district covering territory in which the city is situated. Thomas et al vs. Abernathy County Line Independent School District et al, 290 S. W. 152 (Advance Sheet).

You are therefore advised as follows:

1. That one person may hold the office of School Trustee and City Commissioner if the city is not within or a part of the school district.

2. That one person may hold the office of School Trustee and City Commissioner if the city is within the school district if the duties of the one office are not incompatible with the duties of the other office.

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

Op. No. 2673, Bk. 62, P. 116.

COUNTIES—COUNTY ATTORNEY—FEES—COMMISSIONERS' COURT—RIGHT OF COUNTY ATTORNEY TO REPRESENT COUNTY IN CIVIL ACTION.

Constitution Article 5, Section 21.
Article 335 R. C. S. 1925.
Article 359 R. C. S. 1925.

1. The county attorney is not entitled to commission under Article 3335 R. C. S. 1925 on money collected by suit or otherwise for the county, except when it is the duty of the county attorney to take action in behalf of the county.

2. The provisions of Article 359, R. C. S. 1925 making it the duty of the county attorney to take action against certain officers, apply only to those officers holding office at the time the action is taken and not to officers whose terms have expired or who are out of office.

3. The commissioners' court has authority to employ counsel to the exclusion of the county attorney to institute suits in behalf of the county except actions against office holders, as provided by Article 339.

4. The commissioners' court has authority to employ counsel to the exclusion of the county attorney to bring suits against the Banking Commissioner for the recovery of county funds, against a former county treasurer for defalcation, and against a former tax collector, and the county attorney is not entitled to any commission on collections made as the result of said suits, except as may be provided by contract between the county attorney and the commissioners' court.

AUSTIN, TEXAS, March 19th, 1927.

Hon. J. D. Thomas, County Attorney, Parmer County, Farwell, Texas.

DEAR SIR: This department acknowledges receipt of your letter of February 19th, the material part of which is quoted as follows:

"I am County Attorney of Parmer County and have held this office since September 1st, 1925. I was appointed to this office by the commissioners' court of this county to fill the unexpired term of my predecessor, Mr. A. B. Crane, who resigned. I was elected to the office last November and have qualified since January 1st, by virtue of my election.

"Prior to my appointment as County Attorney there were instituted suits in behalf of the county against the Banking Commissioner for the recovery of funds under the Guaranty Fund Law on account of the bank failure, one against the former county treasurer for the defalcation and one against a former tax collector. In all of these suits the commissioners' court employed special counsels aside from the county attorney. These suits were tried in the October term of the year 1926, in the District Court and resulted in the recovery of the county in each of the suits and of course during my tenure of office. Other than lending my co-operation as County Attorney to the special counsels employed in these cases and assisting them in a general way I have not rendered services as attorney for the county in these specific cases.

"We have compromised with the Banking Commissioner and by virtue of which we will recover from the Guaranty Funds $25,000.00. We will in all probability collect by execution in the other two cases namely against the former county treasurer and the former tax collector the amount of the respective judgments, which as you see will make the recovery of the judgments and their collections to occur during my tenure of office.

"Under this statement of facts, am I, as County Attorney, entitled to receive, under Article 334, Civil Statutes, a commission of 10% of the amount collected on the first thousand dollars and 5% of the remaining in each of the individual cases? If you advise me that the County Attorney may collect the commissions as above stated, shall this commission be divided between myself and my predecessor, who was County Attorney when the suits were instituted. I have read the case of Flint vs. Jones County, 50 S.W. 203; Lattimore vs. Tarrant County, 124 S. W. 205."

In opinion No. 2325 heretofore rendered by this department on April 6th. 1921, and printed on page 484 of Reports and Opinions of the Attorney General for 1920 to 1922, it was held that the County Attorney is not entitled to commissions under Article 363 (now Article 335) 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, and further held that 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. We agree with the hold-

ing in this opinion, and the only question left to decide is when is it the duty of the duty of the County Attorney to bring a suit in behalf of the county None of the decisions of the court have made any clear answer to this question. Nearly every decision cites Article 339 as authority for the County Attorney to bring an action in behalf of the county, and there is no doubt but that the only statutory provision concerning the duty of the County Attorney to bring all suits in behalf of the county are found in Article 339. But does Article 339 cover such cases as those mentioned by you in your letter above set out? In order to answer these questions the writer believes that it is necessary to trace the history of the creation of the office of County Attorney.

The Constitution of 1876 Article 5, Section 21, first provided for the office of County Attorney. Prior to the adoption of the present Constitution there was no such office as County Attorney. This provision of the Constitution provides with reference to county attorneys 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 attorney shall represent the State in all cases in the DISTRICT AND INFERIOR COURTS IN THEIR RESPECTIVE COUNTIES**; but if any county shall be included in a district in which there shall be a district attorney, the respective duties of district attorneys and county attorneys, shall in such counties, be regulated by the Legislature. 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."

We see that under the provisions of the Constitution the office of county attorney is provided for, and it is left to legislative enactment to provide for the election of district attorneys in such districts as the Legislature may deem necessary. The only consitutional duty placed upon the county attorney is to represent the State in all cases in the district and inferior courts, and any other duties of the county attorney must be by legislative enactment. In the case of Maud vs. Terrell, 200 S. W. 375, the Supreme Court held that the Legislature had no authority to pass an act which will exclude the county attorneys from their rights to prosecute all actions for the State.

Acts of 1876, page 85 (G. L. Vol. 8, P. 922) made the first statutory provision for the duties of county attorneys. Section 1 of this act contained the following:

"That it shall be the duty of each County Attorney to attend all terms of the District and County Courts, and all criminal prosecutions before Justices of the Peace when notified of the pendency of such prosecutions; and, when not prevented by other official duties, to conduct all prosecutions for crimes and offenses cognizable in such courts; to

prosecute and defend all other actions in which the State or county is interested, and to perform such other duties as may be prescribed by the Constitution and laws of the State."

Section 6 of the same act contained the following:

"That, in like manner, the County Attorney shall file with the County Treasurer a similar statement of all money received by him by virtue of his office, payable to the County Treasurer, and he shall within twenty days after collection pay the sum so received into the County Treasury, **less his commissions.**"

Section 9 of the same act contained the following:

"That when it shall come to the knowledge of any County Attorney that any officer in his county entrusted with the collection or safekeeping of any public funds is, in any manner whatsoever, neglecting or abusing the trust confided in him, or in any way failing to discharge his duties under the law, he shall institute such proceedings as are necessary to compel the performance of such duties by such officer, and to preserve and protect the public interests."

We see that under Section 1 of the Act of 1876 the Legislature placed the constitutional duty upon the county attorney of representing the State in the district, county and justice courts, and in addition to the duty prescribed by the Constitution made it his duty *to prosecute and defend all other actions in which the state or county is interested.* Thus we see by this section that the Legislature clearly made it the duty of the county attorney to represent the county as well as the constitutional duty of representing the state in all suits.

Under Section 9 of the above Act of 1876 it is provided that the county attorney shall take such action as is necessary to protect the interest of the public against any officer entrusted with public funds, and who is neglecting or abusing the trust confided in him. Surely it cannot be contended that it is by virtue of this section that the county attorney is "the legal representative of the county in all civil actions in which the county is interested. This section certainly does not give the county attorney the authority to file a suit against an ex-officer on his bond on account of a shortage in his accounts with the county. It seems to the writer that it was the plain intention of the Legislature by the adoption of this section to give the county attorney, on his own initiative, authority to file suit or take any other step necessary when a person in office entrusted with public funds is not performing his duty. The section uses the present tense throughout. It does not say an "ex-officer." It used the words "compel the performance of such duties by such officers." It also uses the word "is," neglecting," "abusing" and "failing." If the person against whom an action is brought has gone out of office, how can the county attorney compel such person to perform a duty of that office?

Therefore, it seems to the writer that the only purpose of this section was to give the county attorney the authority, and make it his duty to see that officers entrusted with public funds shall do their duty to see that officers entrusted with public funds shall do their duty and take such steps as may be necessary. If the person is not in office then it becomes his duty under Section 1 of the above act when instructed to do so by the commissioners court to represent the county in a suit, but it does not mean that he had authority under Section 1 to institute a suit without insructions from the commissioners' court. If it had been the intention of the Legislature to provide under the provisions of Section 9 that it was the right of the county attorney to represent the county in all actions, then what was the necessity of placing this right in Section 1 of the act?

The provisions of Section 9 of the above act were carried forward in the Revised Civil Statutes for 1879 as Article 260, which article contained the same provision as the original Section 9, with the exception that the words "district attorney" and "district" were added. The identical provisions of Article 260 of the 1879 Statutes have been carried forward in the identical language up to the present Revised Statutes for 1925, being Article 300 of the 1895 Statutes, Article 366 of the 1911 Statutes, and Article 539 of the 1925 Statutes.

The fact that the district attorney was added to Section 9 of the Act of 1876 as codified in Article 260 of the 1879 Statutes is, in the opinion of the writer, further evidence that the act was intended to apply only to those persons holding office and who, while holding office, were neglecting and abusing the trust confided in them. Can it be said that the district attorney under the provisions of this article, is entitled to represent the county in a suit to collect the amount of the bond of an ex-officer? If so, then what becomes of the right of the county attorney to institute this suit, as the satute gives the district attorney just as much authority as is given to the county attorney.

Let us now trace the provisions of Section 1 of the above Act of 1876, which made it the right and duty of the county attorney to represent the state and county in all actions. The act of which this section is a part was approved and took effect on August 7th, 1876. An independent act relating to the county attorney was approved and took effect on August 21st, 1876, at the same session of the Legislature. This act is found in Acts of 1876, page 283 (G. L. Vol. 8, P. 1119), and reads as follows:

"That in counties where there is a County Attorney, it shall be his duty to attend the terms of the County and inferior courts of his county, and to represent the State in all criminal cases under examination or prosecution in said county, and also to attend the terms of the District

Court, and to represent the State in all cases in said court, during the absence of the District Attorney, and to aid the District Attorney when so requested. And when representing the State in the District Court, during the absence of the District Attorney, he shall be entitled to and receive the fees allowed by law to the said District Attorney, and when he shall at the request of the District Attorney, aid him in examinations or trial of any case, he shall receive one-half of the fee or fees, and the District Attorney shall have and receive the other half of the fee allowed by law in such cases."

Acts of 1879, page 94 (G. L. Vol. 8, P. 1394) contained another provision with reference to county attorneys, which read as follows:

"That in counties where there is a county attorney it shall be his duty to attend the terms of the county and other inferior courts of his county, and to represent the state in all criminal cases under examination or prosecution in said county, and also attend the terms of the district court and to represent the state in all cases in said court during the absence of the district attorney, and to aid the district attorney when so requested; and when representing the state alone, he shall be entitled to and receive the fees allowed by law to the district attorney; and when at the request of the district attorney he shall aid him in the prosecution of any case in behalf of the state, he shall receive one-half of the fee allowed by law, and the district attorney the remainder."

These two acts were not carried forward into the Revised Civil Statutes of 1879, but were placed in the Code of Criminal Procedure for 1879 as Article 33, which reads as follows:

"Article 33. It shall be the duty of the county attorney to attend the terms of the county and inferior courts of his county, and to represent the state in all criminal cases under examination or prosecution in said courts. He shall attend all criminal prosecutions before justices of the peace in his county, when notified of the pendency of such prosecutions, and when not prevented by other official duties He shall conduct all prosecutions for crimes and offenses cognizable in such county and inferior courts of his county, and shall prosecute and defend all other actions in such courts in which the state or the county is interested. He shall also attend the terms of the district court in his county, and if there be a district attorney of the district including such county, and such district attorney be in attendance upon such court, the county attorney shall aid him when so requested and when there is no such district attorney, or when he is absent, the county attorney shall represent the state in such court and perform the duties required by law of district attorneys."

It will be noticed that the provisions of the above Article 33 of 1879, C. C. P., changed somewhat the provisions of Section 1 of the first Act of 1879, and made said article conform more nearly to the provisions of the second Act of 1876 above quoted. It seems that under the provisions of this article it is made the duty of the county attorney to represent the county in all actions only in the county and inferior courts. But we must not lose sight of the fact that the Constitution provides that the county attorney shall represent the *State* in all cases,

in the district and inferior courts in their respective counties, and under the decision in the case of Maude vs. Terrell above cited, the Legislature cannot take away from the county attorney, in a county where there is no district attorney, the right to represent the State in all cases in the trial courts. The Constitution does not regulate the duties of the county attorney in representing the county.

The identical provisions of Article 33 of the 1879 C. C. P. were carried forward as Article 32 of the 1895 C. C. P., and as Article 32 of the 1911 C. C. P. Clearly, then, up until the adoption of the 1925 Code of Criminal Procedure, there is no doubt of the right of the county attorney to represent the county in all actions in the county and justice courts. But the provisions of the Codes of Criminal Procedure for 1879 and 1895 and 1911 as Article 33, 32 and 32 respectively are not carried forward into the 1925 Code of Criminal Procedure. The nearest approach that can be found to these articles is Article 25 of the 1925 C. C. P., which reads as follows:

"The county attorney shall attend the terms of all courts in his county below the grade of district court and shall represent the State in all criminal cases under examination or prosecution in said county; and in the absence of the district attorney he shall represent the State alone, or when requested, shall aid the district attorney in the prosecution of any case in behalf of the State in the district court, and in such cases he shall receive all or one-half of the fees allowed by law to district attorneys, according as he acted alone or jointly."

The old Act of 1879 above quoted, and with slight changes made it the law of today with reference to the duties of the county attorney.

We search in vain to find any provision in either the Civil or Criminal Statutes as they stand today, which provide that the county attorney has the right to represent the county in all civil actions such as suits on the bonds of ex-officers, even those entrusted with the collection and safekeeping of public funds, unless that authority be found in Article 339 of the 1925 Civil Statutes. But as stated above, the writer believes that under a proper construction of this article, as originally enacted under Section 9 of the Act of 1876, above quoted, such article is not authority of the county attorney to represent the county in such actions, but is simply concurrent authority of the district and county attorneys to compel certain officers to perform their duties in the manner provided by law. Of course, we find several special provisions of the Statutes making it the duty of the county attorney to represent the county, such as Article 6716, which provides that the county attorney shall represent the county in certain suits for damage to public roads. The fact that certain statutes require that the county attorney shall represent the county in certain matters is further evidence that it is not the intention of the Leg-

islature to make it the right of the county attorney to represent the county in all actions.

As stated at the outset of this opinion, the decisions of the court construing Article 339 are not altogether clear, but let us examine some of the leading cases on this point.

In the case of Loosoon vs. Harris County, 38 Tex. 511, the district attorney brought suit against certain officials, the object of said suit being to recover from the county attorney a sum of money alleged to have been illegally paid him by virtue of certain drafts issued by the county clerk on the county treasurer, and also to enjoin the county attorney from procuring further drafts by virtue of an order under which he had previously received a certain sum of money, and to restrain the county clerk from issuing to the county attorney such additional warrants. The Supreme Court held that the commissioners' court of a county had the exclusive right to determine whether a suit shall be brought in the name and for the benefit of a county, except in a case where a concurrent or exclusive right is conferred on some other official or tribunal by the Legislature, to exercise in some specified case a like discretion. The court further held that the provisions of Article 260 of the 1879 Statutes (now Article 330) did not confer on the district and county attorneys authority to institute suit against the wishes of the commissioners' court to recover back money authorized by them to be paid out of county funds, or to enjoin further payments on the contract. The court uses this further language:

> "The commissioners' court, presided over by the county judge, is virtually a council vested with power to manage and direct all of such material and financial interests of the county as the laws of the state have confided to its jurisdiction. The management of the financial affairs of the county have always heretofore been vested in tribunals which have existed at different times under various names and designations, such as county court, commissioners' court, etc.; they have, however, all been clothed with similar powers, and like duties have been imposed upon them. The commissioners' court undoubtedly has the right to cause suits to be instituted in the name of and for the benefit of the county, and except where a concurrent right to do the same thing, or where an exclusive right in a specified case or cases is conferred upon some other tribunal or some other officer of the government, the commissioners' court must be deemed to be the quasi executive head of the county, vested with exclusive power to determine when a suit shall be instituted in the name of and for the benefit of the county."

It seems to the writer that under the decision in this case the county attorney has authority under the provisions of Article 339 to bring a suit against certain officers entrusted with public funds without the consent, and even against the wishes, of the commissioners' court. But when an officer has retired from office, and it is a matter of settlement between the ex-officer and the county, then the commissioners' court is the

sole judge of whether the county should be put to the cost of litigation and has the right to determine this matter and make setlement with anyone who may owe the county, and the county attorney would not have authority to file a suit if the commissioners' court had made settlement with an ex-officer on account of a shortage in his accounts with the county.

In the case of Terrell vs. Greene, 88 Tex. 539 (31 S. W. 631), Terrell was County Attorney of Tarrant County. The commissioners' court employed outside counsel to bring suit against the county treasurer and his bondsmen, which treasurer had in his possession, as such treasurer, funds of said county amounting to more than $100,000.00, which he had deposited in his own individual name in a bank. By the failure of the bank the treasurer was unable to account for the money in his hands, and the commissioners' court ordered the suit brought. Terrell, as County Attorney, filed a motion praying that his right as county attorney to prosecute the suit be recognized. The trial court held that the commissioners' court had the right to employ outside counsel, and the county attorney had no right to bring the suit. The Supreme Court held that the county attorney had the authority, and it was his duty, to represent the county under authority of what is now Article 339.

But it should be noticed that in this case the county treasurer that was being sued was still in office, and as the court says in this case:

"The admitted facts show, that Thomas B. Collins was the treasurer of Tarrant County, and by law was charged with the custody and safe keeping of its funds; that he failed to discharge his duty in safely keeping and accounting for such funds; and upon these facts it became necessary that a suit should be filed in order to preserve and protect the public interests, that is, the money in his hands belonging to the county."

The court calls attention to the case of Loosoon vs. Harris County, and does not overrule the same but says the facts in that case are not applicable to the article under consideration, and recognizes that there may be cases that do not fall within the provisions of the present Article 339, and uses this language:

"There are many instances in which it might be necessary to bring suits in the name of the county, or in which suits might be instituted against a county, not embraced in the terms of Article 260. In such cases the Commissioners' Court would have the right to control the institution of such suits, because it has not been committed by law to any other officer or tribunal."

In this case the court did not make a distinction between an officer in office, and one out of office, but nevertheless, the facts in this case concerned an officer in office, and one who was "an officer *neglecting* and *abusing* the trust confided in

him and failing to discharge his duties," as provided by the present Article 339. Therefore, it seems to the writer that this case is not contrary to the opinion expressed herein.

In the case of Lattimore vs. Tarrant County, 124 S. W. 205, in which no application for writ of error was made, the Court of Civil Appeals held that the commission provided by present Article 335 is the only compensation that can be paid the county attorney for representing the county in a suit against the county clerk, and seems to base its decision on Article 339 which made it the duty of the county attorney to file suit against a county treasurer, and since it was his duty to file this suit, the county can pay him only the commission provided by Article 335. However, the opinion does not disclose whether the treasurer was in office or out of office, and for this reason this case is not considered as authority contrary to the opinion expressed herein.

In the case of Edmondson vs. Cummings, 203 S. W. 423, which is an opinion of the Court of Civil Appeals, and which no application for a writ of error is shown, the county attorney brought suit to restrain the commissioners' court county judge, and county clerk from allowing officers to buy postage stamps out of county funds. The court held that it was not an action against an officer entrusted with the safekeeping of any public funds which might be filed by the county or district attorney under Article 339, nor one which any other statute conferred the right upon the county attorney to bring, and therefore, the commissioners' court alone had the right to determine whether such a suit should be brought in the name and for the benefit of the county, and cited the case of Loosoon vs. Harris County as authority.

In the case of Bexar County vs. Davis, 223 S.W. 558, in which a writ of error was refused by the Supreme Court, the district attorney brought suit against the county judge for a sum of money claimed to have been unlawfully appropriated as salary. The court held that under the provisions of Article 339 the only parties against whom suit could be brought are those entrusted with the collection and safekeeping of public funds. The county judge was not entrusted with the collection or safekeeping of the funds, but they were in the keeping of the county treasurer. It is not the question of who appropriated the funds, but in whose hands were they. If the funds were misapplied by the collector or treasurer it was the duty of the district attorney to file the suit. The court says that this is all that is held in the case of Terrell vs. Greene.

The case of Seagler vs. Adams, 238 S.W. 707, which was affirmed by the Supreme Court in 250 S.W. 415, the commissioners' court empowered an outside counsel to assist the county attorney in several separate suits against officials and ex-officals on their bonds. The court says that it may be that the

commissioners' court lacks power to displace the county attorney, but such was not the case, as the outside attorneys were only employed to assist the county attorney, and no attempt was made to displace the county attorney. But in this case the only question to decide was whether the commissioners' court was without authority to employ counsel to assist the county attorney even in those cases where it was the duty of the county attorney to bring suit. The county attorney in this case had not been displaced, and for this reason this case cannot be considered and authority contrary to the opinion expressed herein by the writer. The cases of Terrell vs. Green and Loosoon vs. Harris County are cited in this opinion of the court.

In the case of McAskill vs. Terrell, 259 S. W. 914, which was an opinion by the Supreme Court, the commissioners' court had employed outside counsel to file suit against the county attorney for excess fees due the county. The district attorney filed a motion setting up his right to appear and control the case. The Supreme Court held that under the circumstances the county attorney was an officer entrusted with public funds, and therefore, the district attorney had authority under Article 339 to bring the suit. But it must be noted that in this case the county attorney was still in office. The court cites as authority the cases of Terrell vs. Greene and Adams vs. Seagler.

The writer does not believe that the case of the State vs. Bratton, 192 S. W. 814 is contrary to the opinion expressed herein. In this case the suit brought by the county attorney is one in behalf of the state, and the only question was his right to bring the suit in behalf of the state, and although Article 339 was cited by the court, yet the question considered in this opinion was not gone into. There can be no doubt of the right of the county attorney to institute the suit described in this case in behalf o fthe state, and to receive a commission on the money collected for the State under the provisions of the Constitution above set out as to his authority, and Article 335 concerning commissions.

It cannot be denied that the main purpose of the Constitution, in creating the offices of district attorney and county attorney, was to make as the main function of these officers to prosecute criminal cases as stated by the Supreme Court in the case of Brady vs. Brooks, 89 S. W. 1052. However, the Legislature has from time to time conferred additional duties upon the county and district attorneys, but no authority is found in the statutes since the recodification that makes the county attorney the representative of the county in suits. Title 15 of the Revised Civil Statutes for 1925, Articles 321 to 341 inclusive, contains general provisions with reference to county and district attorneys. In these statutes we find under Article 334 that these attorneys shall advise and give opinions to the va-

rious county and precinct officers, but this does not mean that the commissioners' court is required to employ the county attorney in all civil suits, nor does it mean that the county attorney has the right to represent the county in such suits. The Code of Criminal Procedure for 1925, Chapter 2, Articles 25 to 32 inclusive, also states the general duties of county and district attorney, but we do not find any rights or duties expressed in these statutes contrary to the opinion expressed herein.

The writer believes that none of the above cases cited, when carefully considered, intend to lay down the rule that the county attorney has the right to represent the county in suits against ex-officers, even those who have defaulted with public funds. He believes that it is within the power of the commissioners' court to determine when a suit should be brought against an ex-officer, and that said court has the authority to employ outside counsel to the exclusion of the county attorney. There can be no question about this matter as to a suit against the Banking Commissioner for the recovery of public funds under the Guaranty Bank Fund Law on account of the bank failure, and the writer is of the same opinion as to suits against a former treasurer and a former tax collector for defalcation.

Having decided at the outset of this opinion in adopting a former opinion of this department, that the county attorney is not entitled to the commissions under Article 335, except in those cases where it is the duty of the county attorney to bring the suit or collect money, and having decided that it was not the duty of the county attorney to bring any of the suits mentioned in your letter, you are respectfully advised that you are not entitled to collect any commission on the collections mentioned in your letter. However, if the commissioners' court has employed you to represent the county, and you have made a contract with said court to represent them in these suits or in the collection of the money, then, of course, you will be entitled to compensation, but only such compensation as may be fixed in a contract between you and the commissioners' court.

Yours very truly,

H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2677, Bk. 62, P. 151.

OFFICERS — MUNICIPAL — RESIDENCE — HOLDING THAT CITY RECORDER WHOSE OFFICE IS APPOINTIVE IN CITY OPERATING UNDER "HOME RULE ACT" IS NOT REQUIRED TO RESIDE WITHIN LIMITS OF THE CITY IN ABSENCE OF STATUTORY OR CHARTER PROVISION.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 22nd, 1927.

Mr. Curtis M. Fenley, County Attorney, Angelina County, Lufkin, Texas.

MY DEAR MR. FENLEY: Your letter of the 17th inst. addressed to Honorable Claude Pollard, Attorney General, has been referred to me for reply.

In your letter you advise that Lufkin is a city of more than five thousand inhabitants, and is incorporated under what is known as the "Home Rule Act," and you desire to know whether one residing outside the territorial limits of said city may legally hold the office of City Recorder.

We are, indeed, very grateful to you for enclosing the opinion of Hon. W. O. Seale, the City Attorney, which has saved us much time in writing this opinion, and you will consider our letter supplementary to his letter, we having reached the same opinion that he did.

However, Mr. Seale did not touch upon the provision of the Constitution which, in the judgment of the writer, raises the only question which there can be any serious doubt about.

The charter, a copy of which you have enclosed in your letter, Article 8 provides that the Mayor and each City Manager shall be resident citizens of the City of Lufkin, and shall have the qualifications of electors therein, and shall have been resident of the City of Lufkin for a period of two years preceding the election. This same section mentions the other officers, but does not specify their residence, yet it does define their qualifications.

It is a necessary deduction, therefore, that in the absence of a provision as to residence for the other officers, after having provided for the residence of some officers, that the framers of the charter did not intend that those officers of whom residence in the city was not required should be residents of the city.

We think this is further manifested by Section 25, which provides for the appointment of a City Manager, and which requires that he shall be chosen upon qualifications and fitness for the exercise of his duties, but that he may or may not be a resident of the city when appointed, but shall immediately establish his residence within the city upon accepting the office.

Section 65 goes into detail in specifying just what residence shall be required of the Commissioners and the Mayor, and provides for their vacating the office upon their removal from the respective precincts by the commissioners.

It is clear, therefore, that failure to set out residence as a qualification for the other officers and employees was not the oversight of the framers, but it is evident that they did not deem it necessary or essential that such persons should be residents of the city nor maintain their residence after appointment. This conclusion, we believe, is further manifested by Section 26, which provides that the City Manager shall appoint all appointive officers or employees of the city with the advice and consent of the City Commission, (such appointments to be made upon merit and fitness alone). We believe their purpose in so wording their charter was that the city may not have within its limits one who was sufficiently qualified to fill the place, and that if the City Manager, with the consent of the City Commission, referred to go without the limits of the city to select administrative officers that he could do so. For instance, the City Engineer, who is a civil officer, might be selected from without the City of Lufkin, and may maintain his residence in another city, and yet attend to his duties as the City Engineer of Lufkin.

Title 22 of the Revised Statutes of 1925 in naming the officers of those cities which elect to operate under the "Home Rule Act," does not provide for the office of City Recorder, but authorizes the creation by the municipality of such other officers as it may deem necessary to create, and Section 74 of the charter which provides for the creation of the corporation court is as follows:

"The city commission shall establish and provide for a court for the trial of misdemeanor offenses known as a Corporation Court with such powers and duties as are defined and prescribed in an act of the Legislature of the State of Texas, and any acts amendatory thereof, entitled 'An Act to establish and create in each of the cities, towns and villages of this state a court to be known as the Corporation Court, in each city, town and village; and to prescribe the jurisdiction and organization thereof and to abolish municipal courts,' said Act being Title 22, Chapter 5, Articles 903 to 922 inclusive, Vernon's Sayles' Texas Civil Statutes, 1914."

Title 22 specifies who shall be eligible to the office of mayor and aldermen, and requires residence of twelve months, but no provision is made as to the residence of other officers.

The statute and the city charter having failed to provide for the residence of officers other than the mayor, city council and city manager, we must look to the Constitution to see whether or not there is any inhibition or prohibition therein which would require residence in the city of its other officers.

Article 16, Section 14 of the Constitution is as follows:

"All civil officers shall reside within this State, and all district or county officers within their districts or counties, and shall keep their offices at such places as may be required by law, and failure to comply with this condition shall vacate the office so held."

Former Constitutions contained the same provision except the latter clause providing for the vacation of the office upon failure to comply with said condition.

There is no doubt but that the City Recorder is a civil officer, and it must, therefore, be determined whether or not the provision "district officer" includes a municipal officer, and whether the language of this provision of the Constitution, together with that of the Statute and the Charter, import the necessity of maintaining of residence within the city by all of its officers.

We believe that by using the word "district" in this article, the framers of the Constitution did not intend to include cites or towns, and we believe we are borne out in this conclusion by Article 3, Section 52, which reads partly as follows:

"The Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company, provided, however, that under legislative provision any county, any political subdivision of a county, any number of adjoining counties or any political subdivision of the State or any defined district now or hereafter to be described and defined within the State of Texas, and which may or may not include towns, villages or municipal corporations."

As the people with respect to certain offices have seen fit by express constitutional provisions to restrict their freedom of choice, it is a fair inference that, where the Constitution is silent, they intended no restriction. Wright vs. Noell, 16 Kan. 601.

All Persons are equally eligible to office who are not excluded by a constitutional or legal disqualification; and eligibility does not depend on the right of suffrage. People vs. McCormick, 261 Ill. 413.

There are other states that hold contra, but the Supreme Court of Texas has indicated that it will follow the Illinois holding.

Thus as far back as 1851 where the Constitution of Louisiana restricted eligibility to parish offices to persons who had the right to vote in such parish contemplated, and did not prevent a municipal corporation from electing a surveyor who resided in an adjoining parish, because Justice Slidell said:,

"Public offices and employments are established for the benefit of the people, not of the functionaries; and it seems to us that laws restricting the choice of the people to the area of selection should not receive a

large construction so as to take in by implication offices requiring professional skill and not representative in their character."

State vs. Blancard, 6 La. Ann. 515.

"It seems to be the weight of authority then that residence within the district over which the jurisdiction of the office extend in the absence of an expressed provision, is not required, and there would seem to be no practical reason for holding that residence within such a district is necessary to eligibility, provided the other qualifications mentioned in the Statute are present, but a provision of the Statute requiring residence must be observed."

29 Cyc. 1377.

All persons are normally eligible and qualified for office unless they are excluded by some constitutional or legal disqualification. It seems that under the old common law in England gross or palpable unfitness for an office was considered a disqualification since only men of ability, knowledge and skill were deemed capable of serving the crown, but we have found nothing in the decisions which would imply that at common law one could not hold office because not a resident of the particular district in which he was to serve.

"In the absence of any constitutional regulation of the subject the Legislature is usually recognized as having power to define the qualifications of statutory officers including those of municipalities as well as of the State itself; and it may even prescribe a different qualification for municipal officers from that required of State officers. Since a State Constitution is regarded as a restriction on the powers of the State Legislature, which otherwise would be supreme in all other legislative matters, whenever the power to prescribe the qualifications is not mentioned, the implication is that the Legislature has unrestricted control over the subject. Nevertheless the courts sometime draw the contrary implication, etc."

22 R. C. L. Section 42.
State vs. George, 23 Florida, 583.
State vs. Swearingen, 12 Georgia, 23.
Graham vs. Roberts, 200 Massachusetts, 152.

It was decided in the case of State vs. Swearingen. supra, where the charter of the town provided for the election of the city officials by the people of the city qualified to vote, and were silent as to requiring officers to be residents, that a person might legally be elected and qualified who was not a resident of the place. The Supreme Court of Texas in the case of Stensoff vs. The State, 12 L. R. A. 364, 15 S. W. 1100, which held that a citizen of the State was not eligible to hold office in the county of his residence because he had moved there so short a time before election that he could not vote where neither the Constitution or Statute provided that a county officer had to be a voter in the county, the court quoted the case of Barker vs. The People, 3 Cowan (N. Y.) 703.

"Eligibility to office is not declared as a right or principle by any express terms of the Constitution, but it rests as a just deduction from the expressed powers and provisions of the system. The basis of the principle is the absolute liberty of the electors and the appointing authorities to choose and appoint any person who is not made ineligible by the Constitution. Eligibility to office, therefore, belongs not exclusive or specially to electors enjoying the right of suffrage. It belongs equally to all persons whomsoever not excluded by the Constitution."

The court, after quoting the Barker case, supra, indicated that it would follow the majority holding, and we quote part of the opinion:

"When a Constitution has been framed which contains no provision defining in terms who shall be eligible to office, there is strength in the argument that the intention was to confide the selection to the untrammeled will of the electors. Experience teaches us that in proper elections those only are elected who are in sympathy with the people, both in thought and aspiration, and that no law is needed to secure the election of those only who reside in the county or district in which their functions are to be performed."

It is to be observed, therefore, that neither our Constitution nor the laws on the subject nor the Charter of the City of Lufkin prescribe any qualification such as would inhibit one from holding the office of City Recorder who is not a resident of the city, especially would this be true in a case as that at bar where the office of City Recorder is a creature of the city charter, is appointive, the person holding the same can be ejected therefrom by the commission, and the person holding the same is required to have professional knowledge or skill.

The Constitution does require that every person holding a civil office be a citizen of the State. It also requires each person holding a civil office in a county or district to reside within his respective county or district, but no mention is made of a municipality, and certainly it would not be a just deduction, nor can it be imported from the language used in the Constitution that persons holding a civil office in a municipality must also reside within the municipality, but it seems evident that it was the general intention of the framers of the Constitution to leave the general qualifications of municipal officers to the Legislature or the respective municipalities.

The State Constitution, the Statutes, and the Charter of the City of Lufkin having failed to provide that the above mentioned officer shall be a resident of the municipality in which he serves, it does not result as a just deduction from the other provisions that he must maintain his residence therein.

Yours very truly,

R. M. TILLEY,

Assistant Attorney General.

Op. No. 2686, Bk. 62, P. 201.

SHERIFFS—DEPUTIES—OFFICERS.

1. A sheriff may appoint as many deputies as the commissioners' court under the provisions of Article 3902 may permit.
2. Article 3902 controls over Article 6869 in the appointment of deputies by a sheriff.

Article 3883.
Article 3902.
Article 6869.
Article 6879.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 29, 1927.

Hon. J. A. Moore, County Attorney, Reagan County,
Big Lake, Texas.

DEAR SIR: This Department acknowledges receipt of your letter of the 23rd inst. in which you ask the number of deputies that a sheriff may appoint.

An officer has the right at common law to appoint as many deputies as he desires. This right was recognized by the Legislature in statutory enactments until the passage of Chapter 30, Acts 1889, page 23, which contained the same provisions that are now embodied in Article 6869 in which the number of deputies that a sheriff may appoint is limited to three in the precinct in which the county site is located, and one in each of the other justice precincts.

At the time of the enactment of this statute we had no Maximum Fee Bill. In 1897 the Legislature passed the act known as the "Maximum Fee Bill." (Acts, Special Session, 25th Legislature, Chapter 5.) This act contained a provision in regard to the appointment of deputies, and with various amendments said act is now included in Article 3883 with reference to maximum fees and Article 3902 with reference to the appointment of deputies.

Article 3902 provides that the commissioners' court may authorize any officer named in Article 3883 to appoint deputies, and provides that the commissioners' court shall determine the number to be appointed. The question to determine, then, is, whether Article 3902 controls over Article 3869.

In the case of Urban vs. Harris County, 251 S. W. 594, in which a writ of error was denied by the Supreme Court the courts construed the effects of Article 3902 on Article 6879 which limited the number of deputies that a constable may appoint, and held that as Article 3902 was a later act, while it did not repeal Article 6879, the provisions of the later act control and in this decision the court was able to harmonize the two articles by holding that, as constables in cities under twenty thousand population were not under the provisions of the maximum fee bill and are not mentioned in Article 3883,

the restriction in Article 6879 as to the number of deputies that a constable may appoint applies only to cities under twenty thousand population.

In Article 3883 every sheriff in Texas is mentioned. For this reason there is an absolute conflict between the provisions of Articles 6869 and 3902 as far as the appointment of deputies by a sheriff is concerned, and it is necessary to decide which article shall control. In view of the fact that Article 3902 is a codification of the later act than that contained in Article 6869, and in view of the holding of the court in the case of Urban vs. Harris County, we believe that the provisions of Article 3902 control. To hold that Article 6869 controls, or is a restriction on the number of deputies permitted by Article 3902, would, we believe, destroy the purpose of the Legislature in the enactment of Article 3902. Such a holding would reduce the number of deputies of a sheriff in the large counties to three in the county site. We believe that the Legislature, after the enactment of the Act of 1889 which absolutely limited the number of deputies that any sheriff might appoint, realized in 1897 that in some counties more deputies were needed, and that conditions could change from time to time requiring the appointment of more deputies or probably reducing the number needed, and that the enactment of the Act of 1897, which is now contained in Article 3902, it was the intention of the Legislature to allow the commissioners' court of each county to be the judge of the number of deputies required, and not to have the general restriction on the number of deputies allowed.

You are advised, therefore, that the opinion of this department is the sheriff of your county may appoint as many deputies as the commissioners' court may allow under the provisions and restrictions provided for in Article 3902.

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

Op. No. 2687, Bk. 62, P. 204.

COUNTY ATTORNEY—OFFICER—FEES OF OFFICE—LUNACY PROCEEDINGS.

1. County Attorney representing the State in lunacy proceedings, is entitled to fee of ten dollars upon conviction.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 6, 1927.

Honorable P. W. Minter, County Attorney, Woodville, Texas.

DEAR SIR: We acknowledge receipt of your letter of April 30, 1927, addressed to Honorable Claude Pollard, Attorney

General, requesting a ruling as to the fees county attorneys should receive in lunacy cases.

Prior to the Codification of 1925, it was provided (Article 165), 1922 Supplement, Vernon's Civil Statutes, that: "In judicial proceedings in case of lunacy—in each case the sheriff and county clerk shall be allowed the same fees as are now allowed said officers for similar services in misdemeanor criminal cases. The county attorney shall be allowed a fee of five dollars, provided, that such fee shall be allowed only when a conviction is obtained, etc." Here the fee of county attorneys, in case of conviction in lunacy matters, was especially named and placed at five dollars and the other officers were to be paid as for similar services in misdemeanor criminal cases.

The Revised Civil Statutes, 1925 (Recodification) provides: "In such cases (lunacy cases) the officers and jurors shall be allowed the same fees upon conviction, as are now allowed for similar services performed in misdemeanor cases in the Justice Courts, etc." Under the above *all officers* are to receive for their services the same fees as for similar services in misdemeanor cases in Justice Courts.

Although the special enumeration of five dollars for the County Attorney was omitted, it is certain that the Legislature intended that the County Attorney should still represent the State, for Article 5550 provides: "the cause shall be docketed —in the name of the State of Texas, as plaintiff, and of the person charged to be insane as defendant, and the County Attorney shall appear and represent the State on the hearing, etc." Since it is mandatory that the County Attorney serve in such cases, certainly the Legislature intended that he be compensated for such services; and since no special fee is named, the County Attorney, being an officer, would receive fees as is provided in Article 5561—that is, the same fee upon conviction, as is allowed for similar services performed in misdemeanor cases in the Justice Courts.

The question now arises as to what would be similar service of the County Attorney in misdemeanor cases in Justice Courts and his fee therefor. Article 1068 of the Code of Criminal Procedure, 1925, provides: "The Attorney who represents the State in a criminal action in a justice court shall receive for each conviction on a plea of 'not guilty' when no appeal is taken, ten dollars."

There can be no plea of guilty in an insanity case. There must be a hearing. The Statute makes it the duty of the County Attorney to represent the State at such hearing. The fees *upon conviction* are the same as for similar service in justice court. Similar service in Justice Court in a misdemeanor case would be a conviction in such case, for which the county attorney would receive a fee of ten dollars.

You are, therefore, advised, that the county attorney is entitled to a fee of ten dollars upon conviction in lunacy cases.

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

Op. No. 2692, Bk. 62, P. 238.

FEES OF OFFICE—PROBATE COMMISSION UPON EXHIBITS OF GUARDIANS, ART. 3926, REVISED CIVIL STATUTES OF 1925 CONSTRUED.

The County Judge approving the annual report of a guardian is entitled to the commission of one-half of one per cent upon the actual cash receipts of such guardian to the exclusion of a former County Judge under whose jurisdiction the guardianship began and preceeded, but who did not approve the annual account required by law.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 19, 1927.

Hon. Renne Allred, Jr., County Attorney of Montague County, Montague, Texas.

DEAR SIR: This will acknowledge receipt of your letter of the 13th inst. which reads in part as follows:

"Now the question that I would like to have your opinion is where a Guardian collects money from 1924 to December 31, 1926, during the Ex-County Judge's administration, and makes no report to the County Judge until the present County Judge took office, January 1, 1927, which one of the two judges is entitled to the one-half of one per cent?

"Is the former Judge who looked after all the approval of orders covering deals during the collection or is the Judge in office who has approved the exhibits entitled to the one-half of one per cent. No report was made during 1924, 1925, 1926 as required by law, and none made until the present County Judge took office and required it."

Art. 3926 of the Revised Civil Statutes of 1925 reads in part as follows:

"The County Judge shall also receive . . . a commission of one-half of one per cent upon the actual cash receipts of each guardian upon the approval of the exhibits and the final settlement of the account of such . . . guardian, but no more than one such commission shall be charged on any amount received by any such guardian."

Old Art. 3850 which is at present Art. 3926 in the Revised Civil Statutes of 1925 has been construed so far as we are aware in only two cases, the second of which, Downs vs. Goodwin, 271 S. W., 414, has no bearing upon this question. The case of Grice vs. Cooley, 179 S. W. 1098, is authority for the proposition that the word "exhibit" as used in this Article

includes annual accounts and for the second proposition that the commission provided for by such Article is payable when the annual account is presented and approved, and, third, that a commission is payable upon cash receipts accruing between the approval of the last annual report and the approval of the final report, same being payable at the time when the final account is presented and approved. The specific question which you raise is not passed upon, but the following language is illuminating:

"By Article 4186, Revised Statutes, 1911, guardians are required to present an annual account under oath showing, among other things, 'a complete account of receipts and disbursements since the last annual account' upon presentation of such annual account it is, by subsequent provisions of the statutes, made the duty of the then presiding County Judge to conduct a hearing thereon, and if he is satisfied that the account is correct, it is his duty to approve same. Having made it the duty of the County Judge to approve such account and having allowed a fee of one-half of one per cent upon the 'actual cash receipts' shown thereby, it surely follows, it seems to us, that the commissions are payable upon such approval for the reason that they were clearly intended for the benefit of the officer performing the duty, and, having been so intended, it was never contemplated that he should forego his compensation until final settlement of the estate, particularly when final settlement might not come until after the lapsing of many years, and the possible death of the officer."

Undoubtedly the intention of the Legislature was to provide for payment of the commission in question to a county judge who (in your phraseology) "looked after all the approval of orders covering deals during the collection" *and also* approved the annual account of the guardian for the statute contemplated that this would be done by the *same County Judge.* This would have been the case had the Ex-County Judge in the instant situation not neglected to enforce compliance by the guardian with the Article requiring the presentation of annual accounts. We are constrained, however, to hold that under these facts the commission in question must go to the present County Judge who approved the annual accounts for our only decided case (Grice vs. Cooley, *supra*) states that the commissions "were clearly intended for the benefit of the officer performing the duty." The "duty" referred to being that of conducting the hearing on the annual account and approving same when satisfied that the amount shown therein is correct.

We are conscious that the effect of this holding is to deprive the Ex-County Judge of compensation for a certain amount of labor performed by him, but we are less troubled by this when we take into consideration the fact that he had enforced the provisions of Chapter 9, Title 69 of the Revised Civil Statutes, he would have received this compensation. We realize also that the effect of this holding is to grant to the present County Judge compensation for a certain amount of labor

which he did not perform, but we are less concerned with this because it appears that the present official *did* compel the guardian to comply with Chapter 9 aforesaid, and file the reports thereby required.

You are accordingly advised that, in the opinion of this Department, the commission in question is payable to the present County Judge who approved the annual accounts.

Very truly yours,

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

Op. No. 2695, Bk. 62, P. 251.

COUNTY JUDGE—COMMISSION—GUARDIANSHIPS—ESTATE OF DECENDENTS.

I. Under Article 3926 the county judge is entitled to a commission on the money on hand at the death of the testator or intestate and coming into the hands of the executor or administrator, and is also entitled to a commission on money on hand at the time of the creation of a guardianship, even though such funds may be the corpus or a part of the corpus of the estate.

Article 3320
Article 3624
Article 3689
Article 3926
Article 4225
Article 4297
Article 4310

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 28, 1927.

Honorable J. E. Abernathy, County Attorney, McKinney, Texas.

DEAR SIR: This Department acknowledges receipt of your letter of the 9th instant requesting an opinion on the following question:

"Is the county judge permitted under Article 3926 to collect a commission on the money on hand at the death of a testator or intestate and coming into the hands of the executor or administration, and also on money on hand at the time of the creation of a guardianship and coming into the hands of the guardian, such funds being the corpus or part of the corpus of the estate?"

Section 1, of Article 3926 with reference to the fees of the county judge, reads as follows:

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

The question to decide is whether the expression "actual cash receipts of each executor, administrator, or guardian" includes the money on hand at the time of the death of the testattor or intestate or at the beginning of the guardianship. The writer has been unable to find any authority construing this act and for this reason will briefly review the history of the act concerning fees of the county judge, executors, administrators, and guardians.

Under the Acts of 1876, Page 126, Section 121, it was provided that executors and administrators shall be entitled to receive in cash and the same commission upon all sums they may pay away in cash. But the act also provided that no commission shall be allowed on money received which was on hand at the time of the death of the testator or intestate or for paying out money to the heirs or legatees as such. It seems that the Legislature clearly recognized that the term "actually received in cash" would include money on hand at the time of the death of testator or intestate, for if such had not been the case it would have been unnecessary to provide in the same statute that this commission shall not include money received which was on hand at the time of the death of the testator or intestate.

Under the Acts of 1876, Page 187, Section 140, the same Legislature provided that the guardian of an estate is entitled to five per cent upon all sums that he actually receives or pays away in cash. Nothing was mentioned in the act concerning money on hand at the time of the commencement of the guardianship or money paid out on final settlement of a guardianship. But under the Revised Statutes of 1879, Article 2698, a clause was added to the original act which provided that the act should not be construed to include money on hand at the time of the commencement of the guardianship. Therefore, it seems that the Legislature clearly recognized that the failure of the original act to exclude a commission on the money on hand at the time of the commencement of the guardianship would give the guardian a commission on such money, for if such was not the case, it would not have been necessary three years later to add to this provision to the statutes.

Under the Acts of 1876, Page 285, Section 6, the same Legislature made provision for the fees of the county judge in probate matters and contained the identical provisions that are now contained in Article 3926 above quoted. The statute with reference to the commission of the county judge has remained in force for more than fifty years and has never been changed or altered in any respect. It seems therefore, that the Legislature clearly intended that the county judge should receive a commission on all sums actually received by an executor, administrator, or guardian, regardless of the source from which it came. The fact that the commission allowed the

county judge is exceedingly small, and is allowed only on receipts and not on disbursements, as compared with the commission of five per cent allowed executors, administrators, and guardians for receiving money and the same commission for paying out money, also shows that the Legislature probably thought that the restrictions placed upon executors, administrators, and guardians should not apply to the county judge. The statutes with reference to the judges also provides that "no more than one such commission shall be charged on any amount." The fact that the money on hand at the beginning of the administration or the guardianship will have to be included in every annual or final account filed, also shows, in the opinion of the writer, that it was contemplated that the judge should receive a commission on the amount on hand at the beginning of the probate proceedings, but should be collected only one time.

Article 3320 provides for annual exhibits under oath by an executor or administrator showing fully the condition of the estate. In order for this report to be made, it is necessary that the same show the amount of money that came into the hands of the executor or administrator for administration. Article 3634 provides for the filing of a final account by executors and administrators which account must show, among other things, the property that has come into his hands belonging to the estate. This report will require a showing as to the amount of money on hand at the beginning of the probate proceedings, and in the absence of any restrictions, the same is "An actual cash receipt."

In an opinion rendered by this department on December 20, 1915, and printed in Report and Opinions of the Attorney General for 1914-16, Page 278, it was held that the county judge is not entitled to the fees mentioned in Article 3926 upon the appointment of an independent executor, for the reason that in such casss nothing is done except the probating and recording of the will and the return of an inventory, appraisement, and list of claims, and the inventory is not considered as an exhibit contemplated by Article 3926. While it was not necessary to decide in this opinion the question we are now called upon to decide, yet the opinion indicates that in making an annual or a final account by an executor or administrator, the amount on hand at the commencement of the probate proceedings will be considered a part of the exhibit upon which the county judge will be entitled to a commission.

In 24 Corpus Juris, Page 977, the following rule with reference to the commission of executors and administrators is given:

"The commissions of an executor or administrator are regarded as his entire compensation, not only for collecting the assets of the estate, but also for the labor, risk, and trouble attending the entire administration

and settlement, and it is therefore generally held that commissions should be allowed upon any and all property of the estate which comes into the possession of the representative and for which he accounts."

We see from this general rule that an executor or administrator is entitled to a commission on all of the estate for which he is accountable. Is there any reason why the same rule should not apply to the commission of the county judge:

In the case of Goodwin vs. Downs, 280 S. W., 512, the court allowed a commission to the county judge on the total receipts of the business which was carried on by the administrator for the purpose of carrying out unfilled contracts of the deceased. If this constitutes actual receipts under Article 3926, then it seems, without doubt, that the money on hand at the beginning of the administration will also constitute receipts under this article.

Article 4297 required the final account of a guardian to be made which must include property received by the guardian and belonging to the ward during his guardianship. Both the annual and final accounts of the guardian must of necessity contain an exhibit showing the amount of money on hand at the beginning of the guardianship. In the case of Grice vs. Cooley, 179 S. W., 1093, the court held that the term "exhibits" as used in Article 3926 referred to the annual accounts of the guardians as well as the final accounts. While this case deals only with the question of the judge charging his commission on the annual accounts without the necessity of waiting until the final account is approved, yet the construction in this case of the word "exhibit" throws some light upon the matter now under consideration.

You are advised, therefore, that it is the opinion of this department that the county judge is entitled to a commission on the money coming into the hands of the executor, administrator, or guardian at the beginning of the probate proceedings, even though said money may be the corpus or a part of the corpus of the estate.

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

Op. No. 2696, Bk. 62, P. 257.

COUNTY ATTORNEY — FEES IN DELINQUENT TAX SUITS— "TRACT" AS DEFINED BY STATUTE.

1. The term "tract" as defined in Article 7334, means that a city lot is considered as a tract, and does not mean that all city lots in one addition are considered only as one tract.
2. Each city lot that is rendered for taxation with a separate valuation is a tract under the provisions of Article 7332.

3. Where several adjoining lots are rendered together for taxation with one valuation, all of said lots are to be considered as only one tract.
Article 7332.
Article 7334, Revised Civil Statutes, construed.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 15, 1927.

Honorable H. L. Faulk, County Attorney, Brownsville, Texas.

DEAR SIR: This Department acknowledges receipt of your letter concerning the fees of a county attorney in delinquent tax suits. You state that you have a suit involving thirty separate town lots in the same addition with separate valuations for each lot; that these lots are situated in three blocks, sixteen being in one block, thirteen in one block, and one in another block. You ask if you are entitled to fees on the basis of thirty tracts or whether the same should be only on the basis of three tracts or one tract. Your question involves a construction of Article 7334 which defines the term "tract."

Article 7332 provides a fee for the county attorney for the first tract in one suit and one dollar ($1.00) for each additional tract involved in the same suit. Let us first consider the construction to be placed on the term "tract" without the definition given in Article 7334 and probably arrive at the intention of the Legislature in giving the definition in Article 7334.

In Webster's New International Dictionary, the term "tract" is defined as follows: "An expanse; an area, large or small; a margin of strip not definitely bounded; as, a wooded tract; and unexplored tract of sea." In Black's Law Dictionary, we find the term defined as follows: "A lot, piece, or parcel of land, of greater or less size, the term not importing in itself any precise dimension." In 38 Cyc. Page 669, we find this definition: "Something drawn out or extended; a margin or quantity of land or water of an indefinite extent; a lot, a piece, or parcel of land, of greater or less extent; a lot, piece, or parcel of land, of greater or less size the term not importing in itself, any precise dimension; an area or margin of land or water of indefinite extent."

We see, then, that there is no exact definition of the term "tract" when applied to the fees of the county attorney in Article 7332. We know, however, that in common parlance we usually do not refer to a city lot as a tract of land, but in speaking of farm lands, or a large body of land or a piece of land which is not cut up into subdivisions, or of an undeveloped portion adjoining a city, we usually refer to the same as a tract of land. For instance, we usually refer to a tract of land that has been cut up into an addition or additions.

When we divide property into two main parts, personal and real estate, we think of the real estate in the rural sections and in the towns and cities. This is the way the collector handles

the same on the delinquent tax rolls, the acreage property being placed numerically according to the abstract numbers of the survey and the lots and blocks of various towns and cities are carried separately. See Article 733. There are two kinds of renditions made on the rendition sheets, known as "acreage" and "lots" and "blocks." Acreage is the name given to farm land or lands or city property that has not been divided into lots and blocks. The lots and blocks are the divisions made or real estate in towns. See Articles 7162, 7196, and 7197. Without a statutory definition of the term "tract," we think of it as a quantity of land of indefinite extent outside of a town or city, that is, located in the rural section of the country. We think of "land" as any portion of the surface of the earth in the rural section; we think of a lot as a piece or parcel of land within a city or town. We ordinarily speak and think of a "tract of land", but never think of a "tract of lot."

Article 16, Section 51, of the Constitution of Texas defines a homestead not in a city or town which may be in one or more parcels, and the homestead in a city or town as lot or lots not to exceed in value five thousand dollars at the time of their designation as a homestead. The term "parcels" as used in this provision of the Constitution is synonymous with the term "tract" as ordinarily used. The courts, in construing the rural homestead provisions, usually refer to "tracts". See Baldeschweiler vs. Shipp, 50 S. W. 644; Autrey vs. Reasor, 108 S. W. 1162;Manfin vs. McCall, 54 S. W. 623.

In the case of Rogers vs. Ragland, 42 Texas 422, the court construed the Constitution of 1871 with reference to the homestead in a city or town. The provisions of the Constitution provided for a homestead of city, town, or village lot or lots. Defendant in error was claiming as a part of the homestead some lots in a city which were really used for agricultural purposes. The court held that such land could not be considered as a part of a city homestead and uses this language:

"The question we are considering was examined to some extent in the case of Taylor vs. Boulware (17 Texas, 79), and the Court said: 'The term lot or lots used in the Constitution, 'must be taken and construed in the popular sense of those terms,' and when so used, never would be considered as embracing land within the jurisdictional limits of the corporation, not connected with the limits of the city.' We are of the opinion that the plan of the town proper does not extend over the tracts of land in controversy in such a way as to bring them as lots within the terms town or city lots, as usually understood."

The case of Bank vs. Litchfield, 144 S. W. 350, similarly construed the provisions of the present constitution.

The court referred to a "22 acre tract of land within the limits of the city of Lone Oak which was used for agricultural purposes and held that this was not "lot or lots" as used in the Constitution. The court uses this language:

"Was the 22-acre tract also urban property? If this tract of land though used in the same manner for the benefit of the family as that shown by the evidence, had been situated several miles distant in the country, there would have been no question about its being properly classed as rural property. The only fact, then, which is entitled to any special weight as tending to show that it is urban property, is its location near to, or possibly within the corporate limits of the town of Lone Oak. It is really unimportant whether the land was within or without the corporate limits of Lone Oak as these were originally established. The evidence is undisputed that before the purchase of the Wallace tract by Litchfield there had been an effort made by the city council to exclude that tract, with other lands not used for city purposes, upon the ground that they were rural property and should not have been included within the town limits. The evidence also conclusively shows that this tract was used exclusively for rural purposes. 'The term "lot or lots," used in the Constitution must be taken and construed in the popular sense of those terms, and when so used never would be considered as embracing land within the jurisdictional limits of the corporation, not connected with the plan of the city!"

We do not think of land in a survey when it is inside of a town or city. It is carried as lots and blocks in such. In a survey, it is given the number of acres, the name of the survey and the abstract number of the survey. It does not matter whether it is a large farm or a small portion of only five acres or less. If it is a part of an addition, the property loses its identity as a part of the survey for tax purposes and even for the purpose of conveyance. Therefore, for taxation purposes, a tract of land should mean any portion of a survey in the rural section, whether one acre or one hundred acres where the same is described by one set of field notes. A person may own one hundred acres and may survey and divide the same into ten tracts of ten acres each. Likewise, a tract should also mean a lot in a city which has been platted and set off from other lots. Therefore, the Legislature has supplied a definition of the term which we do not find in the dictionary.

Our delinquent tax laws are found in Chapter 10 of Title 122 of the Revised Civil Statutes of 1925. A great part of this chapter consists of amendments of the 1911 Statutes by the second and third called sessions of the Thirty-eighth Legislature of 1923. An examination of the various articles of this chapter shows that the Legislature did not use the term "tract" as applying to city lots. Article 7320 uses the expression "all lands or lots" with reference to a lien for taxes. Article 7321 provides for the preparation of a list of "all lands, lots, or parts of lots" showing when the "lands or lots" were reported delinquent and requires, in bulk assessments, for apportioning to each "tract or lot" its share of the cost. Here we see that the Legislature clearly had a distinction between the terms "tract" and "lot." Article 7323 provides for taxing a publishers' fee against each "tract or parcel of land," and limits the amount paid to publishers to 25c for each "tract of land." Article 7324 provides for sending notices to the owners of any

"lands or lots" showing the taxes against each such "lands or lots," and in the same article uses the terms "lots or lands," "tract or lot of land," and "tract, lot, or parcel of land." Article 7327 refers to "lands and lots" of unknown owners. Thus we see that the statutes do not refer to lots in an addition or acres in a survey, but simply refers to "lots" and "lands" and with few exceptions where the word "tract" is used, the word "lot" is also used, thus indicating that the word "tract" in its ordinary meaning is not considered as including a city lot. We also notice that the term "lot or tract of land" is commonly used, which further shows that in its ordinary meaning the term "tract" does not include a city lot. Thus, in the absence of any provision explaining what is meant by the term "tract" when Article 7332 says that the county attorney is entitled to a fee according to the number of tracts, there is some doubt as to whether the term would include city lots, since all of the statutes use the word "lot" separately from the word "tract." Therefore, in 1923, at the second called session of the Thirty-eighth Legislature, which act was amended at the third called session of the same Legislature, a clause was inserted in the amendment to old Article 7691 which read as follows:

"The term 'tract' in this bill shall be construed to mean all lands or lots in any survey, addition or subdivision or part thereof owned by the party or parties being sued for delinquent taxes."

This provision was codified in the 1925 statutes as Article 7334 which reads as follows:

"The term 'tract' shall mean all lands or lots in any survey, addition or subdivision or part thereof owned by the party being sued for delinquent taxes."

It will be noticed that the original statute provided that the term tract "shall be construed" to mean all lands in any survey or lots in any addition. It is clear to the writer that this statute was for the purpose of providing a clear definition of the word "tract", since, as seen above, the authorities do not make a clear definition and the use of the word in all statutes indicates that it does not refer to city lots. Therefore, since the statute has set the fees of the county attorney on the basis of the number of tracts involved in the suit, it is necessary to make some provision with reference to the meaning of the term "tract" so that the county attorney will receive compensation for bringing suits for delinquent taxes on city lots as well as acreage property, and this provision was for the purpose of showing that the term should not be limited to the ordinary meaning, but should also "be construed" to mean lots in an addition. We also find that Article 7323 provides for the taxing a publishers' fee of 25c against "each such tract or

parcel of land" and limits the newspapers' fees to this amount for "each tract of land". Therefore, we see that the definition given the term "tract" applies to publication fees as well as to the fees of the county attorney. Could it be said that if a person owns one hundred lots which have been rendered separately with separate valuation, that only a fee of 25c for publication can be charged under Article 7323 just the same as against a person who owns one lot which is delinquent, Is it not a better construction to hold that each lot is construed as one tract, and that each delinquent is to pay costs according to the number of lots delinquent? It would probably have been plainer if the Legislature had made Article 7334 to read: "All land in any survey or lots in any addition or subdivision, or part thereof." The writer believes that this was the real intention of the Legislature.

If the Legislature had intended that the definition given the word "tract" means that all real estate owned by one person and situated in the same survey, whether city lots or acreage property, shall be considered only as one tract then why did it not say so, as it would have been just as easy to have said this as not to say it? But when the Legislature said that the term shall be "construed" to mean a certain thing, the writer believes that it was the intention that this provision was only an effort to make a clearer definition of the word, and was not for the purpose of limiting the fees of an officer by limiting the term to all property owned by a person in the same survey. A person may own one hundred acres of land in the Northwest corner of a survey and fifty acres in the southwest corner of the same survey, which do not adjoin, and might own three lots in three different additions which are carved out of the same survey in which the acreage property is situated. Under the narrow construction of Article 7334, the county attorney would be entitled to a fee for only one tract, although there are five separate and distinct tracts which do not join. On the other hand, if the two tracts of acreage property are in separate surveys and the three city lots are in s eparate surveys, so that no two tracts are in the same survey, then the county attorney would be entitled under this construction to a fee on the basis of five tracts. It is just as much work for the county attorney to file and prosecute the suits under the first example as under the second. But, under a narrow construction, the imaginary survey lines under the second example will give him a greater fee.

A person may own ten lots in the same addition and render them for taxes with separate valuation for each lot. He may give a lien on each lot to ten different persons. The county attorney is required to abstract the entire property and make as parties to the suit all persons who hold a lien against each lot, but, under the narrow construction, he will be entitled to a fee on the basis of one tract. It is just as much

work to file and prosecute the suit where all the property is located in the same addition as it is where all the property is located in different additions

Section 4 of the original act of Chapter 21 of the Acts of the Third Called Session of the Thirty-eighth Legislature, being the same act that adopted the present Article 7334, contained a provision which read as follows:

"When two or more lots or blocks, or tracts of land are rendered in the same rendition with separate valuations, and the taxes due thereon become delinquent, the tax collector shall, when tendered, accept payment of the taxes due on each lot, or block or tract of land having such separate valuation."

We see, from the above quoted phrase, that the Legislature still recognized that the term "tract" is ordinarily not used as meaning a city lot, or else it would not have been necessary to use the word lot or block.

Article 859 of the Penal Code provides as follows:

"Whoever shall willfully injure or deface any public building or the furniture therein shall be fined not less than five nor more than five hundred dollars. "

Article 860 of the Penal Code provides as follows:

"The term 'public building,' as used in this chapter, means the capitol and all other buildings in the capitol grounds at Austin, including the executive mansion, the various State asylums and all buildings belonging to either, all college or university buildings erected by the State, all court houses and jails and all other buildings held for public use by any department or branch of government, State, county or municipal. "

The phraseology or Article 860 in the Penal Code is similar to that used in Article 7334 in the Revised Civil Statutes. It provides that the term "public building" means the capitol and all other buildings, just as Article 7334 provides that the term "tract" means all lands, lots, etc. In order to say that all property mentioned in Article 7334 is to be considered as only tract, under the same construction, we would be required to say that all buildings mentioned in Article 860 of the Penal Code mean only one building, and that a person could not be several times prosecuted for defacing several of the buildings names, or that before he could be prosecuted for injuring a public building, he must injure all of the buildings mentioned in Article 860 of the Penal Code. In short, the writer can see no reason for reading into Article 7334 something that is not said when the same is clear without any addition.

It is a matter of common knowledge that at the time of the adoption of the delinquent tax act of 1923, there was no incentive for the officers to file and prosecute tax suits on ac-

count of the small fees allowed and the fact that the same were accountable for under the maximum fee bill. The emergency clauses of the two acts state that the present laws are inadequate, cumbersome, and needlessly expensive to the counties. What could make the statute more cumbersome and inadequate than to construe Article 7334 to mean that if one person owns a great number of lots in the same addition to a city, the fee of the county attorney shall be based only upon one tract. Instead of making an incentive for officers to do all that is possible to collect delinquent taxes, the reverse will result. For example, a person may own ten city lots in the same addition which are delinquent for taxes and there may be liens against each lot held by different persons. The county attorney would see that by filing suit on one lot, he would get one fee, but for the work of abstracting title to all of the lots and making all lien holders parties to the suit, he would not get any additional fee. Therefore, there would be the temptation to file a suit on one tract and permit the others to go without suit.

The writer cannot believe that it was the intention of the legislature to limit the fees of the county attorney simply because all of the property owned by a delinquent tax payer happens to be within the imagined lines of one survey, but on the principle that the laborer is worthy of his hire, he is to be paid according to the amount of work done. If there is only one tract on which it is necessary to file suit, then he is to be paid on the number of tracts involved in the suit. It is no more trouble to file a suit on two lots in different additions than it is to file suit on two lots in the same addition. Also, it seems to the writer that a person who allows two lots to go delinquent should pay a small amount more than the person who allows only one lot to go delinquent, and it is clear that this was the intention of the Legislature. The collector is paid according to the amount of work done, and is it not reasonable that the Legislature intended to compensate the county attorney in the same manner?

The writer believes that the manner of rendition of the property can have something to do with determining the number of tracts. For instance, a person may own an entire block in an addition and render the same at a valuation of a certain amount for the entire block without reference to the value of any particular lot in said block. In such case, there would be only one tract, even though the plat may show that the block contains several lots. The suit can be brought to foreclose the lien on the block alone. Also, a person may own Lots one and two, for example, of a certain block of a certain addition and may have his home on both lots and render the same as Lots 1 and 2 with a certain valuation for the entire property. In such case it is only one tract. If property is rendered in this manner, neither the assessor nor the collector has the right to

change the rendition on the rolls so as to make it appear as two tracts with separate valuations. See State v. University, 37 S. W. 1 (Tenn.).

You are advised, therefore, that it is the opinion of this department, under the provisions of Article 7534, the term "tract" as defined therein does not mean that all lots in any addition are considered as one tract, but that said provisions is only a definition of the term "tract" and has, as part of its purpose, to provide that a city lot as well as acreage property, is considered as a tract. Therefore, in the case mentioned by you, since there are thirty separate city lots, each with a separate valuation, you are entitled to receive a fee on the basis of thirty tracts.

Very truly yours,
H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2705, Bk. 62, P. 313.

COUNTY COMMISSIONERS—SALARIES.

1. The salaries of county commissioners are determined by the valuations of the county as shown by the approved tax rolls for the previous calendar year and any change in valuations will not affect salaries until January first following the approval of the tax roll.
2. The salaries of county commissioners based upon the 1927 tax rolls do not become effective until January 1, 1928.
Construing: Article 2350 Revised States of 1925.
Chapter 46, Acts of the First Called Session of the Fortieth Legislature.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, October 19, 1927.

Honorable J. D. Patterson, County Judge, Rankin, Texas.

DEAR SIR: This department acknowledges receipts of your letter of the 10th instant which reads as follows:

"The assessed valuation of Upton County for the year 1926 was less than six and one-half million dollars, but the roll just approved for the year 1927 is more than six and one-half million. Under Chapter 46 Acts of the First Called Session of the Fortieth Legislature at what time will the commissioners of this county be entitled to draw twelve hundred dollars annually?"

Article 2350 of the Revised Statutes of amended by Chapter 46, page 138, Acts of the First Called Session of the Fortieth Legislature, sets the salaries of the county commissioners according to the assessed valuation of the county and provides:

"'Assessed valuation' means the total assessed valuation of all properties as shown by the tax rolls certified by the county assessor, approved by the Commissioners' Court and approved by the Comptroller for the previous year. "

Prior to the enactment of this statute and Chapter 290 of the Acts of the Regular Session of the Fortieth Legislature, the salaries of the commissioners were determined according to the taxable valuation for the year 1924. It is clear that it was the intention of the Legislature by the passage of the recent act that the salaries may each year be increased, decreased, or remain the same, according to the taxable valuation, and instead of basing the salaries on the 1924 valuation, the new act bases the salaries on the valuation for the previous year. By the term "previous year" we believe that the Legislature meant the calendar year for which taxes are assessed and did not intend that the salaries might be changed at anytime after the approval of a tax roll for a year.

Article 7222 provides that the assessor shall on or before the first day of August of each year return his rolls to the County Board of Equalization. Article 7224 provides that after the Board of Equalization has made all corrections, if any be necessary, the assessor shall file copies of the rolls with the collector, county clerk, and state comptroller. We see, then, that the rolls for any year may be finally approved at any time after August first.

If the Legislature had intended by the amendment to Article 2350 that the salary of a commissioner might be changed as soon as the tax roll is approved, if the same shows a valuation sufficient to grant a change, it would have been an easy matter to have said so. Article 1645 of the Revised Statutes and also the amendment to said article by chapter 35, Acts of the First Called Session of the Fortieth Legislature, provides that the salary of a county auditor is based upon taxable valuation and shall be computed from the "last approved tax roll." This same Legislature clearly indicated that the salary of the auditor is based upon the last approved rolls, but as to the salary of a commissioner it merely stated that it is based upon the roll for the "previous year." The roll for the year 1927 might be finally approved in August, 1927, but this roll does not constitute the roll for the previous year until January 1, 1928.

You are advised, therefore, that the salary of a county commissioner is determined by the valuation as shown by the approved tax rolls for the previous calendar year, and that any change in valuation will not affect the salary until January 1st following the approval of the tax roll. In the specific case inquired about by you, the salary of a county commissioner based upon the 1927 tax rolls does not become effective until January 1, 1928, and the salaries of the county commissioners for the remainder of the year 1927 are based upon the approved tax rolls for the year 1926.

Yours very truly,

H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2707, Bk. 62, P. 326.

COSTS—FEES—DELINQUENT TAXES.

1. Where land is sold under foreclosure for delinquent state and county taxes for an amount less than the judgment, the costs and fees due officers cannot be paid until the entire taxes, penalty and interest are paid.

Construing Article 7333, Revised Civil Statutes, 1925.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, November 16, 1927.

Honorable S. H. Terrell, Comptroller of Public Accounts, Capitol.

DEAR SIR: This department acknowledges receipt of your letter, in which you request an opinion of this department on the following question: Where land is sold under foreclosure for delinquent state and county taxes for an amount less than the judgment, are the officers entitled to retain any costs or fees before the full payment of the taxes, penalty and interest?

Our first law providing for suits for foreclosure of liens for taxes was passed in 1895, as shown by the Acts of the Regular Session of the Twenty-fourth Legislature, Chapter 42, page 50 (G. L. Vol. 10, p. 780). Section 9 of this act made provision for the fees of the county attorney in tax suits, and provided that the same should be taxed as costs against the land to be sold and paid out of the proceeds of the sale after the taxes and interest due the State are paid. Section 11 of this act gave incorporated cities and school districts the right to enforce collection of delinquent taxes under this act.

The Act of 1895, above mentioned, was largely re-written by Chapter 103, page 133, Acts of the Regular Session of the Twenty-fifth Legislature in 1897 (G. L. Vol. 10, p. 1186). Section 9 of this last act made provision for the fees of the county attorney, tax collector, sheriff, district clerk, and county clerk, and after stating the amount of fees allowed each of these officers, contained this provision:

"provided, that in no case shall the State or county be liable for such fees, but in such case they shall be taxed as costs against the land to be sold under judgment for taxes and paid out of the proceeds of sale of same, after the taxes, penalty, and interest due thereunder to the State are paid."

The above-quoted part of Section 9 of the Act of 1897 was amended by Chapter 13, page 38, Acts of the Second Called Session of the Thirty-eighth Legislature, and omitted the words, "to the State," so as to make the same read as follows:

"provided that in no case shall the state or county be liable for such fees but in each case they shall be taxed as costs against the land to be

sold under judgment for taxes, and paid out of the proceeds of sale of same after the taxes, penalty and interest due thereon are paid."

Section 11 of the Act of 1897 provided as follows:

"Any incorporated city or town or school district shall have the right to enforce the collection of delinquent taxes due it under the provisions of this act."

The Act of 1897 has been amended from time to time, and the various provisions thereof are found in different articles of Chapter 10, Title 122 of the Revised Civil Statutes for 1925. Article 7333 of this title provides as follows:

"In each case such fees shall be taxed as costs against the land to be sold under judgment for taxes, and paid out of the proceeds of sale of same after the taxes, penalty and interest due thereon are paid, and in no case shall the State or county be liable therefor."

Article 7343 provides, in part, as follows:

"All laws of this State for the purpose of collecting delinquent State and county taxes are by this law made available for, and when invoked shall be applied to, the collection of delinquent taxes of cities and towns and independent school districts in so far as such laws are applicable."

It is well settled that in ordinary civil suits for foreclosure of liens on real estate, the costs of the suit must be paid before applying the proceeds of the sale to the judgment. It is also true that Article 7328 provides, with reference to tax suits, that in case of foreclosure an order of sale shall issue and the land sold thereunder as in other cases of foreclosure. The only reason, then, by which it may be claimed that the officers in tax suits should be paid before the judgment is that provision of Article 7328, providing that an order of sale shall issue and the land sold as in other cases of foreclosure. But are we going to say that this provision shall override the entire provisions of Article 7333, which clearly provide that the costs are to be paid *after* the taxes, penalty, and interest due thereon are paid? If so, it would be just as sound to say that Article 7332, which limits the sheriff's fee to one dolalr for selling the property and making deed thereto, must give way to the provisions of Article 3933, which is the general fee bill for sheriffs and which allows a fee of two dollars in ordinary foreclosure cases merely for executing a deed to the purchaser of the real estate under an order of sale, and also allows in addition thereto a commission on the amount realized from the sale.

Our attention has been called to the decision of the Court of Civil Appeals in the case of City of San Antonio vs. Campbell, 56 S. W. 130, in which it was held that where, on a sale of lands for *city* taxes, the purchase price is not sufficient to pay both taxes and costs, the entire costs must be first paid from

the proceeds. This decision cites as authority for this holding the two decisions of the Supreme Court in City of San Antonio vs. Berry, 48 S. W. 499, and Greer, Miles & Co. vs. Riley's Estate, 53 S. W. 578. In citing the Campbell case, we must keep in mind, as already set out above, the original Act of 1895, as well as the Act of 1897 and present Article 7343, provided that cities may avail themselves of the provisions of law for enforcing the collection of State and county delinquent taxes. In speaking of the provisions of the Act of 1895, the Supreme Court in the case of San Antonio vs. Berry, above cited. used this language:

"In our opinion, section 11 was not intended to take away the express authority given to any city by special charter to bring an ordinary suit to recover its taxes. Its purpose was merely to authorize cities, towns, and school districts to accept the benefits of that act, should they see proper to proceed in the manner pointed out therein. As was said in our preliminary statement, the transcript does not show when the original petition was filed. If necessary to sustain the judgment, we should have to hold that it was filed before the statute referred to went into effect. It is clear, we think, that if the suit was brought before the statute was passed, the proceeding would not be affected by it. Not only is there nothing to show that it was intended to abridge any existing remedies conferred by law upon the corporations and quasi corporations mentioned in section 11, but it is clear that that section was to have only a future effect, and was not intended to operate upon existing suits. Besides, it is apparent from the amended petition upon which the case was tried that it was drawn without reference to that law. The charter permitted a suit to recover the taxes, and since no restrictions are prescribed in reference to the proceedings, it must be held that it was meant that it could proceed as under the general laws for the enforcement of liens, and that it could subject the property upon which the lien existed to an absolute sale for the payment of the taxes due upon it."

In further support of the view that the suit of San Antonio vs. Campbell was brought without reference to the provisions of law, concerning foreclosure, as provided by statute, the appellate court in that case expressly approved a commission of $23 for the sheriff on the amount realized from the sale of real estate, while the Act of 1895 limited the fee of the sheriff to $2 for selling the property and making deed thereto, and the Act of 1897 limited the fee, as is now provided by Article 7332, to $1. This decision was rendered by the court in the year 1900.

The case of Greer vs. Riley's Estate, the other case cited in the Campbell case, merely held that court costs in the administration of an estate must be paid before the lien on the property which was sold.

Therefore, without in any sense attempting to overrule the decision of the Court of Civil Appeals in the case of City of San Antonio vs. Campbell, we say that this decision applies only in case of city or school district taxes, where the city or

school district has not availed itself of the provisions of the statutory proceedings for foreclosing the liens for taxes.

It may be said that in cases where the property is sold for less than the amount of the taxes due, and the proceeds are not applied to the costs due the officers that the officers will be required to perform services for which they receive no compensation. This will be true, unless they are compensated by the commissioners' court for ex-officio services, as provided by Article 3895. However, it is a well settled principle that an officer is required to perform all duties imposed upon him, even though no compensation is provided for the services he is required to perform. See McCalla vs. City of Rockdale, 246 S. W. 654, and Knight vs. Harper, 279 S. W. 589. See also Duclos vs. Harris County, a recent unpublished decision of the Commission of Appeals.

You are advised, therefore, in answer to your question that where land is sold under foreclosure for delinquent State and county taxes for an amount less than the judgment, the costs and fees due the officers cannot be paid until the entire taxes, penalty, and interest are paid.

Yours very truly,

H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2711, Bk. 62, P. 347.

COUNTY CLERK—EX-OFFICIO COMPENSATION.

1. Article 3932 of the Revised Civil Statutes for 1925 limits the amount of ex-officio compensation of the county clerk to Twenty-five ($25.00) Dollars for each one thousand (1,000) inhabitants, with a maximum of Five Hundred ($500.00) Dollars

2. The amount of ex-officio compensation allowed the county clerk under Article 3932 is further limited to the amount allowed officers under Article 3895, so that the amount allowed, together with the fees and excess fees earned, will not exceed the maximum fees and excess fees allowed under Articles 3883 and 3891.

3. In a county which contains a population of 50,350, the commissioners' court may allow the county clerk ex-officio compensation in any amount not to exceed Five Hundred ($500.00) Dollars, provided said amount does not increase the entire compensation of the county clerk beyond Forty-two Hundred and Fifty ($4250.00) Dollars per annum.

4. If the county clerk in a county of 50,350 population has earned fees and excess fees in excess of Thirty-seven Hundred and Fifty (3750.00) Dollars, then the commissioners' court can allow ex-officio compensation only in the amount of the difference between Forty-two Hundred and Fifty ($4250.00) Dollars and the amount of fees and excess fees earned.

Construing Articles 3883, 3891, 3895, and 3932.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, November 30, 1927.

Mr. Joe M. Fugitt, County Auditor of Hunt County, Greenville, Texas.

DEAR SIR: This department acknowledges receipt of your letter of the 22d instant, which reads as follows:

"Kindly advise me the amount of ex-officio the County Clerk of this County is entitled to draw, and how the same shall be paid."

This question involves a construction of several articles of our statutes, particularly Articles 3895 and 3932.

Article 3932 provides, in part, as follows:

"For all ex-officio services in relation to roads, bridges and all other public services not otherwise provided for, to be paid upon the order of the commissioners' court out of the treasury, the county clerk shall receive not less than ten dollars nor more than twenty-five dollars per annum for each one thousand inhabitants of his county; provided, that the total amount paid the clerk in any one year shall not be less than fifty nor more than five hundred dollars."

The original act, which comprises present Article 3932 is found in the Acts of 1881, page 99. This act clearly placed a limitation of Five Hundred ($500.00) Dollars per year that may be paid the county clerk as compensation for ex-officio services.

By the Acts of 1897, Special Session, page 5, the fees of various officers were fixed, including the maximum amount of fees allowed to be retained by officers, and Section 15 of this act read as follows:

"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 each 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."

In the case of Navarro County vs. Howard, 129 S. W. 857, the Court of Civil Appeals held that prior to the Act of 1897, above mentioned, it was mandatory upon the commissioners' court to pay to the clerk the amount provided for in the Act of 1881, which is now Article 3932, but further held that with the passage of the Act of 1897 it was within the discretion of the court to allow an amount within the limits provided by the act, and used this language:

"This court is of opinion that the provisions of said section 15 substitutes the discretion of the commissioners' court, within certain

limits, for the arbitrary method of fixing the compensation of county clerks for ex officio services as contained in the act of 1881. (Now Art. 3932). And the commissioners' court of Navarro county having exercisedtheir discretion under said act and refused to allow the claim of appellee herein sued on, he has no cause of action therefor against said county."

You will notice that the court stated that it was within the discretion of the court to pay the clerk ex-officio compensation within certain limits. What limits? It can mean nothing other than the limit of $500.00 mentioned in the Act of 1881, or in the present Article 3932. The appellate court in this case agreed with appellant that the Act of 1897 did not repeal the Act of 1881 with reference to the ex-officio salary of county clerks, which was limited to $500.00 per annum.

The Act of 1897, above mentioned, was carried forward as Article 3893 of the Revised Statutes for 1911. Therefore, under the decision in the above mentioned case, it was held that Article 3893 of the 1911 Statutes, which is Article 3895 of the 1925 Statutes, did not repeal Article 3862 of the 1911 Statutes, which is Article 3932 of the 1925 Statutes.

By the Acts of 1913, page 242, Article 3893 of the 1911 Statutes, which is quoted above as Section 15 of the Act of 1897, was amended, and this article as amended is carried forward as Article 3895 of the 1925 Statutes, and reads as follows:

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

So, then, the only question to decide is whether the amount of ex-officio compensation for the county clerk, as provided for by Article 3932, is exclusive, or whether the court may allow any amount of ex-officio within the limits prescribed by Article 3895?

In the case of Anderson County vs. Hopkins, 187 S. W. 1019, the county clerk was sued for $850.00 ex-officio compensation granted him on the ground that the amount allowed as ex-officio compensation increased his compensation beyond the maximum compensation provided by law. The court held that under the provisions of Article 3893 of the 1911 Statutes which, with amendments, now constitutes Article 3895, the clerk was entitled to any amount of ex-officio, just so the amount allowed did not increase his total compensation beyond

the amount of his maximum fees and excess fees allowed by law. In that case the clerk was entitled to a maximum salary of $2400.00, and maximum excess fees of $1250.00, making a possible $3650.00 that he could earn. The court held that the commissioners' court was authorized to pay the county clerk ex-officio compensation in any amount, just so that the total amount he had earned in fees, plus the amount allowed as ex-officio, did not exceed $3650.00. It would seem, then, that under this decision the commissioners' court is not limited to the $500.00 ex-officio compensation for county clerks as provided in Article 3932, as they permitted the clerk in this case to retain the sum of $850.00 ex-officio compensation. However, the question as to whether the compensation provided for by Article 3932 was exclusive was not raised in this case, and the only question discussed or raised was whether the court was permitted to allow compensation up to the amount of maximum fees and excess fees, and for this reason this case can be considered only as an authority on the question raised therein. The court did not even consider present Article 3932.

In the case of Veltman vs. Slater, 217 S. W. 378, the Supreme Court construed a similar statute with reference to the ex-officio compensation of sheriffs, and held that the special statute (now Article 3934), with reference to the ex-officio compensation of sheriffs was exclusive. In discussing Section 15 of the Acts of 1897, which is quoted above, and is Article 3895 of the 1925 Statutes, the court said with reference to said section:

"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."

Also in discussing the amendment of 1913 to Article 3893 of the 1911 Statutes, which is Article 3895 of the 1925 Statutes, the court says:

"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 allowances 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."

You are advised therefore that the amount of ex-officio compensation that may be paid the county clerk is not only limited by Article 3895, but is also limited by Article 3932. As to your particular county, we notice that the 1920 census

gives Hunt County a population of 50,350. Therefore, the maximum compensation allowed the county clerk under Article 3932 is $500.00. Article 3883 sets the maximum fees of the county clerk at $2750.00, while Article 3891 limits the excess fees to $1500.00, making a total amount of fees and excess fees of $4250.00 that the clerk may earn. The commissioners' court may allow the sum of $500.00 ex-officio compensation to the clerk, provided this amount does not increase the entire compensation beyond $4250.00. But if the fees and excess fees of the clerk are in excess of $3750.00, then the commissioners' court cannot allow the full amount of $500.00, but only the difference between $4250.00 and the amount of fees and excess fees earned by the clerk.

Yours very truly,

H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2712, Bk. 62, P. 353.

OFFICERS—COUNTY JUDGE AND EX-OFFICIO COUNTY SUPERINTENDENT—COMPENSATION.

The compensation allowed by Commissioners' Court to county judge who is ex-officio school superintendent should be paid out of general fund of county and not out of school funds.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, December 3, 1927.

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

DEAR SIR: You have requested this department to give you an opinion on the question whether the compensation of a county judge who acts ex-officio as school superintendent, should be provided by the commissioners' court out of the general fund of the county or out of the public school fund of the county. Replying to your request, you are advised:

Under the provisions of the act of 1893 (Ch. 122, General Laws of 23rd Legislature) the compensation of a county judge serving as ex-officio county superintendent of public instruction, was to be paid out of the school fund; but this part of the act was superceded and repealed by the act of 1897 (Ch. 5, Gen'l Laws of the 25th Legislature), and under the latter act the compensation of the county judge who served as school superintendent unquestionably could not be paid out of the school fund, but was payable out of the general funds of the county. Under the act of 1893, by the terms of which as before stated the compensation of the county judge was pay-

able out of the school fund, such compensation was little more than nominal, and was adjudged to the amount of school funds available in the county, with a minimum allowance of $25.00 per year.

Under the provision of the act of 1897, commonly known as the maximum fee bill (which as above pointed out repealed the law of 1893), the county judge when acting as superintendent of public instruction received "such additional salary for such services as may be provided by the Commissioners' Court not to exceed the sum of $600.00 per annum."

We will now examine legislation subsequent to the act of 1897 to ascertain if the compensation of county judges when acting as superintendents of public instruction is made payable out of the school fund; unless some such act, which by its terms or reasonable interpretation makes such compensation payable out of the school fund, is found the plain import of the act of 1897, which repealed all laws and parts of laws in conflict therewith must stand.

In 1920 (Ch. 57, Laws of the 36th Leg. 3rd C. S.), the Legislature increased the salary of county superintendents of public instruction, and also increased the allowance to be made the county judge who acts as superintendent of public instruction. Section 1 of this law provides that county superintendents of public instruction shall receive from the available school fund of their respective counties an increase in salary (scaled to the population of the respective counties) and that the Board of Trustees shall make annual allowance out of the State and county available school fund for the salary and expenses of the county superintendent. Section 2 provides that where a county judge acts as superintendent of public instruction, he shall receive for his services such salary as may be provided by the commissioners' court not to exceed the sum of $900.00 per annum.

Nothing in this act can be construed as attempting to provide for the payment of services of county judges acting as school superintendents out of the school fund. It is significant that the county board of trustees, who are the custodians of the school fund under the existing law, do not fix such ex-officio compensation of county judges, nor is provision made for the payment of such ex-officio compensation by the county board of trustees; but the authority to fix and provide the salary is given to the Commissioners' Court which has no jurisdiction or control over school funds. If it had been the intention of the Legislature to make the school fund liable for such ex-officio compensation of county judges so fixed by the Commissioners' Court, then the Legislature, presumably at least, would have made some provision by which such compensation when fixed by the Commissioners' Court should be certified to the county school trustees so that that body could

take same into account in the annual apportionment and expenditure of school funds.

Art. 2701 (R. S. 1925), under the title "Education," certainly contains no provision, either expressed or implied, for the payment of ex-officio services of county judges acting as school superintendents out of the school fund.

Art. 3888 (R. S. 1925), under the title "Fees of Office" provides that in a county where the county judge acts as superintendent of public instruction, he shall receive for such services a salary not to exceed $900.00 a year as the Commissioners' Court may provide. There is nothing in this law which impairs or affects the act of 1897, which repealed that provision of the act of 1893, by which the fees of county judges for services as superintendent of public instruction were paid out of the school fund.

Moreover, available school funds are set aside by the constitution and law, for certain specific purposes, including, it is true the salary of school superintendents. A county judge, though performing the duties of a school superintendent, is not in fact a school superintendent; he is not subject to the qualifications required of one who fills that office. He is a mere county officer charged by law with the duty of performing, ex-officio, certain services relating to the public schools of his county, for which services he is to receive such compensation as is fixed by the Commissioners' Court, and not to be paid out of the school fund.

The authority of the Commissioners' Court to allow compensation for ex-officio services is found in Art. 3895; and it can not be denied that compensation granted under this article should come out of the general fund of the county.

The Legislature has left it optional with counties of less than 3000 inhabitants to dispense with a superintendent of public instruction and relieve their small school fund of the burden of the salary of a county superintendent, whose salary, under existing law, is not less than $1600.00 which salary in, many instances, would be more than their allotment of state school funds.

And where a county exercises its option of not having a school superintendent, the plain intent of the law is, we think, for the Commissioners' Court to make an allowance to the officer for such ex-officio services and pay for the same out of the common county fund. We have seen that under the provisions of law which permit the Commissioners' Court to fix the compensation of a county judge for service as school superintendent, they may make an allowance of as much as $900.00. If this compensation must be paid out of the school fund, it would exceed many times in some instances the entire state allotment of school funds (based on scholastic population) which in some of these counties amounts to less than $100.00; and the contemplated relief to the school fund in counties with

a population of less than 3000 inhabitants by dispensing with the services of a county superintendent proper, would fail if the compensation of the county judge for serving as school superintendent was still to be paid out of the meagre school fund.

The full import and effect of the act of 1897 repealing the law of 1895, under which such ex-officio compensation was paid out of the school fund, still persists. The 40th Legislature passed an act (H. B. 386, Reg. Session 1927) providing that the county judge when acting as superintendent of public instruction, should receive for such services a salary not to exceed $900.00 a year as the Commissioners' Court might provide, the same to be paid from the available school fund of the county in the same manner as the salary of county superintendents is provided for in Art. 2700 (R. S. 1925). If as the time of the passage of this act such ex-officio compensation of the county judge was payable out of the available school fund, there would have been neither occasion nor reason for the enactment of the law in question; and we must presume that the Legislature at the time of passage of the act just referred to was of the opnion that former legislation made such ex-officio salary payable out of the general fund of the county and not out of school funds. True, this act was vetoed by the Governor and same did not, of course, become a law; but it remains as a plain expression of the legislative intent that before such compensation could be paid out of the school fund, the passage of the act in question was necessary. With that legislative intent we agree.

This department is constrained to hold that all school laws should be construed so as to give the children of the state the full benefit of the school fund provided for their education where such construction does not do violence to the legislative intent and is in consonance with the well established cannons of statutory construction. And since such rules of construction support the conclusion reached here, we are of the opinion that the compensation of a county judge for services rendered as ex-officio superintendent of public instruction must be paid out of the general fund of the county and not out of the school funds of said county.

Very truly yours,
ETHEL F. HILTON,
Assistant Attorney General.

Op. No. 2725, Bk. 62, P. 421.

1. A "commitment" for which a peace officer is allowed a fee of $1.00 is for executing an order of a court directing that a person be placed in jail, and an officer is not allowed to charge such a fee in the absence of such order.

2. A capias or warant is not a commitment for which a fee is allowed.
2. The judgment of a court is not within itself a commitment for which a fee is allowed.
4. A "release" for which a peace officer is allowed a fee of $1.00 is for releasing or discharging a defendant from the force and effect of a judgment, and the fee is allowed in all cases where a defendant is convicted and discharges his fine and costs, whether under a plea of guilty or not guilty.

Construing: Article 1065, Code of Criminal Procedure.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 13, 1928.

Honorable Wayne Somerville, County Attorney, Wichita, Falls, Texas.

DEAR SIR: This department acknowledges receipt of your letter of the 4th instant. You ask to be advised of our interpretation of that part of Article 1065 of the Code of Criminal Procedure which allows a peace officer a fee of $2.00 for executing each warrant of arrest, a fee of $1.50 for taking and approving a bond, a fee of $1.00 for each commitment or release, and ask the following questions:

1. When a man is arrested, taken directly before the justice of peace, pleads guilty and pays his fine and is immediately released, is the officer entitled to $3.00 or $4.00?

2. When a man is arrested and makes a bond and is later tried and convicted and immediately pays his fine and is released, what fees is the officer entitled to?

3. Where a man is arrested, makes bond and is later tried, convicted and confined in jail, and later pays his fine and is released, what fees is the officer entitled to?

4. Is an officer entitled to charge $1.00 for commitment where he puts a defendant in jail before trial, or does not put him in jail at all?

Unless a peace officer actually takes and approves a bond of a defendant, he is not entitled to receive any fee whatever for this purpose, and, therefore, if a person is arrested and taken before the court and after judgment is entered immediately pays his fine, no fee for the bond is allowed.

We find that the law authorizing a fee of $1.00 for each commitment or release has been a part of our statutes since the year 1848 (G. L. Vol. 3, P. 304), but do not find any decisions of our courts or of this department construing this provision. It is necessary, therefore, before answering your questions, to determine what is meant by the terms "commitment" and "release."

The only statute giving a definition of the term commitment is found in Article 264 of the Code of Criminal Procedure. This provision, however, clearly applies to examinating trials only, and, therefore, in cases of offenses before an examining

court a fee for a commitment is allowed where the accused is held to answer the charge against him.

In 12 Corpus Juris, page 149, we find the following explanation of the term commitment:

"The word has in law a well defined meaning, and signifies the act of sending an accused or convicted person to prison; the sending of a person charged with an offense to prison; the sending of a person charged with an offense to prison to await his being held to answer. The word is often used in statutes as applying to the order and warrant of commitment, and in this sense has been defined as a warrant or order by a court or magistrate directed to a ministerial officer, to take a person to prison; a warrant, order or process by which a court or magistrate directs a ministerial officer to take a person to prison or to detain him there; the warrant or mittimus by which a court or magistrate directs an officer to take a person to prison; the process directed to a ministerial officer by which a person is to be confined in prison, usually issued by the order of a court or magistrate; the process by which a person is confined under the order of a court at any time before or after final sentence; a document whereby one person is committed to the custody of another; a judicial order."

We believe, therefore, before a peace officer is entitled to receive a fee of $1.00 for a commitment, it is necessary that the accused be placed in jail by an order of the court. But in this connection two questions arise. The first is whether the judgment of the court is within itself a commitment for which the law intends to allow a peace officer a fee, and the second is whether a warrant or a capias for the arrest of a person is a sufficient commitment.

Article 41 of the Code of Criminal Procedure, which makes provisions for the general duties of the sheriff, provides that he shall apprehend and commit to jail all offenders until an examination or trial can be had. This article was originally passed by the First Legislature of Texas in 1846. (G. L. Vol. 2, p. 1573). At the time of the passage of this act, there was no statute authorizing a fee for a commitment, for as shown above, the commitment fee statute was not passed until 1848. We believe that the language of Article 41 is not to be construed so as to authorize a fee of $1.00 for a commitment when a person is placed in jail before there is an order of a court so directing.

Article 917 of the Code of Criminal Procedure provides that the judgment in a justice court shall provide that the defendant shall remain in custody of the sheriff until the fine and costs are paid. This, however, does not require that the defendant be placed in jail. Article 1066 provides for a fee of fifty cents for the justice of the peace for each final judgment and also a fee of $1 for each commitment. Surely it would not be said that a fee of $1.50 would be allowed for a judgment on the theory that the judgment is a commitment. Therefore, we are of the opinion that a judgment itself is not

a sufficient commitment to authorize the charge of $1.00 allowed a peace officer for a commitment.

An examination of several provisions of our criminal statutes will show that it was the intention of the Legislature that a commitment, as that term is used in the fee bill, applies only when an order is made by a court directing that a person be confined in jail, and does not apply merely by placing an accused person in jail after arrest on a warrant or capias. Article 26 of the Penal Code provides that criminal process is intended to signify any capias, warrant, citation, attachment, or any other written order issued in a criminal proceeding, whether the same be to arrest, commit, collect money, or for whatever purpose used. We see, then, that this article recognized a distinction between arresting and committing an accused person. Article 218 of the Code of Criminal Procedure defines a warrant as a written order of a magistrate directing a peace officer to take the body of a person accused of an offense. The warrant does not direct the officer to place the accused in jail, but Article 233 provides that the officer executing the warrant shall take the accused before the magistrate. Article 441 defines a capias as an order of a court or clerk directing a sheriff to arrest a person accused of an offense and bring him before the court. We see, then, that neither of the processes for the arrest of a defendant in a misdemeanor case requires that the person be placed in jail. In short, neither a warrant nor a capias in an order of a court directing the officer to place the defendant in jail, and, therefore, each lacks the essential element of a commitment, to-wit: an order of a court directing that a person be placed in jail. Article 455 provides that in case a person is arrested on a felony capias for a capital offense, the defendant shall be confined in jail and the capias shall, for such purpose, he sufficient commitment. This last mentioned article, we believe, further shows that the Legislature intended that in order for a process to constitute a commitment it is necessary that the same direct that a person be placed in jail, but in this particular instance the Legislature has said that if the offense is a capital offense, the accused must be placed in jail and a capias, for that purpose, may be considered as a commitment. Article 42 provides for keeping a person in jail who is committed by a magistrate or court. Article 85 provides for committing to jail for one year of a defendant failing to give a peace bond. Articles 236 and 238 provide for committing to jail certain defendants. Articles 238 and 284 provide for committing to jail principals on bail bonds. Article 792 provides for committing a defendant to jail on default of paying the fine and costs. Article 981 provides for committing to jail a person after inquests proceedings. Article 1001 provides for committing fugitives from justice to jail. All of these statutes, we believe, show clearly that there must be a distinct order

directing that a person be placed in jail before an officer is allowed to charge a fee for a commitment.

The term "release" must be construed according to its ordinary meaning. Webster's Dictionary defines release as follows:

"To let loose again; to set free from restraint; to give liberty to or to set at liberty; to let go."

The dictionary also gives the word "discharge" as a synonym for "release."

Article 917 of the Code of Criminal Procedure, as heretofore stated, provides that the judgment of the justice court shall recite that the defendant is to remain in custody of the sheriff unti lthe fine and costs are paid. Articles 785, 787 and 792 provide for enforcing a judgment in all misdemeanor cases and make provisions for discharging the defendant. The term "release," therefore, as used in the fee bill and as defined in the dictionary is, we believe, the same as "discharge" and the officer who discharges or releases a defendant from the force and effect of a judgment restraining him is entitled to collect the fee of $1.00 for a release. As the judgment is the same in all cases of conviction, whether under a plea of guilty or a plea of not guilty, it follows, therefore, in every case, an officer is entitled to a fee of $1.00 for a release. But a fee is not allowed for a commitment in every case unless the court is required to commit the defendant to jail in default of payment of the fine and costs or in the county court, the defendant might be committed to serve a jail sentence even though the fine and costs are paid.

We beg to advise you as follows:

Under the circumstances mentioned in your first question, the officer is entitled to a fee of $2.00 for the arrest and $1.00 for a release, making a total of $3.00.

Answering the second question, we advise that the officer is entitled to $2.00 for arrest, $1.50 for taking and approving a bond, and $1.00 for a lease, making a total of $4.50.

Answering the third question, we advise that the officer is entitled to $2.00 for the arrest, $1.50 for taking and approving the bond, $1.00 for the commitment and $1.00 for the release, making a total of $5.50.

An officer is not entitled to charge $1.00 for a commitment for placing a defendant in jail before trial or where he does not place him in jail at all.

In answering these questions, we have not taken into account

any fees for mileage, serving subpoenas for witnesses, or performing any services other than those mentioned.

Very truly yours,
H. GRADY CHANDLER,
Assistant Attorney General.
GALLOWAY CALHOUN,
Assistant Attorney General.

Op. No. 2745, Bk. 62, P. 542.

FEES OF WITNESSES—OUT OF COUNTY WITNESS.

1. An out of County witness in a criminal case, who has been summoned to attend court for the purpose of proving the general reputation of the defendant, is entitled to witness fees, and the number of such witnesses, if in excess of two, is within the sound discretion of the trial court.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, August 29, 1928.

Honorable Homer L. Pharr, District Judge, Lubbock, Texas.

DEAR SIR: Under date of August 15th, you addressed a communication to Honorable Claude Pollard, Attorney General, requesting an opinion on the following question:

"Is an out of county witness in a criminal case, who has been subpoenaed to attend Court for the purpose of proving the general character of the defendant, entitled to witness fees?"

The answer to this question requires a partial construction of Section 3 or Article 1036 of the Code of Criminal Procedure, 1925, which reads as follows:

"Fees shall not be allowed to more than two witnesses to the same fact, unless the Judge before whom the cause is tried, shall, after such case has been disposed of, certify that such witnesses were necessary in the cause. Nor shall any witness recognized or attached for the purpose of proving the general character of the defendant be entitled to the benefits hereof."

In the last sentence of the above quotation, the words "recognized or attached" are used, but word "subpoena" is not used. By reason of this omission it would seem that out-county character witnesses, who respond in answer to subpoenas, would then be placed under the same provisions as other witnesses, to-wit:

"Fees shall not be allowed to more than two witnesses to the same fact, unless the Judge before whom the cause is tried, shall, after such case has been disposed of, certify that such witnesses were necessary in the cause."

In other words, it would seem that fees would be allowed to two character witnesses, and more, if deemed necessary by the trial court.

Emphasis is given this construction by the provision of the Suspended Sentence Law, which provides:

"The Court **shall** permit testimony as to the general reputation of the defendant to determine whether to recommend the suspension of sentence, etc."

It would seem, that since it is mandatory that the Judge shall hear testimony as to the general reputation of the defendant, as above provided, it would be but right to place such witnesses on the same basis as other witnesses; and if, in the sound discretion of the trial judge, more than two witnesses are necessary, then fees should be allowed such additional witnesses.

However, this is entirely within the *sound discretion* of the trial court, and his decision with reference to whether or not the account of more than two witnesses shall be allowed is final. The conclusiveness of the action by the trial judge, in this respect, has been upheld by the Court of Criminal Appeals, in the case of Murray v. Gillespie, 72 S. W. 161, in the following language:

"The action of the Judge in allowing or disallowing the account of a witness for his fees is conclusive and not subject to review or control by mandamus or otherwise."

Therefore, it is our opinion that an out of county witness in a criminal case, who has been summoned to attend court for the purpose of proving the general reputation of the defendant, should be entitled to witness fees, and the number of such witnesses, if in excess of two, is within the sound discretion of the trial court.

Yours very truly,

GALLOWAY CALHOUN,
First Assistant Attorney General.

OPINIONS RELATING TO SCHOOLS AND SCHOOL DISTRICTS

Op. No. 2656, Bk. 62, P. 9.

POWER OF LEGISLATURE AS TO SCHOOL DISTRICTS UNDER CONSTITUTIONAL AMENDMENT.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 28, 1927.

Honorable Benjamin Woodall, Chairman of Committee on School Districts, House of Representatives, Austin.

DEAR MR. WOODALL: In your communication of January 21, you submit for an opinion the following questions:

1. "Does the Legislature under the Constitutional Amendment, have authority to consider legislation tending to the establishment of Independent School Districts in this State?"
2. "Does the Legislature of Texas have power to repeal, alter or change legislation already enacted prior to the adoption of the Amendment?"

You state that there is now pending before the Legislature, a Bill seeking to repeal a special law of the Thirty-ninth Legislature, creating an Independent School District.

We have had several inquiries from various members of the Legislature presenting many phases of the question involved as to the authority of the Legislature in the matter of creating, repealing and amending previous special Acts creating Independent School Districts. I have, therefore, given the entire subject matter very careful consideration, and present in this opinion an answer to all questions which I think will arise growing out of the recent constitutional amendment, which prohibits the Legislature from passing any special law creating an Independent School District.

Prior to the adoption of the amendment, the Constitution granted the Legislature power "for the formation of School districts by general or special law, without the local notice required in other cases of special legislation." (Article 7, Section 3).

Article 3, Section 56 then provided, and still provides, that the Legislature shall not "except as otherwise provided in this Constitution, pass any local or special law regulating the affairs of school districts."

This provision in connection with Article 7, Section 3, was construed by our Supreme Court to authorize the formation of school districts by special law without the local notice required under Article 3, Section 57, by reason of which there have been

created seven or eight hundred Independent School Districts by special law, without local notice.

The amendment recently adopted, and now effective, has substituted in lieu of the former provision of Article 7, Section 3, the following:

"And the Legislature may also provide for the formation of school districts by general laws."

This, of course, takes away the power to create school districts by special law, and as it must be construed in connection with Article 3, Section 56 and 57, the Legislature is now prohibited from creating a school district by special law, even though the local notice might be given as provided in Section 57. This, for the reason that Section 56 of this Article absolutely prohibits the regulation of the affairs of school districts by special law, unless it is authorized by some other provision of the Constitution, and since the recent amendment prohibits this, these acts cannot be passed as special laws, but can now be created only by general law.

Article 7, Section 3, prior to its amendment, in addition to providing that the Legislature might by special law, create school districts, also authorized the passage of laws for the assessment and collection of taxes, and for the management and control of the public school, or schools, of such districts. Under this provision, the Legislature had the power, not only to create a district, by special act, without notice, but also to provide in the act of creation, for the assessment and collection of taxes, and for the management and control of the public schools of such districts. This being true, the numerous districts created were of various and sundry types, each having such provisions as to the management and control of the schools, and the collection of taxes, as might be desired for the particular community.

While the amendment of this Article still contains the provision for the assessment and collection of taxes, and the management and control of the schools, it must be construed in connection with the manner in which districts may now be formed.

In view of the provisions of Article 3, Section 56, that unless authorized by the Constitution, no local or special law can be passed regulating the affairs of school districts, and of the fact that the amendment to the Constitution takes away from the Legislature any power to regulate the affairs of school districts by special law, it necessarily follows that it cannot now, since the amendment has become effective, pass any local or special law regulating the affairs of school districts, either as to the assessment and collection of taxes, the management and control of the schools, or in any other matter. This prevents it from passing any local or special law as to any parti-

cular school district now in existence, under which it is sought to amend any of the provisions of the existing local law; that is to say, so as to enlarge boundaries, restrict boundaries, regulate tax rates, the assessment and collection of taxes, the management and control of the public schools, or in any other matter. This can now be done only by general law. It cannot be done either by local or special law, even though local notice should be given as required in Section 57 of Article 3, because of the fact that there is an absolute prohibition in Section 56, of the passage of any local or special law regulating the affairs of school districts, unless the Constitution expressly authorizes this particular thing to be done, and nowhere, does the Constitution authorize it. Therefore, this particular kind of a local or special law is taken out of the provisions of Section 57 of Article 3.

A different situation exists in answer to the question as to whether or not the Legislature can now repeal any law heretofore passed, creating an Indepndent School District by name. This is answered by the well established principle that the Legislature has the inherent power to repeal a Special Act, although the constitutional authority to pass such an act, has been withdrawn definitely determined in our State in the of Central Wharf Company vs. City of Corpus Christi, 57 S. W. 982, Thompson vs. State, 56 S. W. 603, and the City of Oak Cliff vs. State, 77 S. W. 24. The proposition is well supported by decisions from other jurisdictions, and although under the constitutional provisions now in existence, the Legislature cannot enact a special law creating Independent School Districts, it has the inherent power to repeal such special acts. In one of the cases cited, that of Thompson vs. State, the Court of Civil Appeals at Galveston, speaking through Judge Garrett, used this language:

"This Court would hesitate to hold that the legislature could not repeal the charter of a municipal corporation, without giving notice of its intention to do so, although the law would be local in its application."

This expression of the court was probably not necessary to a decision of the issue involved, but many of the courts of other jurisdictions, hold that a special act of the Legislature may be repealed by general law without notice. You are advised, however, that there is some doubt as to this under the provisions of our Constitution, and in order to repeal any of the special acts now existing, creating Independent School Districts, notice of an intention to introduce such law, it being local and special in its nature, should be given as provided in Article 3, Section 57.

Various questions have been submitted to this Department as to general laws regulating the dissolution of existing Independent School Districts created by special act, and the formation

of new districts, and I deem it advisable, therefore, to suggest to your Committee, some established principles by which you should be guided in the preparation of such laws.

1. An Act of the Legislature providing for the abolishing of an Independent School District, which has outstanding indebtedness, must make adequate provision for the payment of such indebtedness, or else the law will be invalid as impairing the obligation of contracts.

2. If an Act of the Legislature provides for the combination of an existing Independent School District, which has a bonded indebtedness with other territory, which has no bonded indebtedness, such other territory cannot be made liable for the existing indebtedness, without a vote of the majority of the taxpayers of the new district created.

3. Where territory embraced within a school district, having bonded or other indebtedness, is detached from such district, such indebtedness and the taxes voted for the payment thereof, continue in force and constitute a lien on such territory, although it be combined with other territory to form another school district.

4. Where territory embraced within a school district upon which a tax is voted, is added to another district, such other district may be empowered to levy and collect such tax.

5. An Act of the Legislature may provide that the title to property of a school district, which becomes a part of another school district, shall vest in such other district, or its governing officers.

These general principles should be strictly adhered to in the preparation of all general laws passed by your body, providing for the abolishment of old districts, whether created by general or special law; and for the creation of new districts. Care should be taken that provision is made for the payment of existing bonded and other indebtedness of all districts, or parts of districts which may become combined with other districts, or added to same. A new district formed by the combination of districts, or by the combination of a district and additional territory, will not, as such, become liable for previous bonded or other indebtedness, except by a vote of a majority of the property taxpaying voters of the new district.

I hope this general discussion of the situation which confronts the Legislature may give you such information as you desire. Be assured that this Department is willing and anxious to render such assistance to your Committee and the Legislature toward re-adjustment of things to conform to the amended Constitution, as may be desired.

I specifically answer the two inquiries which you have presented to this Department, and some others which have been presented, as follows:

1. The Legislature has no authority to pass a local or special law creating an Independent School District.

2. The Legislature has the power to repeal any special law heretofore passed, creating an Independent School District, but this being a local and special law, notice of an intention to introduce it, should be given under the provisions of Article 3, Section 57.

3. The Legislature has no power by special or local law, to amend any local law heretofore passed, creating an Independent School District, even though notice of an intention to introduce such a special law might be given, under the provisions of Article 3, Section 57.

4. All general laws passed by the Legislature for the abolishment of existing Independent School Districts, whether created by special or general law, should provide for the payment of existing bonded or other indebtedness against such districts, or parts thereof.

5. Any general law, providing for the creation of Independent School Districts by the combination of existing districts, or the addition of territory to existing districts, or the taking away of territory from existing districts, if it is sought to have the new district assume any bonded, or other indebtedness, should provide for an election upon such questions, at, which, a majority of the tax-paying voters should vote in favor thereof.

In view of the difficulties which may hereafter arise, in this department in the matter of issuance of bonds, by districts which may be created by general law, under the amended Constitution I would prefer that prior to final passage, and at such period during the course of enactment, as that amendments may be made, that they be submitted to this department for such suggestions as we may deem advisable. By doing this, probably much difficulty in the future may be avoided.

Very truly yours,

CLAUDE POLLARD,
Attorney General.

Op. No. 2663, Bk. 62, P. 61.

THE LEGISLATURE HAS AUTHORITY UNDER SECTION 48, ARTICLE 3, OF THE CONSTITUTION TO ENACT LAW PROVIDING FOR JUNIOR COLLEGE DISTRICT.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 14, 1927.

Honorable H. T. Brown, House of Representatives, Capitol Building, Austin, Texas.

DEAR SIR: Your letter of February 12th, addressed to Attorney General Pollard, has been referred to me for reply.

Answering your question: "Has the Legislature the Constitutional authority to enact a law providing for one or more school districts or counties to organize a Junior College District and vote a tax for the support of such Junior College?

We answer in the affirmative. We base our opinion on the following provisions of the Constitution of the State of Texas:

Section 48 of Article 3 provides, among other things, as follows:

"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; * * * * *."

Again, Section 1 of Article 7 is: "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."

We believe, under these provisions of the Constitution, it is the right and the duty of the Legislature to make such provision for such schools and junior colleges as the Legislature in its wisdom deems best.

Respectfully submitted,
D. L. WHITEHURST,
Assistant Attorney General.

Op. No. 2664, Bk. 62, P. 62.

1. Where Special Act of Legislature creating Independent School District included in its territory Common School District in its entirety which had theretofore voted $1.00 maintenance tax, such maintenance tax was abrogated.
2. If election to vote maintenance tax in pending election is defeated, there will be no maintenance tax on Common School District so included in Independent School District.

OFFICES OF THE ATTORNEY GENERAL.
AUSTIN, TEXAS, February 16, 1927.

Honorable S. M. N. Marrs, Superintendent, State Department of Education, Austin, Texas.

DEAR MR. MARRS: Your letter of February 14th, addressed to Hon. Claude Pollard, Attorney General, has been referred to me for reply.

In your letter you call attention to the creation of Belton Independent School District by special act, and state that the newly created Independent School District included in its territory a suburban school district in its entirety; that the subur-

ban school district had theretofore voted a local maintenance tax of $1.00 on the $100.00 valuation, and you submitted the following questions:

1. "Has the Board of Trustees of the Belton Independent School District, as now constituted, the authority to continue to levy the maintenance tax heretofore voted on the property lying within the boundaries of this suburban district? In other words, as the Belton Independent School District through a special act of the Legislature now contains the entire suburban common school district, did the act of the Legislature in so incorporating this territory into the Belton Independent School District abrogate the maintenance tax heretofore voted?

2. "In the event that your answer to the first question is to the effect that the tax voted on the common school district has not been abrogated, can the board of trustees of the Independent School District of Belton levy the tax of 75 cents on the 100 dollars within the territory of the original independent school district and the maintenace tax of one dollar heretofore voted in the suburban territory?

3. "An election is now pending in the newly created Belton Independent School District to authorize the levy of a maintenance tax not to exceed 100 cents on the 100 dollars. In the event that the tax should be defeated, what effect, if any, would this election have on the rates heretofore voted in the district, as stated above?

You further state in your letter that the Belton Independent School District was of the type known as a municipal independent school district; that said district had heretofore voted a maintenance tax of 75 cents on the 100 dollars valuation.

Answering your first question: It is our opinion that in incorporating the common school district into the Belton Independent School District, the maintenance tax of 100 cents on the 100 dollars valuation theretofore voted was abrogated.

Having answered Question No. 1 as we have, it is unnecessary to answer Question No. 2.

Answering Question No. 3: In the event the tax should be defeated in the pending election, the newly created district would be in the same condition as it is at this time, that is, the maintenance tax having been abrogated by the creation of said new district, there would be no maintenance tax on the old common school district.

We base our opinion on the case of Hill, et al. vs. Smithville Independent School District, 239 S. W. 987; affirmed by the Supreme Court 251 S. W. 209. The report of that case discloses that the Smithville Independent School District was created by special act of the Legislature, that it included within its bounds the Town of Smithville which had theretofore assumed control of its public schools and considerable adjacent territory including parts of four common school districts, that some of said common school districts had voted the maintenancenance tax in various amounts. In discussing this case, the Court said:

"The contention that the act provides for unequal taxation rests upon

the fact that prior to the creation of the Smithville district the Alum Creek district had voted a maintenance tax of 50 cents on the $100 of property in that district, and that the Upton district had voted a manitenance tax of 15 cents, and that, inasmuch as the tax authorized by the election complained of authorizes the levy of a 60-cent tax on all property in the Smithville district as now comprised, the tax in the Upton district will be 75 cents, and that in Alum Creek district will be $1.00, while property in the remaining part of the territory will be taxed only 60 cents on the $100.

"This contention is unsound, for the reason that the act by taking certain portions of the Alum Creek and Upton districts out of these districts, and incorporating them in the Smithville district, automatically released such portions from any taxes which might thereafter be levied upon such districts of which they were no longer parts. State vs. Norwood, 24 Tex. Civ. App. 24, 57 S. W. 876; Oliver vs. Smith (Tex. Civ. App.) 187 S. W. 528.

"The portions of the Alum Creek and Upton districts, as they formerly existed, which were incorporated into and now form parts of the Smithville district, will be required to pay the same maintenance tax as the rest of the Smithville district.

"The act in releasing such portions of the Alum Creek and Upton districts from the maintenance tax which may hereafter be levied upon property in those districts is not repugnant to article 3, section 55, nor to article 3, section 56, of the Constitution of this State, for the reason that a debt which has never been incurred cannot be said to have been released. The act, by taking portions of the common school districts and placing them in the Smithville district, simply placed them in a position whereby they would not incur any debt for the future maintenance of schools in the districts of which they were formerly parts."

By the same reasoning, it is our opinion the common school district which had been made a part of the Belton Independent School District has been released from the maintenance tax voted on such common school district prior to the time it became part of the Belton Independent School District.

Very truly yours,

D. L. WHITEHURST,
Assistant Attorney General.

Op. No. 2682, Bk. 62, P. 180.

STATE SCHOOLS—TUITION—CHARGES—SENATE BILL 202 OF 40TH LEGISLATURE.

1. State educational institutions of higher learning are prohibited from collecting tuition fees in excess of thirty dollars for any term of nine months, or laboratory fees to exceed four dollars in each course.

2. Senate Bill 202 does not prohibit students from voluntarily furnishing materials and supplies used by them in courses in which the State furnished instruction but no materials, or materials insufficient in quantity.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 12, 1927.

Honorable E. E. Davis, Dean of North Texas Agricultural College, Arlington, Texas.

DEAR SIR: Your letter of the 5th instant, addressed to the Attorney General, has been referred to me for attention. You refer to Senate Bill No. 202 regulating tuition, fees and charges at State educational institutions.

You state in your letter that the materials consumed in some of the courses given at your school run in excess of thirty dollars per student and that in one course alone, which only lasts six weeks, that the materials per student amount to fifty dollars, and that there are at least one hundred men now waiting to take the last mentioned course and are glad to pay for the materials consumed in taking the course. You further state that if the new law prohibits students paying for the materials used by them in taking such courses and the State fails to appropriate for consumable supplies, then, your school will be compelled to discontinue them.

Since the bill inquired about is very short, we take the liberty of copying it at length:

"An Act regularing tuition, fees and charges at state educational institutions; limiting the amount of the same; permitting voluntary payments for student activities under certain restrictions, and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS

Section 1. No State educational institution shall collect from the students thereof any tuition, fee or charge of any kind whatever except as permitted by this act, and no student shall be refused admission to or discharged from any such institution for the payment of any tuition, fee or charge except as permitted in this act.

Section 2. Any such educational institution may collect from each student a matriculation fee of not to exceed thirty dollars for any term of nine months, and laboratory charges to cover actual laboratory materials and supplies used by such student not to exceed in any event four dollars for any one year from any one student in any one laboratory course. Matriculation fees for any six weeks may not exceed five dollars, or for any ten weeks, not to exceed ten dollars. Provided, however, said educational institution may collect reasonable deposits from students each year to insure said institutions against losses, breakage, etc. in libraries and laboratories, said deposits to be returned at the end of each school year minus such damages, loss or breakage as may have been done by each individual student who has put up a deposit.

Section 3. The words 'State educational institutions' as used in this Act, shall include the following and any branch thereof: The University of Texas; the Agricultural and Mechanical College of Texas; the various State Teachers' Colleges of Texas; the College of Industrial Arts of Texas; the John Tarleton Agricultural College; the North Texas Industrial College; the Prairie View Normal and Industrial College; the

Texas Technological College and any other state educational institutions either heretofore provided for or hereafter to be provided for under the laws of the State.

Section 4. Nothing in this act shall prevent the collection of fees or charges voluntarily paid by the students to cover the expense of student activities; provided, however, that the same shall never be made compulsory or required by the educational institution as a condition precedent to a student entering or continuing at said institution."

In construing this Statute, we must be guided by the rules of construction of laws in this State and more especially Section 6 and Section 8 of Article 10 of the Revised Statutes.

Section 6 provides as follows:

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

Section 8 provides partly as follows:

"Said statute shall constitute the law of this state respecting the subjects to which they relate; and the provisions thereof shall be liberally construed with a view to effect their objects and to promote justice."

By the enactment of this measure, we believe it was the intention of the legislature to fix a standard measure or scale of tuition, fees or charges for the State institutions so that no student shall be excluded from any State institution because of the exaction by the school authorities of an unreasonable tuition, fee or charge and to direct other schedules or scales covering the subjects set out in said measure.

"Tuition" has been defined as "the charge made or money paid for instruction; tuition fee; as the scholarship pays the tuition."

"Fee" has been defined as "a payment for services done or to be done, usually for professional or special service, the amount being sometimes fixed by law or custom and sometimes optional; compensation; charge; a charge for a special privilege, as admission to an entertainment or membership to a society."

"Charge," although a word of more general meaning, has been defined as "the price fixed or demanded for anything, as for a service rendered or merchandise sold."

You state in your letter that in several of the courses now given, materials consumed by each student cost much in excess of four dollars, some of them running as high as fifty dollars, and that up to this time, the Legislature has made no appropriation for supplies of this character.

It is our personal wish that every student in each State institution may obtain an education and secure the benefits of every course which he may consider personally beneficial. We would like to hold that this statute does not apply to special courses nor to materials used by the students in such courses if a contrary holding would eliminate from your curriculum any

given course which students are anxious to take. However, the plain wording of the statute is that no matriculation fee may be collected to exceed thirty dollars for a nine months term, and that the institution may collect not to exceed four dollars for materials and supplies used by any one student in a laboratory course for one year. Section One of the Act prohibits the collection of any tuition fee or charge of any kind except those permitted by the Act. It is true the act says that no student shall be refused admission to any institution nor shall he be discharged therefrom for non-payment of any other tuition fee or charge. In view of the wording of the entire act, however, we believe the maximum charges are specified as hereinabove noted.

In case the Legislature makes appropriation for special courses and for materials and supplies used by the students in any given course regardless of the value of such materials the student may not be charged in excess of four dollars for any one such course in the event the Legislature makes no appropriation for materials and supplies used by the individual student in a given course, but does provide instructors therefor, it is our opinion that the institution may make a charge of four dollars for the laboratory course and the materials furnished by the institution. If additional materials are needed by an individual student, we find no obstacle in this act to the student supplying such materials himself just as he does his books, pencils and other incidental supplies. In other words, where courses are given by a state school and the Legislature appropriates funds not only for the instruction, but for the supplies and materials used, the individual student may not be charged in excess of four dollars therefor, but if the funds provided by the Legislature are sufficient only for the general expense of the institution and the regular courses given and no state funds are available for the supplies and materials needed by the individual student, we think the student would have the right to purchase his own supplies and materials and avail himself of the instruction offered by the institution.

We find nothing in the Act which would permit additional tuition for special courses which are not on the regular curriculum of the school.

Very truly yours,
D. A. SIMMONS.
First Assistant Attorney General.

Op. No. 2700, Bk. 62, P. 284.

IN RE: HOUSE BILL NO. 99.

1. No conflict in first two sections, but two, to some extent, consistent methods are provided for doing same thing; method provided in first section is impracticable and incapable of being enforced.
2. Section 3 and Section 4 of Act are in conflict in that they provide

two methods of doing the same thing; one entirely inconsistent and in conflict with the other.

3. Section 3 of Act is in conflict with Sections 1 and 2, in that Section 1 and Section 2 each provide for inconsistent and different methods for annexation of territory to Common School Districts.

4. County Board would necessarily make disposition of territory where Common School District is abolished under terms of Section 3 of Act if said territory is to be placed in School District. Provision of last part of Section 4 would not apply.

5. If provisions of said Act are in conflict with Chapter 238, then such provisions as conflict with provisions of this Act would be repealed if this Act is valid and capable of being enforced.

6. Since this Act provides that its provisions shall not affect Rural High School Law, Rural High School Law would prevail where in conflict with this Act.

7. Provisions of Section 8 are in irreconcilable conflict. Sections 3 and 4; Sections 1 and 3, and Sections 2 and 3, are in conflict, are impracticable, ambiguous, and can not be successfully followed and enforced.

OFFICES OF THE ATTORNEY GENERAL.
AUSTIN, TEXAS, July 25, 1927.

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

MY DEAR MR. MARRS: Your letter of June 27th, addressed to Honorable Claude Pollard, Attorney General, has been received and referred to me for reply. Receipt is also acknowledged of a copy of House Bill No. 99. The questions submitted by you are as follows:

"1. Are Sections 1 and 2 in conflict, and if so, what should be the method of procedure in changing boundaries of school districts?

"2. Is Section 3 in conflict with Section 1?

"3. In the event a common school district should vote to be abolsihed under authority of Section 3, would the County Board on its own initiative dispose of the territory?

"4. If Number 3 is answered affirmatively, please construe the meaning of the last sentence in Section 4.

"5. Does the formation of independent districts provided for in Section 5 conflict with Chapter 238, Acts of the Regular Session, 40th Legislature?

"6. Section 7 specifically states that the rural high school law passed by the 39th Legislature shall not be affected by the provisions of this Act. There are sections of this bill which seem to be in direct conflict with the provisions of the rural high school law. Which Act will prevail?

"7. Section 8 provides that no County Trustee shall be elected except by the voters in districts under the jurisdiction of the County Board. In some counties there are commissioners precincts composed entirely of independent districts. How shall such County Trustees be elected?"

Replying to your Question No. 1: You are advised that Sections 1 and 2 are not in conflict but attempt to provide for two somewhat consistent methods of doing the same thing. Section 1, in effect, provides for the annexation of territory contiguous to an independent school district. The method prescribed for such annexation is that a majority of the qualified property tax paying voters residing in such territory must desire annexa-

tion. After such desire is ascertained, a petition must be presented to the County Judge, signed by twenty or a majority of the property tax paying voters residing in the district from which the territory is to be taken. How the desire of a majority of the property tax paying voters in such territory is to be ascertained is not prescribed. It is also prescribed that after a petition signed by twenty or a majority of the property taxpaying voters residing in the district from which the territory is to be taken is presented, the County Judge is to order an election in said "Common School District" for the purpose of determining whether a majority of the legally qualified property taxpaying voters residing in said common school district shall favor the annexation of the proposed territory. It will be noted that in this section the territory contiguous to an independent school district is assumed by said section to be a part of a common school district. After such election is held over the entire school district in the manner prescribed in Section 1, the returns of the election are to be canvassed by the Commissioners' Court. If it is found that a majority of the legally qualified property tax paying voters vote in favor of the annexation, a petition is then to be presented to the Board of Trustees of the Independent School District to which such territory is proposed to be annexed, and, if such Board of Trustees of the Independent School District approve the annexation, the annexation is to be made; provided the County Board of Trustees also approve such annexation, and provided also that the Board of Trustees of the Independent School District shall order an election for the purpose of having the voters of said Independent School District vote on the proposition of annexation of such territory to the Independent School District. Clearly, the method provided for the annexation of territory contiguous to an independent school district as provided for in Section 1 is impracticable and the terms of said section are so burdensome as to render said Section 1 in-operative and almost incapable of being enforced. A method is attempted to be prescribed by Section 1 for the annexation of territory contiguous to an independent school district. No provision is made for annexing such territory if it should be part of an independent school district, or any territory if it be other than a common school district. Said section also provides for two elections—one in the entire territory of the common school district from which the territory is to be taken—the second, in the independent school district after the trustees of such independent school district and the County Board of Trustees have approved such annexation.

Section 2 provides that whenever a majority of the legally qualified property tax paying voters residing in the contiguous area of an independent school district or common school district desire to have such territory detached from said independent school district or common school district and annexed

to some other independent school district, or for the purpose of forming a new district, they shall present a petition duly signed to the Board of Trustees of the independent school district or common school district praying for the detachment of the territory for one of the purposes mentioned therein.

The phrase "residing in a contiguous area of an independent school district or common school district," as here used, means that such area of the district must be adjoining; that is, a section in one part of the district and a section in another part of the district are not authorized to present such petition. Such territory is to be a part of the independent or common school district from which such contiguous territory is to be taken. After such petition is presented to the Board of Trustees of such common or independent school district the section provides, that such board may pass an order detaching such territory therefrom and declaring it annexed to some other district, or for the purpose of forming a new district. It is also provided that such order must be approved by the Board of Trustees in order to become effective. It will be noted that this section provides "the annexation of the detached territory to any other district *must* be made by the County Board of Trustees." It will also be noted that in Section 4 it is provided: "No common school district will be encroached upon or reduced in area except by a majority vote of such common school district." Apparently, Section 4 and Section 2 of the Bill are in conflict.

Replying to your Question No. 2: Section 3 of said Act is in conflict with both Section 1 and Section 2 because Section 1 and Section 2 each provide for a different and inconsistent method for annexation of territory to a common school district from that provided for in Section 3.

Replying to your Question No. 3: You are advised that in the event a common school district should vote to be abolished, under the authority given in Section 3, there is no method provided for the disposition of such territory. The County Board of Trustees would necessarily have to make some disposition of such territory, if it is to be placed in a school district.

Replying to your Question No. 4: You are advised that after the common school district has been abolished, as provided for, the last sentence in Section 4 would not apply to such territory because no common school district would be encroached upon or reduced if the territory was territory which had formerly been a common school district.

As above stated, however, this section is apparently in conflict with Section 2.

Replying to your Question No. 5: You are advised that if the formation of independent school districts provided for in Section 5 of said House Bill No. 99 is in conflict with any of the provisions of Chapter 238 of the Acts of the Regular Session of the 40th Legislature, then such provisions of Chapter

238 as are in conflict with the provisions of House Bill No. 99 would be repealed because Section 13 of House Bill No. 99 so provides; that is, of course, assuming that House Bill No. 99 is a valid act and capable of being enforced.

Replying to your Question No. 6: It is believed that since said House Bill No. 99 specifically provides the rural high school law passed by the 39th Legislature is not to be affected by the provisions of said House Bill No. 99, that the provisions of the rural high school law passed by the 39th Legislature would prevail over the provisions of House Bill No. 99 where in conflict therewith.

Replying to your Question No. 7: Section 8 provides, among other things, that one County Trustee is to be elected from each Commissioner's Precinct by the voters of the Districts under the supervision of the County Trustees and no school district "not under the supervision of such Trustees" shall participate in either election. If, as you state, some Commissioners' Precincts are composed entirely of independent school districts, the anomaly would be created by House Bill No. 99 of requiring five trustees—one from the County at large, and one from each Commissioners' Precincts, and at the same time preventing such precincts as are composed entirely of independent school districts from electing a trustee. The provisions of Section 8 are in irreconcilable conflict.

It is believed that Sections 3 and 4; Sections 1 and 3, and Sections 2 and 3, are impracticable, ambiguous and inoperative, and that as to said Sections the Bill can not be successfully followed or enforced.

Respectfully submitted,

D. L. WHITEHURST,
Assistant Attorney General.

Op. No. 2706, Bk. 62, P. 316.

SCHOOLS—TEXTBOOK COMMISSION.

1. The Text Book Commission is authorized under Section 5 of Chapter 176 of the Acts of the Thirty-ninth Legislature to adopt an English grammar for use in the high schools.

2. The concluding proviso of Section 5 of the Acts of the Thirty-ninth Legislature, as well as the terms of the 1917 act (Chapter 44, First Called Session of the 35th Legislature) upon the basis of which vested rights are fixed, prohibits the Text Book Commission from adopting any texts which would to a material extent reduce the number of books which the State would purchase under existing contracts for related subjects.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, October 12, 1927.

Honorable Dan Moody, Governor of Texas, Ex-Officio Chairman, Text Book Commission, Capitol.

DEAR GOVERNOR MOODY: In your letter of the 10th instant, you ask to be advised on the following questions:

First, whether the concluding proviso of Section 5 of the Free Text Book Law (Acts of the 39th Legislature, Chapter 176) would prohibit the Text Book Commission from adopting a text for a one-year course in General History for use in the high schools in view of the fact that there is an existing contract for a text on Ancient History and Modern History in which connection you specifically state that "it is understood to be a fact that the adoption of a one-year course in General History would to some extent reduce the number of books which the State would purchase under its contract for a text in Ancient History and Modern History."

Second, whether the Commission can legally let a contract for a text on English Grammar to be used in the high schools in view of the fact that the second paragraph of Section 5 does not include among the subjects upon which the texts are authorized to be adopted the subject of language or grammar.

Third, whether the concluding proviso of Section 5 prohibits the Commission from adopting a text on grammar for use in the high schools, in view of the fact that there is an existing contract for a text for English Composition for use in the high schools; and in this connection, you do not state whether or not it is a fact that the adoption of a grammar for use in the high schools would reduce the number of books which the State would purchase under its contract for a text on English Composition also for use in the high schools.

I am reliably informed that the present existing contract upon the subject of history is for early European and for Modern European History and was duly made and executed December 27, 1924, for a six-year period beginning September 1, 1925, and ending September 1, 1930. I am also reliably informed that the existing contract for English Composition was duly made and executed on the same date as the other contract and was for a like period; and the same is true as to another existing contract for English Grammars for use in the public free schools of Texas. I am also informed that the State Board of Education on January 12, 1925, found each of these contracts to be regular and valid and by formal order instructed the necessary steps looking towards their performance. I am, therefore, assuming the correctness of this information in its bearing on your questions.

For convenience, I will consider your second question first, answering it in the affirmative. The question is simply one

of power of the Textbook Commission, under the terms of the law as it now exists, being Section 5 of Chapter 176 of the Acts of the 39th Legislature, which is in no respect now here material amended by Chapter 213 of the Acts of the 40th Legislature. Its solution does not require a determination of whether the Legislature in its enumeration of subjects for text books for use in the high schools intended to reserve to itself a selection of subjects on the one hand, or on the other hand to merely suggest subjects to which unrelated subjects might be added by the Commission. It is enough that the subject of English Composition, specifically authorized by the Legislature to be included, does in fact embrace as a sub-subject English Grammar. Furthermore, though the contention that an English Language and Grammar for use in the high schools is authorized by the first paragraph of Section 5, where such a text is specified for use "in the public free schools of Texas," however general the last quoted language, is refuted by the fact that the second paragraph of this section makes a distinct enumeration of subjects which are in both their nature and according to the specified terms of the law appropriate for use in the high schools; yet, it seems to me that the first paragraph of Section 5 has important bearing on the construction of the second paragraph thereof, for the reason that in the first it is said that the commission "shall include and *be limited* to text books" named, and in the second it is said simply that the Commission shall adopt a multiple list "including no fewer than three nor more than five" of the subjects named. Certainly some significance must be attached to the terms "be limited" in the first paragraph and by the same reasoning an absence of those or similar terms in the same connection in the second paragraph.

You are, therefore, advised that the Text Book Commission is authorized under the law and apart from other considerations to adopt an English Grammar for use in the high schools. Your first and third questions may be considered together and if it is a fact that the adoption of the new texts would to some extent reduct the number of books which the State would purchase under its existing contracts, then these questions are also answered in the affirmative. You state that this condition is true with respect to the first matter inquired about and it may or may not be true with respect to the other.

Chapter 44 of the First Called Session of the 35th Legislature is the Text Book Law under which both the existing contracts on history and English composition were made. Section 5 thereof does not, like the later law, make a separate enumeration of subjects of texts for use in the high schools but authorizes the Commission to select the books "to be used in the public free schools of Texas," the books so selected and adopted by the Commission to be printed in the English language and

shall include and be limited to text books on the following subjects:

"... English Grammar, English Composition ... History of the United States ... History of Texas ... General History."

after which it is provided that no public free public school shall use any text book unless same has been previously adopted or approved by the Commission. Section 7 authorizes the Commission to require changes, amendments or additions to the books adopted according to the best interest of the schools, provided that "nothing in this section shall be construed so as to give said Commission power or authority to abandon any book or books originally contracted for." Section 23 provides in part as follows:

"That books adopted by the Commission under the provisions of this Act shall be introduced and used as texts to the exclusion of all others in the public free schools of this State for such period of years as may be determined by the Commission, not to exceed six years in any case."

These provisions of the law whether set out in the existing contracts or not must be considered as read into their terms and the rights of the respective contracting parties so fixed and controlled.

The second paragraph of Section 5, Chapter 176 of the Acts of the 39th Legislature (R. S. 2843) in a separate enumeration of books for adoption for use in high schools includes a one-year General History, Ancient History, Modern History, American History and English Composition, and in its concluding language reads as follows:

"provided that existing contracts shall not be affected by any adoptions made under this Act."

Section 7 of the Act of 1925, (R. S. 2845) contains the same proviso as above quoted from the corresponding section of the Act of 1917, and Section 22 (R. S. 2860) as amended by Section 8, Chapter 213, Acts of the 40th Legislature, reads the same as Section 23 of the Act of 1917 as above quoted.

Both the contract for the Ancient and Modern History and the contract for the English Composition were existing contracts at the times of the enactment and effective date of the Act of 1925 and are, therefore, protected by the concluding proviso as quoted from that Act.

In the case of D. C. Heath & Co., vs. Marrs, 114 Tex. 574, mandamus was granted against the State Superintendent of Public Instruction requiring him to send out requisition blanks containing the titles of the histories covered by the existing contract here and now in question, and in the case of Silver, Burdett & Co. vs. Marrs, 114 Tex. 573, like relief was granted

with respect to English Composition texts here and now in question; and in each of these cases judgment was rendered: "directing respondent to do any and all other things required of him by law to give effect to relator's contract" and enjoined and restrained "from ordering any books on requisition blanks already sent out by him in so far as such books may be in conflict with relator's contracts."

In these cases it is true that there was no issue discussed as to the adoption of other books affecting or impairing the obligations of these contracts and there does not appear to have been any positive action taken to that end. Instead the respondent defended upon the ground, inter alis, that the State was not obligated to purchase any particular amount of text books or any at all unless and until needed and that the State Board of Education had determined that these books were not needed; and in the companion case of Laidlaw Bros. vs. Marrs, 114 Tex. 561, 568, it is said:

"After the contract had been legally executed the act of the State Board of Education in reviewing the Act of the State Text Book Commission, in determining that relator had a valid contract and in ordering it to be observed, concluded the matter of establishing the identity and validity of the contract and was final. Nothing remained to be done in that respect. It was then subject to be performed under the statutes regulatory thereof, unless set aside by proper judicial action for sufficient legal reasons.

"Rights under the contract had attached; the identity and validity of the contract had been legally determined, and the contract certified for performance at the hands of those charged by law with the doing of acts necessary to its performance. Contractual obligations became fixed and cannot be recalled. If the duties of the State Board of Education in regard to determining who are contractors of textbooks and instructing respondent, State Superintendent, in regard to them, are discretionary, in this case that discretion has been exercised and rights have become fixed and the discretion cannot be exercised again to undo them."

If by inaction or attempted recission the vested rights under these contracts may not be affected or impaired, no more may they be by adoptions of other textbooks.

By a regular departmental opinion dated December 10, 1919, and written by C. W. Taylor, the Textbook Commission was advised as follows:

"The State Textbook Commission having adopted books upon the specified subjects embraced in General Science, then in the opinion of this department the Textbook Commission would have no authority to adopt a text on General Science and the school authorities of this state would have no authority to put same in use in the public schools in this state, if in so doing the prior adopted book upon any subject covered by General Science would be displaced.

"If the curriculum of the high schools can be so arranged that a work upon General Science may be used as an elementary book preceding the adopted texts upon specified subjects and did not in any manner displace or be substituted for any adopted book, then we would see no objection to the adoption and use of such a work.

"It has been suggested that General Science being in the nature of an elementary work is essentially for use in the first year in high school work and that at least some of the schools of this state propose to offer General Science in lieu of, first, Physical Geography and Physiology (being one-half year books), or, second, agriculture. This illustrates the vice we are endeavoring to point out in an adoption of a work on General Science."

If, in other words, the present English Composition is used only during a certain portion of the high school work, and it is now proposed to adopt an English Grammar for use during another portion of the high school work, there would be no practical displacement of the first by the second and therefore the existing contract on the first would not be affected or impaired by the adoption of the second; otherwise, as illustrated in the opinion, there might be such displacement and consequent impairment of the contract.

Some half a dozen authorities are cited in this opinion and in addition thereto we would call attention to the case of State vs. Board of Education, 35 Ohio State 368, as supporting the same rule.

In Rand McNally & Co. vs. Hartranft, 73 Pac. (Wash.) 401, the Board of Education having made a contract with plaintiff for use of its readers in the first six grades substituted another reader for the first grade but still retained plaintiff's reader in six following grades, and it was held that by practical though limited displacement of its books, by reason of there being more students in the first six grades than in the six grades following the first, plaintiff's contract had been impaired and it was entitled to an injunction.

These authorities are predicated upon vested rights inhering in existing contracts and apart from the explicit statutory provision protecting such contracts from being affected by any adoptions made under the provisions of the textbook law. The purpose of this proviso as added by the 39th Legislature in conjunction with the addition to the 1917 list of a one-year General History, Ancient History, Modern History and other subjects was doubtless to make it plain that by these additions the Legislature did not intend to authorize the Commission to make any adoptions affecting the various existing contracts on related subjects.

A one-year *General History* is undeniably a *General History,* and so also is an *Ancient* or *Modern* History; and the latter were adopted by the Commission under the provision for *General History* in the 1917 Act, and under Section 23 of that Act and Article 2860 of the present law they "shall be introduced and used as textbooks to the exclusion of all others (meaning of course of the same kind) in public free schools of this state for such period of years as may be determined by the Commission, not to exceed six years in any case." In the meantime such contract must not be affected by the adoption

of a one-year General History under the subsequently enacted law, which means of course that such adoption should not be made because it will operate to reduce the number of books purchased under the existing contract in question.

Since the adoption of both English Grammar and English Composition for use "in the public free schools of Texas" is authorized under Section 5 of the 1917 Act, it is not apparent upon the face of that law that one contracting to furnish an English Composition in the high schools takes a vested right in its use as a textbook to the exclusion of all English Grammars in the high schools. It is at this point that the practical application of the law by the Commission becomes important as picturing the intent of the contracting parties. Having made a contract for an English Grammar for use in the elementary grades and none for its use in the high schools, and having made a contract for an English Composition for use in the high schools and none for its use in the elementary schools, the Commission effected a reasonable and practical interpretation of the law upon which the latter contracting book company might well be entitled to rely on fixing the right to the use of its English Composition in the high schools to the exclusion of all other books of that description for the six-year period of its contract. If however we were wrong in this, the concluding proviso of Section 5 of the Act of 1925 prohibits the adoption of an English Grammar for use in the high schools if such adoption would affect the existing contract for use of an English Composition in the high schools. Whether or not it will is a question of fact upon which the Commission should satisfy itself.

It might be suggested that the Legislature should have the power to vary the curriculum according to the needs of our schools and that the publishers must take this into consideration in making their contracts. The legal answer to this is that the Supreme Court in the Liadlaw case settled any doubt that contracts creating vested rights arise under the textbook law, and both Federal and State Constitutions prohibit laws impairing the obligations of contracts; the moral answer is that the business integrity of the state is paramount even to the needs of its schools; and the practical answer is that the State would find no one prepared to deal with it upon such a one-sided basis.

We are therefore of the opinion that the concluding proviso of Section 5 of the Acts of the 39th Legislature, as well as the terms of the 1917 Act upon the basis of which vested rights are fixed, prohibits the Commission from adopting a text for a one-year course in General History for use in the high schools during the period of the existing contract for use of Ancient and Modern History in the high schools. You are likewise advised that the Commission is similarly prohibited from adopting a text for an English Grammar for use in the high schools

during the period of the existing contract for use of English Composition in the high schools, provided the adoption of the former would to some material extent reduce the number of books the State would purchase under the contract for the latter.

Respectfully submitted,
C. W. TRUEHEART,
Assistant Attorney General.

Op. No. 2709, Bk. 62, P. 337.

SCHOOL FUNDS—HOW ADMINISTERED IN COUNTIES—DUTIES OF COUNTY AUDITOR.

1. School affairs of county are under supervision of the State.
2. School funds are not county funds, and are administered by school authorities.
3. County Auditor is required to keep school ledger, showing all school funds received and disbursed by trustees of county school districts in his county, and a record of all school bonds issued by said districts. He is required to examine all vouchers given by trustees of common school districts of the county and to inquire into the correctness of same.
4. County auditor is not authorized to approve or pass on legality of expenditures out of school funds, nor to countersign vouchers drawn against such school funds.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, November 23, 1927.

Mr. H. A. Hodges, County Auditor, Williamson County, Georgetown, Texas.

DEAR SIR: The Attorney General is in receipt of your letter of the 3rd inst., requesting an opinion concerning the duties of the county auditor relative to the funds of the county schools of the county. You ask whether such school funds are county funds; and whether the county auditor has any authority to pass on the legality of expenditures of school funds. Replying thereto, you are advised:

The School affairs of a county, administrative and financial, are under the supervision of the State and not the county; the county being merely a convenient unit through which the State functions. Appeals from the county superintendent to the county school trustees, and from the county school trustees to the State Superintendent, and thence to the State Board of Education.

School funds are not county funds; and from whatever source derived, they must be paid into the county depository direct (or into the district depository of an independent district having more than one hundred and fifty scholastics), and do not pass through the hands of the county treasurer. These

funds are apportioned by the county school trustees to the various school districts in the county. The law provides that the county superintendent (who is an agent of the State and not a county officer) shall approve all vouchers drawn against these school funds, and that in no case shall the county depository pay out any part of said funds without the approval of the county superintendent.

Article 1652, R. S. 1925, provides that the county auditor shall keep a school ledger, showing all funds received and disbursed by the common school districts of his county, and a bond register showing all school bonds issued by said common school districts, and shall also keep an interest and sinking fund account of such school bonds.

Article 1653 provides that he shall have continual access to and shall examine all books, accounts, etc., of any officer relating to finances of the county, and all vouchers given by the trustees of all common school districts of the county, and shall inquire into the correctness of same.

In the succeeding articles, the duties of the county auditor with reference to county finances and expenditures are prescribed in detail, and provide that he shall advertise for competitive bids for supplies *for the county;* that all claims, bills and accounts *against the county* must be filed with the auditor for his approval; that he shall not audit or approve any such claim, unless it has been contracted as provided by law, nor any account for the purchase of supplies or material for use *of said county,* or any of its officers, unless the requisition therefor is approved by the county judge; that all warrants on the *county treasurer* (except for jury service) shall be countersigned by the county auditor. (Articles 1654-1661.)

Articles 1667-1672 provide that in certain counties the county auditor shall exercise control over funds and expenditures in improvement districts of the county.

The law which elaborates the duties of the county auditor, with reference to the supervision of county funds and the funds of improvement districts in the county, does not charge him with the duty of supervising the expenditure of school funds. The school laws provide that the district school trustees and the county superintendent shall disburse all school funds, and the duties of these officials with reference to disbursement of the funds have been definitely defined, Article 2749-2756, Articles 2827-2830.

We are, therefore, of the opinion that the administration and disbursement of school funds is under the control of the school bodies and that this authority should not be limited by supervision of the county auditor and other county officials when such supervision has not been specifically authorized. That the county auditor is required to keep a record of bonds issued by the common school districts of his county, an interest and sinking fund account of such school bonds, and an account of all

school funds received and disbursed; and to examine and check the correctness of vouchers which have been given by trustees of common school districts of the county, approved by the county superintendent, and paid by the county depository. That the county auditor is not required or authorized to pass on the legality of accounts and vouchers for school funds, nor to approve same.

Yours very truly,
ETHEL F. HILTON,
Assistant Attorney General.

Op. No. 2717, Bk. 62, P. 385.

SCHOOLS—TRANSFER OF SCHOLASTICS.

1. A child transferred from one district to another in good faith may attend school in district of parent's residence in change of residence is not in fact made, without payment of tuition or other fee.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 19, 1927.

Mr. S. M. N. Marrs, Superintendent, Department of Education, Capitol.

DEAR MR. MARRS: The following question has been submitted to this department for a ruling:

If a child has been transferred from one district to another in good faith, and on the basis of a contemplated change of residence by its parents, and the change is not in fact made, may the child attend school in the district of its parents' residence and permanent home without payment of tuition or the amount of tax transferred?

We have answered this question, as follows:

That the child should be permitted under these circumstances to attend school in the district of his residence, and should be received by this district on the same basis that any other scholastic, resident and not enumerated, would be received.

About twenty-five years ago the Attorney General was asked to rule on a similar question; and under date of January 16, 1902, Mr. T. S. Johnson, Assistant Attorney General, wrote a letter advising the then State Superintendent of Education that if the child had been transferred and the parents did not in fact change their residence as intended the child could not thereafter attend school in the district of residence; that this privilege of residence had been waived by the transfer.

We cannot agree with this view of the law for the following reasons:

Article 2696 (R. S. 1925) provides that any child lawfully enrolled in any district may, at the discretion of the county superintendent, be transferred to the enrollment of any other district in the same county upon the written application of the parents; that no child shall be transferred more than once; that upon the transfer of any child, its portion of the school fund shall follow and be paid over to the district to which such child is transferred; and provides that no transfer shall be made after August 1. (Acts of 1893, Page 287.)

Article 2697 provides that the transfer may be made to an adjoining district of another county on the approval of the county superintendent. (Acts of 1907).

Article 2901 provides that every child in this State of scholastic age shall be permitted to attend the public free schools of the district in which it resides at the time it applies for admission, notwithstanding it may have been enumerated elsewhere or may have attended school elsewhere part of the year. (Acts of 1895, Page 182.)

The law does not require that a parent contemplating a change of residence into another school district must make his intention known to the school authorities before the close of the enrollment period in order that his child may attend school in the district of contemplated residence. Indeed, it is provided that he may move from one district to another and at any time of the year, and his child, notwithstanding he may have been enumerated elsewhere, will be permitted to attend school in the district of residence.

A Transfer based on a contemplated change of residence, therefore, is not made for the benefit of the child but for the benefit of the contemplated district, and, it seems reasonable to suppose, is made at the solicitation of the district which expects to gain a scholastic. The child in such a case should certainly not be required to bear the results of the enterprise of the contemplated district or of a change in the plans or fortunes of its parents; but the resident district should receive the child on the basis of an unenrolled resident scholastic.

Any other construction of the law could have the effect of depriving a child in this situation of his school year or subjecting him to undue hardship in attending school in a remote district. These possibilities are contrary to the manifest intention of the Legislature, which has always been to encourage (and compel) children of scholastic age to attend school, and to provide for them the best and most convenient schools available.

Very truly yours,

ETHEL F. HILTON,

Assistant Attorney General.

Op. No. 2748, Bk. 62, P. 552.

TEXT BOOKS

1. It is obligatory upon the Textbook Commission to meet sufficiently in advance of the expiration of a contract to furnish textbooks to the State for the purpose of readopting the old text or adopting a new text.
2. The law is not mandatory that the Commission act on the readoption of the old or the adoption of a new text at the regular annual meeting, but action may be had on this subject either at that meeting or any special meeting called for the purpose.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, November 16, 1927.

Honorable Dan Moody, Governor of Texas, Capitol.

DEAR GOVERNOR: In your communication of November 12th you state that the contracts of the State on certain text books now in use in the public free schools will expire September 1, 1928; that the Commission lets contracts in October preceding the expiration of the term of existing contracts in the following September; that this has not been the uniform practice as where the State has had on hand sufficient books on a subject upon which the contract was expiring to supply the schools for another year, the Commission generally postpones the adoption until a year after the expiration of the existing contract. You give as illustration the assumption that the State has a contract with a publisher to supply a given text on Latin, the contract expires and, though the State has sufficient books on hand to meet the needs of the schools for the next year or two, the Commission adopts a text on Latin different from that upon which the contract has expired; that the law allows three years for gradual introduction of a new text, but in practical operation, approximately 50 per cent of the books bought on a new text are purchased within a six months period after the adoption.

You state that it is being contended that when a textbook contract expires, that it becomes the duty of the Textbook Commission to let a contract for that text on that subject at the annual meeting of the Commission preceding the expiration of the contract; that you do not agree with this construction of the law, but that the Commission has the discretion to postpone the adoption of a text for a year or two years as long as there is sufficient books on hand upon which the contract has expired to supply the needs of the schools. You ask for my opinion as to whether or not the Commission has the right to postpone the adoptions under these circumstances.

Your communication involves two questions:

First: As to whether or not it is the duty of the Commission to re-adopt the old text or make a new adoption prior to or at the time of the expiration of existing contracts.

Second: Assuming that it is necessary that the Textbook

Commission make a new adoption upon the expiration of contracts, whether this adoption must be made at the regular annual meeting preceding the expiration of the contracts.

An answer to the first question makes it desirable that a brief outline of the history of legislation upon the subject of uniform textbooks be presented. The first uniform textbook act was passed in 1897, (Chapter 164, Acts of Regular Session 25th Legislature). The purpose of it was to create a State Textbook Board and to procure for use in the public free schools of the State "a series of uniform textbooks." The obligation to do this was imposed upon the State Board of Education, together with the State Superintendent of Public Instruction, the President of Sam Houston Normal Institute, and the Attorney General, which board was required to select and adopt a uniform system of textbooks for use in the public schools, and to enter into contracts with publishers for furnishing to the schools these textbooks, and the law provided that the textbooks so selected should be "used as textbooks to the exclusion of all others in the public free schools." The emergency clause of the act declared that the purpose of its enactment was to relieve the schools of a situation existing by reason of conspiracies and combinations against competition from the payment of unreasonable prices and the unnecessary expenses caused by constant change of textbooks. This law was the beginning of the public policy of this State requiring a uniform system of textbooks to be used in the public free schools to the exclusion of all others at prices definitely fixed by written contracts. This policy did not involve free textbooks but was definite in requiring a uniform system selected by State authority.

Various laws were passed from time to time until 1917 when there was submitted to the people an amendment of Article 7, Section 3 of the Constitution, this amendment being adopted and becoming a part of the Constitution on November 5, 1918. Under its provisions the duty was imposed upon the State Board of Education to set aside annually a sufficient amount out of a tax rate of 35 cents on the one hundred dollars' valuation authorized by the amendment "to provide free textbooks for the use of children attending the public free schools in this State." The Legislature, which submitted this amendment to the people, also created a "permanent textbook commission (General Laws, First Called Session, 35th Legislature, Chapter 44). This permanent commission was composed of seven persons appointed by the Governor together with the Superintendent of Public Instruction. This act, of course, did not provide for free textbooks since the provision of the Constitution requiring free textbooks had not become effective. It contained very definite provisions, however, for "the keeping and operation of a complete system of uniform textbooks for the public free schools of this State."

Detailed provisions are contained in the law by which these textbooks should be selected, and the mandatory obligation was placed upon the Commission to adopt textbooks for the public free schools in accordance with the act, and there is this definite inhibition in the law:

"No public free school in this State shall use any textbook unless same has been previously adopted or approved by this Commission."

In determining the question of continuing contracts in effect, the obligation is imposed upon the State Superintendent to furnish to the Commission an expression of opinions from the superintendents of the various schools as to whether "the expiring text should be *re-adopted or new text adopted.*" To my mind, the provisions of the law are clear and definite in these regards:

First: It is the duty of the commission to adopt a uniform system of textbooks for a period of not exceeding six years to be used in the schools of the State to the exclusion of all others *for such period.*

Second: When a contract for a text is about to expire, it is the duty of the commission, either at the regular session on the second Monday in October, or at such other time as they may be called together for that purpose by the chairman, to either adopt a new textbook for a definite period not to exceed six years, or, to re-adopt the old text for such period, or if there are sufficient books of the text on hand to supply the needs of the schools for one, two or three years, to re-adopt the text for such period as may be advisable in view of this condition, or, if financial economy so dictates. to secure bids from the publisher of such texts for such books as may be necessary for the first, second, and third years succeeding the expiration of the contract and re-adopt this text for such period.

There must be the adoption of a new text or a re-adoption of the old in order to carry out the purpose and intent of the law that there shall be a uniform system of textbooks consisting exclusively of those adopted by the commission, a deviation from which is not permitted under penalty of criminal prosecution. If the commission determines that there are on hand a sufficient number of usable books under a contract which is about to expire, for one or two or three years, there is no obligation, of course, to purchase new books, but there is the obligation to re-adopt the text for the years for which there is a supply on hand. If there is a supply on hand for one year, and probably two or three years and financial economy dictates that no changes should be made, then it is the duty of the commission to ascertain from the publisher the lowest price at which the book will be furnished for one, two or three years, and readopt it for such period. If a contract ex-

pires by reason of the terms of the law and its own provisions, and the commission has not re-adopted the text, or adopted a new text, there would be no uniform text on this subject for the public free schools, and therefore, there would be no obligation upon the administrative officers of the schools to use any particular text for the reason that none has been adopted and no contract is in force by furnishing same, and, under the provisions of Section 22, the trustees of the schools might purchase any text from the local maintenance funds for use in the particular schools. There might not be any necessity to purchase any additional books of any text by reason of having a sufficient number of usable books on hands either for one, two or three years, and there would be no obligation upon the Board of Education to purchase any, but if the term for which a text has been adopted is about to expire, there is the obligation upon the commission to either re-adopt or adopt a new text. This may be done at the regular annual meeting of the commission or at such other or special meeting as may be called by the chairman.

It contained the further provision that the books adopted by the Commission shall be "introduced and used as textbooks to the exclusion of all others in the public free schools of this State *for such period of years as may be determined by the Commission not to exceed six years in any case.*

After the amendment to the Constitution, requiring the State to furnish textbooks free, became effective, there was passed at the Regular Session of the 36th Legislature (Chapter 29) an act making it mandatory upon the State Board of Education to purchase books from the contractors of textbooks used in the public free schools and distribute same without cost to the pupils attending such schools. Under this act, the contracts which had been made by the permanent textbook commission were recognized, and the obligation placed upon the State Board of Education to purchase a sufficient number of books at the contract price for use in the public free schools, and to furnish and distribute same free beginning at the commencement of the scholastic term 1919-20.

Chapter 44 of the Acts of the First Called Session of the 35th Legislature was amended by Chapter 34, Acts of the First Called Session of the 37th Legislature, but not in any way as relates to the issue here involved. This act of the Thirty-fifth Legislature passed prior to the adoption of the amendment to the Constitution requiring free textbooks, together with Chapter 29, Page 41 of the General Laws of the 36th Legislature and the amendment of 1921 remained the law regulating the adoption of free textbooks in this State until 1925 when an entirely new act was passed in lieu of existing laws (Chapter 176, General Laws, 39th Legislature). This act also provided for a permanent textbook commission consisting of six teachers and one business man, appointed by the Governor

together with the State Superintendent of Public Instruction. While Section 5 of the Act on its face would merely give the Commission the "authority" to select and adopt a uniform system of textbooks, the other provisions of the act are such as that this duty is mandatory, as for instance, in the same section there is the provision that the Commission "shall adopt textbooks in accordance with the provisions of this act for every public free school in this State, and *no public free school in this State shall use any textbooks unless same has been previously adopted and approved by this commission.*" It likewise contains the mandatory provision that the books adopted by the commission "shall be introduced and used as textbooks to the exclusion of all others in the public free schools in this State *for such period of years as may be determined by the commission not to exceed six years in any case.*" Fines are imposed upon teachers and members of the boards of education, against any school trustees who shall prevent or aid in the prevention of the use of such books or any of them in the schools, and also against any teacher in any school who shall fail or refuse to use said books. It contains the general clause evidencing its intent that its provisions "are intended to furnish a complete plan for the adoption, purchase, distribution, and use of free textbooks to be supplied to the public free schools in the State."

The Fortieth Legislature enacted the law under which we are now operating, and a construction of which is involved in your inquiry, and it is necessary to call attention to some of its specific provisions. Its purpose and intent is expressed in the last section of it (51) that it is "to furnish a complete plan for the adoption, purchase, distribution and use of free textbooks to be supplied to the public free schools of the State." It contains the provision that the books adopted by the commission shall be introduced and used as textbooks "to the exclusion of all others in the public free schools of this State for such period of years as may be determined by the commission not to exceed six years in any case." It likewise contains the provisions imposing penalties upon school trustees and school teachers who prevent or aid in preventing the use of such books in the public free schools.

It thus appears from the history of the legislation in this State for a long number of years that there is an established public policy that the free schools of this State shall use a uniform system of textbooks. During these years, the machinery of the law has been provided for the selection of this uniform system, and the laws have been mandatory that no other system shall be used in the public free schools. For a while the laws were operative only for a certain period of five years, for instance: The Act of 1907 was operated for a period of five years. At the end of that period in 1912, another five-year law was passed, but throughout all of them, there runs the

definite policy of the State and will of the Legislature that there shall be a uniform system of free textbooks, and that, too, for certain definite periods of time. This purpose and intent of the law is as definite and mandatory as is the provision of the Constitution that these textbooks shall be furnished free. So that there is imposed upon the Textbook Commission the obligation to provide for certain fixed periods of time a uniform system of free textbooks to be supplied to the public free schools of the State, from which there can be no variance by any of such schools, or the administrative officers thereof or the teachers therein. The law makes it the duty of the Commission to meet annually on the second Monday in October, and at such other times as it may be called together by the chairman, for the purpose of considering the advisability of one of two things:

First: Of continuing or discontinuing at the expiration of each current contract any or all of the State's adopted textbooks, or
Second: Of making adoptions as the law provides.

Its duty is to do one or the other. This is clear for the reason that the law expressly provides that before there shall be any change in an adoption series, the commission shall make a thorough investigation and satisfy itself of two things:

First: That it is "for the best interest of the school children" that such a change be made, and
Second: That it is "consistent with financial economy."

Furthermore, it is provided that "unless new textbooks better suited to the requirements of the schools, and at a price and quality satisfactory to the commission" are offered, the commission shall renew the existing contract for a period "not to exceed six years." The discretion is given that if a contractor supplying any books agrees to renew the contract for a period of not less than two years or more than six, preference should be given to the offer "if they thereby secure as good or better books at a lower price than by making a different contract." There is the further duty that before they can displace any book upon which a contract is expiring and make a contract "for a new text," they shall ascertain the number of usable books on hand, and the estimated number that will be necessary for use in the schools for the first, second and third years succeeding the expiration of the contract but in this event they shall secure from the publisher an offer for furnishing such textbooks for such period, but at the expiration of such periods, "the commission shall then make a contract for a textbook on the subject."

Therefore, in answer to the first question, you are advised that the law is not mandatory that the commission act on this

subject at the regular annual meeting, but action may be had at the meeting or at any special meeting called for the purpose by the chairman.

In answer to the second question, you are advised that it is obligatory upon the commission when a contract, the term of which is definitely fixed by the statute or by the contract itself, is about to expire, to meet sufficiently in advance of the expiration of the contract and either re-adopt the old text or adopt a new text. If a new text is to be adopted, it must be for a definite period of not less than six years. If there are sufficient books on hand under an old contract for use in the schools for one, two or three years, or if financial economy dictates that the old text should be continued for either of these periods, it is obligatory upon the commission to adopt the old text and make contracts with the publisher, if it may be done under the provisions of the law, for furnishing such number of new books as may be necessary for the schools of the State during the period desired, or, the commission has the authority to renew the old contract on the same terms for a period of not less than two years or more than six years, if, thereby, they can secure "as good or better books at a lower price than by making a different contract," but in this event, there must be a re-adoption for the period of renewal.

Yours very truly,
CLAUDE POLLARD,
Attorney General.

OPINIONS RELATING TO TAXATION

Op. No. 2654, Bk. 62, P. 1.

DELINQUENT TAXES—TAX COLLECTOR—FEES FOR DELINQUENT TAX CERTIFICATES.

1. A tax collector is required by law to issue a certificate under seal showing all delinquent taxes on lands or lots.
2. The tax collector is not authorized to charge a fee for issuing delinquent tax certificates.
Arts. 7324 and 7331, Revised Civil Statutes, 1925.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 17, 1927.

Mr. J. H. Tullos, County Auditor, Corsicana, Texas.

DEAR SIR: Under your letter of the 12th instant addressed to Attorney General Pollard you ask questions with reference to delinquent tax certificates issued by the tax collector, which questions may be summarized as follows:

1. Is the tax collector required to issue certificates with reference to delinquent taxes on land?

2. If the law does require the issuance of these certificates, is the tax collector authorized to charge a fee for this service?

3. If he is permitted to charge a fee for this service, do the fees so collected constitute fees of office accountable for under the maximum fee bill?

Article 7324 of the Revised Statutes of 1925 provides for the collector to make up notices of delinquent taxes on lands and lots for each year they are delinquent, and said Article contains this sentence:

"The tax collector shall furnish on demand of any person, firm or corporation like statements with reference to any particular lot or tract of land for whatever purpose desired, which shall be in all instances certified by him with the seal of his office attached."

Article 7331, Revised Statutes of 1925, provides the commission of five per cent for the collector of all delinquent taxes collected by him, and in stating the duties to be performed in order to receive this commission, contains this clause:

"Issuing statements in regard to particular tracts of land required by this law."

We see from Article 7324 that the tax collector is required to furnish on demand of any person a statement with reference to the delinquent taxes for whatever purpose desired. The Court of Civil Appeals has held in the case of State vs. Devisson, et al, 280 S. W., 292, that this act requires the tax collector to issue statements with reference to delinquent taxes, using this language:

"By the express terms of article 7689a, section 1 of chapter 13, Second Called Session of the Thirty-eighth Legislature, it is made the duty of the tax collector to furnish, on demand of any person or persons, firm, or corporation, statements with reference to the amount of taxes due on any particular lot or tract of land for whatever purposes desired, which shall be in all instances certified by and with the seal of his office attached."

It is clear, then, that the law requires the tax collector to issue delinquent tax certificates, and the only question to decide is whether he is authorized to demand and collect a fee for this service.

In order to make a proper construction of Articles 7324 and 7331, it is necessary to trace the history of the original acts which at present constitute these articles.

Section 1 of the Acts of the Regular Session of the 34th Legislature of 1915, Chapter 147, page 250, provided that in counties having less than fifty thousand population the tax collector shall mail to the owners of all lands delinquent a notice showing the amount of taxes due on lands or lots for each year and contained the above quoted section of present Article 7324 with reference to furnishing delinquent tax statements. Section 3 of this same act provided for five per cent commission on delinquent taxes collected.

Acts of Second Called Session, 36th Legislature, 1919, Chap. 64, page 164, amended the provisions of Section 1 and 3 of the Acts of 1915 above mentioned, and in Section 1 changed the law, making the same applicable in every county in the State, and still retained the above quoted phrase with reference to furnishing statements regarding delinquent taxes. The same act amended section 3 of the 1915 act and retained the five per cent commission for collecting delinquent taxes, but expressly made said commissions fees of office accountable for under the fee bill.

Section 1 of the Acts of the Second Called Session of the 38th Legislature, Chapter 13, page 31, again amended Section 1 of Chapter 147 of the Regular Session of the 34th Legislature, as amended by the Second Called Session of the 36th Legislature, as amended by the Second Called Session of the 36th Legislature, and still retained the above quoted phrase with reference to furnishing delinquent tax statements. This Act, as amended, is carried forward as Article 7324 of the Revised Statutes of 1925.

Section 7 of the Acts of the Second Called Session of the 38th Legislature also amended Article 7691 of the Revised Statutes of 1911, and in said section retained the five per cent commission allowed collectors, and made as part of the duties necessary to perform in order to receive this commission. the following:

"Issuing statements in regard to particular tracts of land required by this Act."

Acts of the Third Called Session of the 38th Legislature, Chap. 21, page 180, amended Section 7 of the Act above quoted, and still retained the five per cent commission and the phrase with reference to issuing statements in regard to particular tracts of land. This Act is carried forward as Article 7331 of the Revised Statutes of 1925. We have standing today Article 7324 which requires the tax collector to issue delinquent tax certificates, and Article 7331, which states among other duties that for "issuing statements in regard to particular tracts of land required by this law" the collector shall receive five per cent commission on delinquent taxes collected.

Article 7331 is a part of Section 7 of the Acts of the Second Called Session of the 36th Legislature, Chap. 13, and Article 7324 is a part of Section 1 of the same Act. Therefore, the provisions of Section 7 of this Act, or Article 7331 in using the term "this act" or "this law" evidently refers to the statements required to be furnished under the provisions of Section 1 of the above mentioned act, which is now Article 7324. In short, the phrase quoted from present Article 7331 with reference to issuing statements required by "this law" refers to statements provided for in Article 7324; but even if Article 7331 is not intended as the compensation to be paid the tax collector for issuing said statements, the tax collector would still not be authorized to demand or receive a fee from any person who demands a statement with reference to delinquent taxes. If the statute does not provide a fee for an officer for a service that he is required to render, then he is not authorized to receive or collect a fee for such service. The statutes prescribing fees for public officers are strictly construed and fees by implication not permitted. This statement is held in a decision by the Commission of Appeals in the case of McCalla vs. City of Rockdale, 246 S. W. 654 in which the Court uses the following language:

"The courts of this state have adopted the rule construing strictly those statutes prescribing fees for public officers and against permitting such fees by implication. No officer is permitted to collect fees or commissions unless the same are provided for and the amount thereof declared by law. This is true, notwithstanding such officer may be required by law to perform specific services for which no compensation is provided. The obligation to perform such service is imposed as an incident to the office, and the officer is deemed to have engaged to perform them without compensation by his acceptance thereof."

In the case of Knight vs. Harper, 279 S. W. 529, the Court uses the following language:

"In order for a public officer to successfully assert a right to a fee of office, it must have been expressly provided for and declared by law."

The fact, therefore, that the Legislature might have imposed

a duty upon the tax collector without a fee for this duty does not permit him to make a charge for same. He is not the only officer who is required to perform duties without any fees for same. The county clerk, district clerk, sheriff and other officers are required to perform many duties for which no fees are provided, and resort is had only to the statutes authorizing the commissioners' court to grant ex-officio compensation.

You are advised therefore that in answer to your first question, the tax collector is required by law to issue certificates with reference to delinquent taxes on land.

In answer to the second question, you are advised that the tax collector is not authorized to charge a fee for this service.

The answer to the above question makes an answer to the third question unnecessary.

Very truly yours,
H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2666, Bk. 62, P. 70.

TAXATION—EXEMPTIONS—MUNICIPAL CORPORATIONS.

1. Art. 1038, Revised Statutes, 1925, does not authorize the city to exempt from taxation any property other then the property mentioned in Sections 1 and 2 of Article 8, of the Constitution.

2. Art. 1038, of Revised Statutes, 1925, in so far as it attempts to authorize cities to exempt from taxation property other than that mentioned in the Constitution is unconstitutional.

Art. 1038 and 7150, Revised Statutes Constitution, Sections 1 and 2, Article 8.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 19, 1927.

Honorable Lanham Croley, City Attorney of University Park, Praetorian Building, Dallas, Texas.

DEAR SIR: As city Attorney of University Park, you seek an opinion from this Department as to whether your city has the authority to exempt from city taxation the personal property of industrial plants, financial institutions, trust companies and insurance companies in order to encourage the establishment of such institutions in your city. You cite Art 1038, of the Revised Civil Statutes for 1925 as authority for the city to exempt the property above mentioned and ask the opinion of this Department as to the constitutionality of this Article.

Article 1038 above referred to reads as follows:

"The city council may, by ordinance, provide for the exemption from taxation all such property as they may deem just and proper."

This Article, standing alone, would seem to authorize the city council to provide for the exemption of the property mentioned in your letter as the Article itself does not have any restrictions as to the property that may be exempted, but reads that the council may exempt such property as they may deem just and proper. It becomes necessary, therefore, for us to decide whether the Legislature, by the enactment of this Article, intended to permit cities to exempt only property that the Constitution permits to be exempted, or whether it was an absolute right given the city to exempt any property, and if the latter, is the Article constitutional?

It is a well known principle of law that municipal corporations have only such authority as is conferred by statutes, or the Constitution. It is deemed unnecessary to cite authorities on this point. Therefore, the right of your city to levy any tax whatever must come from some statutory or constitutional authority. In Cooley on Taxation, 4th Ed. Sec. 122, we find the following:

"The power to levy taxes is not inherent in municipal corporations. This applies equally well to license and occupation taxes. The fact that the state creates municipal governments does not by implication clothe them with the power to levy taxes. That power must be conferred in terms, or must result by necessary implication form the language made use of in the law.

The above principle is approved in State vs. H. & T. C. Ry. Co., 209 S. W. 820, see also the case of Vance vs. Town of Pleasanton, 261 S. W. 457.

Art. 8 Sec. 1, of the Constitution, provides as follows:

"Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporation, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The Legislature may impose a poll tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this State. It may also tax incomes of both natural persons and corporations, other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax; provided, that two hundred and fifty dollars' worth of household and kitchen furniture belonging to each family in this State shall be exempt from taxation."

Does this provision of the Constitution apply to cities? In short, can cities levy taxes that are are not equal and uniform. In the case of Town of Pleasanton vs. Vance 277 S. W., 89, the Commission of appeals held that this provision does apply to city taxes. In this case the defendant was defending against a suit for city taxes, and the Appellate court used this language:

"Our Constitution also provides that 'taxation shall be equal and uniform,' and that 'all property in this State * * * shall be taxed in

proportion to its value, which shall be ascertained as may be provided by law.' Art. 8, Sec. 1. In a suit to recover taxes the owner of the property assessed has the right under this provision to show in defense of the action that the taxes assessed were not 'equal and uniform'; that the value of his property was not ascertained as provided by law; and that the value assessed is in excess of its real value."

Art. 8, Section 2, of the Constitution provides as follows:

"All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; but the Legislature may, by general laws, exempt from taxation public property used for public purposes; **actual places of religious worship**; places of burial not held for private or corporate profit; all buildings used exclusively and owned by persons or associations of persons for school purposes and the necessary furniture of all schools, also the endowment funds of such institutions of learning and religion not used with a view to profit and when the same are invested in bonds or mortgages, or in land or other property which has been and shall hereafter be brought in by such institutions under foreclosure sale made to satisfy or protect such bonds or mortgages that such exemption of such land and property shall continue only for two years after the purchase of the same at such sale by such institutions and no longer; and institutions of purely public charity; and all laws exempting property from taxation other than the property above mentioned shall be null and void."

Does this provision of the Constitution apply to cities? If Section 1 of the same Article applies, why should this section not apply also? In the case of Hoefling vs. San Antonio, 85 Texas, 228, which was a question as to the uniformity of city occupation taxes, the Supreme Court held that this section would apply to cities, and used this language:

"The Constitution provides, that 'all Occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax.' Constitution, Art. 8, Sec. 2.

"This is as binding in case of occupation taxes levied by a municipal corporation as in such taxation levied by the State."

It will be noticed that under the provisions of Sec. 2, Art. 8, above quoted, that the property is not necessarily exempt from taxation, but the Legislature is authorized by General Laws to exempt such property. But under the provisions of Section 1 it is provided that $250.00 worth of household and kitchen furniture belonging to each family in this State shall be exempt and does not leave it to the discretion of the Legislature in exempting furniture as provided in said section.

We see then that under Section 2 of the above quoted Article that the Legislature has power to exempt only certain property from taxation, and it has done so by enactment of Article 7150, of the Revised Statutes for 1925. Section 2 of Article 8 of the Constitution specifically provides that all laws exempting property from taxation other than the property mentioned therein shall be null and void. There can be no doubt but that the exemptions provided for in Article 7150 apply to city taxes.

Numerous cases have been decided by our courts with reference to exemption of certain property from taxation, and many of the suits have been for city taxes, and the only question to decide in those cases was whether the property fell within the exemption clauses of the statutes and Constitution.

The case of City of Houston vs. Scottish Rite Association, 230 S. W. 978, was a tax suit by the City of Houston for taxes on some lodge property. The defendant claimed that the property was exempt from taxation, evidently claiming exemption under the provisions of Art. 7150, for the Constitution of Texas does not exempt any property except a certain amount of household and kitchen furniture. It is only by virtue of Article 7150 that the property could be claimed as exempt. Therefore, it necessarily follows that the provisions of Article 7150 apply to all taxes including city taxes, and are not limited to State taxes. The court says that if it is assumed that the property was exempt under the statute, the question remains whether it was exempt under the Constitution. The court held that the property was not exempt for the reason that an exemption was prohibited by Art. 8 Sec. 2 of the Constitution. We see then that under this decision the Legislature would be unauthorized to grant an exemption from city taxes on any property except that mentioned in the Constitution.

In the case of City of Cleburne vs. Ry. Co. 1 S. W. 342, the Supreme Court of Texas, in speaking of Art. 436, which is now Article 1038, used this language:

"It is not certain, by any means, that, under Article 436, a city could exempt from taxation the general property of the railway company."

Since cities secure the right to tax property by virtue of the Constitution or the statutes, and since they have only such powers as granted by the same source, it necessarily follows that a city cannot exempt property from taxation without some grant of authority from either the Legislature or the Constitution. In Cooley on Taxation, 4h Edition, Sec. 669, we find the following rule:

"The power to exempt may be delegated by the legislature to the same extent it may itself exercise the power to exempt. Thus the legislature, where the Constitution does not forbid, has authority to delegate to municipalities the power to exempt property from taxation to the same extent the legislature has power to exempt."

In the same work, in Section 670, we find this rule:

"Pertaining as it does to the sovereign power to tax, the municipalities of a state have not the exempting power except as they are expressly authorized by the State. A municipal corporation has no inherent power to grant exemptions from taxation nor to commute taxes. However, the legislature may delegate to a municipality the power to make particular exemptions; but power delegated to a municipal corporation to tax does

not include the power to exempt and of course the legislature cannot delegate power to exempt so far as exemptions are forbidden by the constitution. And it has been held that it is not competent to confer a general power to make exemptions, since that would be nothing short of a general power to establish inequality."

It seems clear then that the legislature does not have the authority to exempt from taxation any property, except that which it is authorized to exempt under the Constitution. Does it seem plausible then, that the Legislature may give power to a city that it does not have for itself? The authorities above cited hold that the provisions of Sections 1 and 2 of Article 8 of the Constitution apply to cities. The provisions of Article 7150 apply to all taxes which will include city taxes and the Supreme Court in the City of Houston case above cited held that lodges could not claim exemption from city taxes under the statute for the reason that the Legislature did not have authority to exempt such property from taxation. Therefore, if it was the intention of the Legislature in the enactment of Article 1038 to allow cities to exempt property other than that mentioned in the Constitution, then in the opinion of this department said article is unconstitutional. However, it might have been the intention of the Legislature in the enactment of this Article to give cities authority to exempt from taxation the property mentioned in the Constitution on the theory that it was necessary to do so in order for cities to have authority to exempt even the property mentioned in the Constitution. If Article 7150 should be construed as not applying to city taxes, then it would be necessary to look to Article 1038 for a city to have authority to exempt even the property mentioned in the Constitution, and said property would not even be exempt from city taxation unless an ordinance exempting same for taxation should be passed by the city.

However, we are of the opinion that the provisions of Article 7150 include city taxes, as well as other taxes, and that the property mentioned in said article is the only property that a city is authorized to exempt from taxation.

You are advised, therefore, that the City of University Park would be unauthorized to exempt from taxation the property mentioned in your letter and that only the property mentioned in sections 1 and 2 of Article 8 of the Constitution can be exempted from taxation.

Very truly yours,

H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2669, Bk. 62, P. 90.

CONSTITUTIONAL LAW—CONSTRUCTION OF ART. VII. SECTION 10. LEGISLATURE CANNOT RELEASE PERSONS AND PROPERTY FROM TAXES EXCEPT IN CASE OF "GREAT PUBLIC CALAMITY"—WHAT IS "GREAT PUBLIC CALAMITY"—DALLAS, TARRANT, STARR AND TYLER COUNTY BILLS.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 9, 1927.

Honorable W. S. Barron, House of Representatives, Austin, Texas.

DEAR MR. BARRON: You, in conjunction with Messrs. O. L. Parrish, J. A. Merritt, A. H. King, J. C. Rogers and J. F. Wallace, members of the Legislature, submit to me, copies of Senate Bill Nos. 228, 229, and 293 pending before the Fortieth Legislature, and ask for my opinion as to the constitutionality of same.

Senate Bill No. 228 has as its purpose the control of the flood waters of Trinity River, declaring that a great public calamity exists that requires immediate legislation for the protection of the loss of lives and property; it provides for the issuance of bonds and for the release of a portion of the State ad valorum tax within said district not to exceed 23 cents on the $100.00 assessed valuation for a period of twenty-five years from and after December 21st, 1928. It, by its terms, is offered under the provisions of Section 10 of Article 8 of the Constitution. The area of the district is not given in the Act, but my information is that it contains several thousand acres of land.

Senate Bill No. 229 is an act releasing inhabitants of, and property subject to taxation of Dallas Levee Improvement District, and Dallas County Levee District No. 5, for a period of twenty-five years from payment of ad valorem taxes levied for State purposes, to prevent great public calamities in said district caused by high waters and overflows. By its terms, it is offered under Section 10 of Article 8 of the Constitution. The boundaries of this district are not given, but my information is that it likewise, contains many thousand acres. This act states that the property included within the districts involved, was in years 1890, 1908, 1913, 1914, 1915, 1916, 1918, 1920 and 1922, greatly damaged by high waters and overflows.

Senate Bill No. 259 is an act making a grant, or donation to Starr County of a portion of the State ad valorem taxes for a period of twenty-five years, to enable said county to construct levees, etc., to protect it from disastrous and calamitous overflows. It recites that there is a large area of the county subjected practically every year to great damage by high waters

and overflows, and a grant is made to the county of all State ad valorum taxes in excess of 5 cents on the $100.00 valuation. It is not, by its terms, offered under Section 10 of Article 8, but must be authorized under it, or it must fail.

Senate Bill No. 293, is an act granting and donating to Tyler County for a period of fifteen years, that part of the state ad valorem tax in excess of 10 cents on the $100.00 valuation. It is stated that the county depository failed, and the county lost a large sum of money by reason of such failure, which has left it in poor financial condition.

These acts all depend for authority for their enactment upon a proper construction and application of Section 10 of Article 8 of the State Constitution.

I am not unmindful of the matter of public interest involved in the proposed legislation, but with the policy of the law this department has nothing to do. Its functions ends with a definite statement of what it conceives to be the law.

The Constitution of 1846, Article 7, Section 27, provided that taxation should be equal and uniform throughout the state, and that all property should be taxed in proportion to its value, "except such property as two-thirds of both Houses of the Legislature may think proper to exempt from taxation."

Section 28 of the same Article, authorized the Legislature to exempt from taxation, $250.00 worth of household furniture.

These identical provisions were carried forward into the Constitution of 1861 and of 1866, and appear in both as Article 7, Section 27 and 28. The provisions in the identical language were also carried forward into the Constitution of 1869, and appear as Article 12, Section 19.

During these years, and prior to the adoption of our present Constitution, the Legislature of Texas exercised rather extensively, its power to exempt property from taxation. This power it had the right to exercise since no constitutional provision was violated thereby, for in addition to the inherent power of a State Legislature to exempt property from taxation, unless expressly prohibited by the Constitution, the provisions of these Constitutions expressly authorized such exemptions as the Legislature "may think proper." A few of the many instances are given of the exercise of this power.

In 1870, the Legislature incorporated the Washington Fire Engine Company No. 1 of the City of Austin, and expressly provided that its property should be exempt from taxation for State and County purposes. (Gammel's Laws, Vol. 6, page 524.) During the same session, an act was passed authorizing one A. M. Nigs to sell, barter and trade in goods, wares and merchandise anywhere in the State of Texas, free of any State, county or city incorporation tax. (Gammel's Laws, Vol. 6, page 639.) At the same session, laws were passed exempting from taxation the bonds of the United States, and of the corporation of the City of Houston, and all cemetery lots and the

property of all churches, Masonic and Odd Fellows Lodges and other charitable associations. (Gammel's Laws, Vol. 6, page 76.)

Likewise, the capital stock and property of the International Railroad Company was exempted for five years from August 5, 1870; (Vol. 6, page 109), and the capital stock and property of the Texas Timber & Prairie Railroad Company for 10 years after completion, (Vol. 6, page 303); and the property of Gymnastic Association of New Braunfels from State, County, Occupation or other taxes. (Vol. 6, page 320.)

The Legislature of 1873 released all State ad valorem and poll taxes that were at that time, or that might thereafter be assessed against the residents of the counties of Montague, Wise, Parker, Hood, Erath, Hamilton, Lampasas, Burnet, Blanco, Kendall, Bandera, Medina, Frio, McMullen, Duval, Starr and all counties lying west and southwest of same. (Gammel's Law Vol. 7, page 59.) The basis of the release was stated to be for the purpose of protecting the frontier from the invasion of Indians. The Legislature of 1875, expressly repealed this law. (Vol. 8, page 382.)

During these years, there were many similar laws, evidencing an unlimited extensive exercise of its power to exempt persons and property from taxation, and many acts making donations to counties, and authorizing counties to issue bonds for the purpose of promotion of railroads construction, etc.

These constitutional provisions and this legislative history constitute the background of the provision we are called upon to construe.

As a future protection against Legislative action as it relates to the matter of taxation and the public funds, there was incorporated into the Constitution of 1876, several provisions which are pertinent in construing the one before us. As to granting of public money to individuals or counties, Article 3, Section 51 of the original constitution of 1876, provided that "the Legislature shall have no power to make any grant, or to authorize the making of any grant of public money to any individual, association of individuals, municipal or other corporaton whatsoever; *provided, that this shall not be so construed as to prevent the grant of aid in case of a public calamity.*"

This Article was amended in 1912, and the words: "provided, that this shall not be so construed as to prevent the grant of aid in case of public calamity," were eliminated. As amended, this particular article of the Constitution could have but one construction, and that is, that the Legislature cannot in any event, make any grant, or authorize the making of any grant of public money to any individual, association of individuals, municipal or other corporation whatsoever; even in case of a public calamity.

Therefore, if by any rule of construction, the provisions of

these acts might be brought under the terms of this section of the Constitution, there is clearly no authority in the Legislature to enact them. Senate Bill No. 259 relating to Starr County and Senate Bill No. 293 relating to Tyler County, purport by their very terms to be a grant by the State to these counties of a portion of the ad valorem taxes of said counties, constituting the revenues of the State; and therefore, if in truth and in fact, these acts are to be construed as their terms indicate, is the purpose of the law, they must both fall under this provision of the Constitution.

Going further, in an effort to guard against the evils which had existed theretofore, Section 55 of Article 3 prohibits the Legislature in any event from releasing, extinguishing in whole or in part, the indebtedness, liability or obligation of any incorporation, or individual, to the State, or to any county, or other municipal corporation therein.

While this provision of the Constitution does not directly bear upon the question before us, it is important as indicating the extent to which the framers of the Constitution endeavored to go in protecting the public revenues from donation to individuals, or municipalities, either directly or through the release of any indebtedness lawfully owing by them to the State. An indebtedness for taxes due to the State, or to the county, or to any other municipal corporation, is a debt under this provision of the Constitution, which the Legislature has no power to release or extinguish.

Two of the acts in question, expressly purport to have as a basis for authority of enactment, Article 8, Section 10, which was contained for the first time in the Constitution of 1876, and all of them must stand or fall under it. It is as follows:

"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 great public calamity in such county, city or town, when such release is made by a vote of two-thirds of each House of the Legislature."

This is the prohibitory provision of the Constitution and the proponents of the bills must come within the exception to this express prohibition in the Constitution. It is proposed to enact these bills on the assumption that they come within the exception; in that, the purpose and intent of the Acts is to relieve counties, cities and towns against a "great public calamity."

The Constitution of 1876, containing this provision. became effective on the 18th day of April of that year. Within less than four months after it became effective, the Legislature of Texas was presented with a situation which required a construction and application of it, arising by reason of a cyclone or storm of wind and rain in Montague County on the 5th

day of May of that year. On August 15th, it passed an act "for the relief of the citizens of Montague County," based upon statements contained in the act, that the storm had almost entirely destroyed the dwellings, fences, barns, personal property and growing crops of the inhabitants of the county, and based on this "great public calamity" it released the taxes for the years of 1876 and 1877 (Gammel's Laws, Vol. 8, Page 1294).

At the same session of the Legislature, an act was passed "to release from taxation the property of certain citizens of Matagorda and Brazoria Counties located within a certain particular territory, by reason of the calamitous storm upon the coast in September, 1875, and the release was from taxes for 1876 only. (Gammel's Laws, Vol. 8, Page 1295).

At the same session of the Legislature, the persons and property of the town of Indianola in Calhoun County, were exempt from taxation for the year of 1876 by reason of the same storm. (Vol. 8, Page 1296).

These acts af the Legislature, coming within so short a time after the adoption of the Constitution, clearly indicate the intent of the provision under the consideration, as understood by the Legislature. It is noted that the "great public calamities" involved, were storms and cyclones, unexpectedly occuring, disastrously affecting whole communities, and that the release from taxation was for only two years for the purpose of enabling those who had been injured by the calamity, to recover from its disastrous effects.

The Twenty-Eighth Legislature in 1903,passed an act releasing the town of Goliad from State and County taxes for the year of 1902 by reason of a cyclone of most unusual and terrific violence, resulting in great loss of life and the destruction of property. The same Legislature donated to Brazoria County the State ad valorem and a portion of the occupation taxes for the period of two years, on account of the terrific and destructive hurricane of 1900.

The same Legislature passed an act donating taxes to the City of Galveston by reason of the same great public calamity; this donation being for a period of fifteen years.

The Thirty-Fifth Legislature passed an act, remitting State taxes to the City of Paris in Lamar County, for five years, by reason of a calamitous fire, which destroyed all municipal buildings, including the courthouse, school houses, etc., churches and hundreds of homes, and the entire business district.

The same Legislature remitted a portion of the State taxes to the Garrison Independent School District for a period of five years, by reason of a calamitous fire which destroyed all of the buildings and equipment of the district.

Each of these acts clearly came within the provisions of the Constitution under consideration, because there was presented

to the Legislature a situation which disclosed that a great public calamity had occurred, calling for the exercise of its power for the releasing of persons and property from taxes.

It is significant that in none of these instances, was the release granted for any considerable time, except that of Galveston, and authority to grant relief to it cannot be disputed in view of the great public calamity, relief against which was sought.

Under the provisions of an entirely separate section of the Constitution, viz: Section 8 of Article 11, which authorides the Legislature to grant aid to counties and cities on the Gulf Coast, several acts have been passed remitting State and County taxes, to-wit: that of the Thirty-fifth Legislature to Corpus Christi; that of the Thirty-sixth Legislature to Aransas Pass; that of the Thirty-sixth Legislature to Rockport; that of the Thirty-sixth Legislature to Port Lavaca and of the same Legislature to Freeport; and of the Thirty-seventh Legislature to Corpus Christi, but the authority to act in these instances is based upon a different constitutional grant.

In addition to the acts above mentioned, the Thirty-eighth Legislature passed an act releasing State taxes to the inhabitants of Hidalgo County for twenty-five years, and of Wharton and Matagorda Counties; and the Thirty-ninth Legislature passed an act remitting taxes to Cameron and Willacy Counties. In the last mentioned act, the authority is based upon the provisions of the Constitution authorizing the granting of relief to counties upon the Gulf Coast.

In the act relating to Wharton County, and a part of Matagorda County, the authority is based upon Section 10 of Article 8, and likewise, any authority for passing the act relating to Hidalgo County must be based upon the same provision of the Constitution, and in fact, by its very terms, is so based.

As to Hidalgo County, it was stated in the act that during the preceding year, there had been a calamitous overflow, whereby great property damage was done and many inhabitants drowned.

The above constitutes the Legislative history under Article 8, Section 10, of the Constitution, as well as under Article 11, Section . With the exception of the relief granted to Wharton and Hidalgo Counties, the Legislature has never exercised any power under Article 8, Section 10, except to relieve against a "great public calamity" that had already occurred. I refrain from discussing the two exceptions to this history, as they are not before me.

A proper conclusion, of course, depends on what is meant by the words: "great public calamity." "Calamity" is defined to be "any occurrence, especially when sudden and unexpected, that causes great or widespread distress, trouble or affliction to individuals or to the community, as the failure of crops, an earthquake, the devastation of war or plague, or an extensive

fire or flood." (Corpus Juris, Vol. 9, page 1116.) It is further defined as: "any great misfortune, or cause of an extensive fire or flood." (Corpus Juris, Vol. 9, page 1116.) It is further defined as: "any great misfortune, or cause of misery—generally applied to events or disasters which produce extensive evil, either to communities or individuals." (Websters Revised Unabridged Dictionary.)

I think the words were used as indicated in the construction given them by the Legislature of 1876, and succeeding ones, except those of recent years, as meaning "sudden and unexpected events which produce widespread distress of loss." I do not think it was ever intended by the framers of the Constitution that permanent existing conditions, although unfortunate, and although occasionally causing loss of property, were intended to be corrected by the release of the property located therein, from the payment of taxes. I do not believe that the framers of the Constitution intended to grant to the Legislature the power to release property from taxes during long period of future time, solely by reason of the fact that the property might be located at some place where it was subject to overflows from year to year. If this is the correct interpretation of the Constitution, there could scarcely be found in certain portions of this State, a single county which would not have the right to have its inhabitants and property within certain defined territories of it, released from taxes. There are in many counties in this State, land so located as that it is subject to periodical overflows, creating great loss of property, but this permanent situation of property in relation to streams which makes it subject to overflow, is not such an occurrence, or event, or happening as could be brought within the term: "great public calamity." What is the "great public calamity" relief from which, is sought to be given in the acts presented? In one of the Bills (S. B. No. 229) there is the statement that during several years, the last being five years ago, certain property overflowed and great damage was done; in two others (S. B. Nos. 228 and 259), that a large area of productive and cultivated land is subject to damage by overflow; and in the other (S. B. No. 293) that the county depository has failed.

Not being influenced by the consideration of public good which might be accomplished by legislation, I am of the opinion that none of these situations come within the provisions of the Constitution, that gives the Legislature power to release persons and property from taxation, in case of "great public calamity".

Under the provisions of the Constitution, the Legislature would not have the power to release the inhabitants of, or property in any county, city or town, from taxes, except to grant relief for a calamity that has already occurred, and would not have the power under this provision of the Con-

stitution, to release from taxes so as to prevent a possible occurrence of a great public calamity in the future. The provision is one to cover emergencies, sudden and unexpected occurrences of events, and disasters which produce great and widespread distress and loss to whole communities.

My attention has been directed to the decision of the Supreme Court in the case of Aransas Pass vs. Keeling 112 Texas 339, as an authority for this legislation. The act under consideration in this case granted to Aransas County the ad valorem taxes for a period of twenty years. This act, as heretofore indicated, was passed under a provision of the Constitution entirely different from the one we are now considering. (Section 8, Article 11), which provided that as the counties and cities on the Gulf Coast were subject to calamitous overflows, the Legislature was expressly authorized to aid, either by donation of the public domain, or in such other mode as may be provided by law, the construction of seawalls, etc. There was nothing involved in this case at all pertinent to a construction of Section 10, Article 8.

It is true that the court considered the facts of the particular case before it, in order to determine as to whether or not it was authorized under the following provision of the Constitution:

> "The counties and cities on the Gulf Coast being subject to calamitous overflows, and a very large proportion of the general revenue being derived from those otherwise prosperous localities, the Legislature is specially authorized to aid * * * * the construction of seawalls, etc."

The court held that the remission of a portion of the State ad valorem taxes upon the property of San Patricio County, which bordered upon the Gulf Coast, was authorized under this section of the Constitution. It is to be noted, however, that this constitutional provision expressly states the location of the counties and cities that might receive aid, and the reason why; that is, counties and cities on the Gulf Coast, and because they were subject to calamitous overflows.

The court referred to Article 8, Section 10 of the Constitution as being a related provision, authorizing relief in certain cases, but there is nothing in this opinion which would indicate that the court thought that because a county or city in other portions of the State might be subject to calamitous overflow, it would come within the provisions of Section 10, Article 8, authorizing a release of taxes in case of a great public calamity.

The right of a State Legislature to limit its power of taxation, and to exempt persons and property from taxation is inherent, unless there is a prohibition in the Constitution. In our State it has been uniformly held that this power is not unlimited, and that under the provision that "taxation shall be equal and uniform", the Legislature has no power to exempt

any person or property, unless it is expressly authorized so to do by some provision of the Constitution.

We are here confronted with an express prohibition against release from taxation, and the contemporaneous construction of the provision by the Legislature of the State as we have heretofore indicated, it not such as to justify the view that it was ever intended to be applied to permanent existing situations, as attempted in the acts before us, but only as a temporary relief against widespread disaster by reason of an unexpected emergency.

My attention also has been directed to Article 16, Section 59, which relates to the conservation and development of the natural resources of the State, including the control, storing, preservation and distribution of its storm and flood waters, and the creation of conservation and reclamation districts; and it is suggested that the provision that authorizes the Legislature to pass "all such laws as may be appropriate thereto" would justify the passage of the acts under consideration. I do not believe this provision of the Constitution can be so construed.

The purposes of the two provisions are entirely different. Two of the acts under consideration expressly purport to be justified under Article 8, Section 10, as relief against great public calamities. The purpose of Article 16, Section 59, is the organization of districts and the issuance of bonds to provide for the use of storm and flood waters; for irrigation and the reclamation and irrigation of arid lands; for the reclamation and drainage of overflowed lands and the conservation and development of forests, which is an entirely different purpose from that of granting relief by reason of calamitous overflows. One involves progressive development of the state by the preservation of its natural resources; the other involves relief from disasters by reason of a great public calamity.

While the Legislature has never been put to the necessity of seeking constitutional authority for its enactments, specific prohibitions against the exercise of power by it, must be construed strongly against its exercise, and its right to act must come clearly within the provisions of an exception to the express prohibition. The wisdom or policy of a law is entirely within its cognizance, but the fact that the constitutional provision under consideration requires for the exercise of its power, a vote of two-thirds of each house, clearly indicates that the people demanded that an undoubted right to come within the exception should exist.

As to how far the courts will go in determining as to whether or not the Legislature has exceeded its power in passing upon facts necessary to its exercise, is quite uncertain.

It has been suggested that when the Legislature acts in the matters under consideration, that the courts would have no authority to go behind the enactment to determine as to whether

or not there existed a great public calamity, authorizing the law.

I do not agree with this contention, and am of the opinion that if, after the Legislature enacts the bills under consideration, it should appear in any contest in the courts that the necessary facts did not exist to authorize their enactment, the court would hold them invalid, and would consider the facts to determine the issue. Otherwise, the Legislature, might at any time, declare that in any certain city, town or county, a great public calamity existed, and release the persons and property therein from taxation. The fact that the Constitution requires a two-thirds vote, in order to pass the law does not militate I think against the principle that the act of the Legislature in passing the law does not close the door of an attack upon it for failure of conditions that would authorize its enactment.

In view of the public interest involved, I have given most careful consideration to the question submitted, and have conferred freely with, and had the briefs of, attorneys interested for their clients in a contrary view, but I am convinced that neither of these acts may be enacted by the Legislature, without a violation of the constitutional provision.

Respectfully submitted,

CLAUDE POLLARD,
Attorney General of Texas.

Op. No. 2678, Bk. 62, P. 158.

GAS UTILITY.

An oil corporation producing gas for sale to a pipe line corporation held liable under Article 6060 for utility tax, regardless of the fact that it owns the pipe line corporation and the pine line corporation pays tax.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 2, 1927.

Hon. Clarence E. Gilmore, Chairman Railroad Commission, Capitol.

DEAR SIR: The file in the matter of the Houston Oil Company has been referred to me, together with the inquiry as to whether this Company should be required to pay the utility gas tax, as provided in Article 6060 of the Revised Statutes of 1925. It appears from the facts submitted that:

1. The Houston Oil Company and the Pipe Line Company are separate corporations, organized under the laws of Texas, but that the Houston Oil Company owns all of the stock in the Pipe Line Company.

2. The Houston Oil Company was organized to produce oil, gas and other minerals and the Pipe Line Company was organized to transport this gas to a market and that the Pipe Line Company owns the pipe lines and transports natural gas

to municipalities and other concerns and is paying the utility tax required under Article 6060.

It is contended that as the Oil Company owns the Pipe Line Company and the Pipe Line Company pays the utility tax that the Oil Company should not be required to pay this tax as payment by the Pipe Line Company is payment by the Oil Company and that to tax each would constitute double taxation.

We have carefully considered the briefs prepared on behalf of the Oil Company, together with the facts submitted, and have reached the following conclusions with reference to the matter:

1. In those instances where the Pipe Line Company owns the gas and the Oil Company merely acts as drilling contractor, the Oil Company would not be liable for the utility tax. We base our decision with reference to this on the provisions of Article 6050 which provides that any company producing oil *for sale* to companies producing or purchasing natural gas and transporting or causing the same to be transported by pipe lines to or near the limits of the municipality in which the gas is received and distributed, and sold to the public by another public utility, or by said municipality is declared to be a public utility. Clearly when acting as a drilling contractor, merely, the Oil Company could not be considered as producing or obtaining gas for sale.

2. In those instances where an individual owns an oil lease and the Oil Company is paid to drill the wells but the drilling contract provides that after the well has been drilled and goes back to the owner, that the Oil Company shall purchase the gas and the Oil Company then sells the gas to the Pipe Line Company, irrespective of the fact that the price paid by the Pipe Line Company is the same price as paid by the Oil Company, that the Oil Company is a public Utility because it is certainly obtaining natural gas for sale to a concern which purchases the gas and transports it, as provided under paragraph 3 of Article 6050, and therefore liable for the tax.

3. In those instances where the Oil Company has a lease from an individual and owns all the gas except royalty gas and sells the gas produced to the Pipe Line Company who transports to market and sells it, the Oil Company is clearly producing natural gas for sale to a concern producing or purchasing natural gas and transporting the same, as provided in Section 3 of Article 6050.

4. In those instances where the Oil Company owns a certain interest in oil and gas leases and contracts to drill a well and after being paid for drilling the well in gas is entitled to a certain interest in the gas produced and then sells this gas to the Pipe Line Company, it is pointed out in No. 2 above, a gas utility and liable for the tax.

We might add also that in our opinion the tax is properly levied on royalty gas which is purchased by the Oil Company

and sold to the Pipe Line Company, as well as gas which is used to pay the Oil Company for drilling a well, if that gas is sold to the Pipe Line Company, because in each instance the Oil Company is obtaining natural gas for sale to the Company which transports the same and which is a public or gas utility.

We realize that double taxation is not favored by the law but do not see the application of this principle to the facts here.

The Oil Company urges that it would be unfair to require each company to pay a utility tax when one company is owned by the other. Our answer to that is that it is no more unfair to require this than to require the payment by each company of a franchise tax or filing fees. In other words, to countenance such proposition would be to put a premium on the organization of subsidiary corporations or the owning by one or more corporations by one corporation. And we do not see any reason for allowing a producing company to escape taxation merely because it owns a transporting company which pays the tax, especially since it could not be doubted that if there were two separate and distinct corporations, neither of which was owned by the other, that both would be required to pay the tax.

Very truly yours,

ALLEN CLARK,
Assistant Attorney General.

Op. No. 2679, Bk. 62, P. 162.

TAXES—PAYMENT—PAYMENT BY CHECK.

Holding that acceptance by tax collectors of checks or other orders does not constitute payment.

OFFICES OF THE ATTORNEY GENERAL.
AUSTIN, TEXAS, *April* 5, 1927.

Hon. S. H. Terrell, Comptroller of Public Accounts,
Austin, Texas.

MY DEAR MR. TERRELL: Your letter of the 31st ult., together with the enclosed letters of R. A McElrath, Tax Collector of Cooke County, and W. A. Perkins of Wilson, Oklahoma, have been handed me for attention by General Pollard.

The letters which you enclose present a rather unique statement of facts, but the sole question raised so far as the State of Texas is concerned is, does the giving of a check by a taxpayer for the amount of his taxes constitute payment thereof?

Your letters reflect the following situation:

A resident of Oklahoma remitted his taxes by a cashier's check on an Oklahoma bank; check was received in due course of the mails by the Tax Collector of Cooke County, and was deposited in the county depository as a regular deposit; the depository bank put the same through for payment, but the check was stolen out of the mails; the tax collector had issued his regular receipt upon receiving the check; when the depository bank was notified of the check being stolen, it notified the tax collector who in turn notified the taxpayer. The letter does not state whether the taxpayer notified the payor bank to stop payment on the check. The tax collector threatens to foreclose for the amount of the taxes for which said check was given, and the taxpayer refuses to make payment of the taxes claiming that he has already paid the same.

The question of mode of payment of taxes having been raised numerous times, we are going rather into detail so that hereafter when questions are raised as to the mode of payment of taxes you may refer to this letter.

Section 4 of Article 11 provides that cities and towns having a population of five thousand or less shall collect taxes only in current money.

Article 1066 provides as follows:

"Taxes levied to defray the current expenses of the city government and all license and occupation tax levied, and all fines, forfeitures, penalties, and other dues accruing to cities, shall be collectable only in current money."

Article 7049 provides as follows:

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

As a general rule of law the giving of a check which is never paid is not an extinguishment of a debt unless shown to have been accepted absolutely as payment. However, a different question arises where a check is given with funds in the bank, and the bank is ready to pay the same upon presentment. It has been held in Texas only recently that for a check to have the effect of payment in the absence of an agreement or of laches by the holder, the drawer must have funds to his credit in the bank upon which it is drawn, and the bank must be in a position to pay the check on demand.

Waggoner Bank and Trust Co. vs. Gamer Co., 213 S. W. 927;
Sagerton Hardware etc. vs. Gamer Co., 166 S. W. 428.

It has been held also in Texas that a bank in which a check on another bank is deposited for credit is charged merely with

the use of due diligence for its collection and due care in its selection of an agency for that purpose.

Waggoner vs. Gamer Co., Supra, 21 R. C. L. 60.

The provisions of the statutes above referred to in the opinion of the writer will not permit debate as to whether or not the giving of a check for the payment of taxes constitutes payment. Nor does the fact that the check was a cashier's check materially affect the question. An ordinary check is simply a written order of a depositor to his check to make a certain payment, and is executory in its nature. A cashier's check is one issued by the authorized officer of a bank directed to another person evidencing the fact that the payee is authorized to demand and receive upon presentation from the bank the amount of money represented by the check, and like an ordinary one, it is also executory in its nature and revocable at any time before the bank has paid it.

Checks are expected to be paid upon presentation, but reliance on that expectation does not bind the holder unless the check itself is actually paid, except where there has been gross negligence in its presentation resulting in injury to the bank or some of its depositors. The term "payment" is the discharge of an obligation by the delivery and acceptance of money or of something equivalent to money which is regarded as such as the time the party to whom the payment is due. In its broadest significance payment is satisfaction of an obligation. To constitute payment there must be a delivery by the debtor or his representative to the creditor or his representative of money or something accepted by the creditor as equivalent thereof with the intention on the part of the debtor to pay the debt and accepted as payment by the creditor. "Payment" means full satisfaction as contrasted with an "accord" which involves the acceptance of something as satisfaction, and "release", which is a conclusive acknowledgement of satisfaction. The term "payment" means a payment in money, and, in order to constitute a payment the debtor must give something either in money or something which is the equivalent of money. Commercially speaking the term "payment" relates to, and is restricted to a payment in money.

1 Words and Phrases, Second Series, Page 658;
Robinson vs. St. Johnsbury, et al, L. R. A. N. S. 1249;
State vs. Tyler, etc., 277 S. W. 622; 30 Cyc., Page 1181.

The fact that the tax collector gave his receipt would not materially affect the question here for two reasons:

1st. Because the giving of a receipt on acceptance of check where debt is not extinguished would not in itself constitute payment. unless by special agreement.

2nd. The tax collector having no authority to accept the

check in payment of the taxes would be unauthorized to give a receipt therefor, and the receipt would only become effective upon the condition that the check was honored and paid in due course.

The tax collector who was the agent of the state was expressly forbidden by the terms of the law to bind the State by accepting from the taxpayer in satisfaction of his obligation anything except currency or coin of the United States. Conceding that the tax collector accepted the check as payment, the fact that he accepted it as payment of the money belonging to the state and county is not a material one. Because by accepting the cashier's check he violated his official duty, and was acting beyond the scope of his authority as an agent of the state and county, and, therefore, the same could not constitute payment. It can only be said, then, that in accepting checks and other orders, tax collectors accept the same only as an accommodation to the taxpayer and owner as a conditional payment, the payment becoming effective upon the check or order being paid unconditionally.

Watson, Tax Collector, vs El Paso County, 202 S. W. 126.

We are, therefore, constrained to advise you that the taxes have not been paid by the taxpayer, and unless the same are paid it will be the duty of the Tax Collector of Cooke County to proceed according to law to collect the same. We advise you further that the giving of a check or order to the tax collector of any city or county in this State by a taxpayer, and the acceptance thereof, is only a conditional payment, even though statutory receipt is given at the time of the receipt of such check or order. It, therefore, becomes unnecessary for us to determine upon whom the loss must fall, but in order that the taxpayer who resides in Oklahoma may not think that he has been grossly mistreated, we quote as follows:

"The liability of a bank which has undertaken the collection of commercial paper for failure to return the paper has usually arisen in cases in which the paper has been lost. In most such cases the liability is predicated upon negligence It is ordinarily held that if a bank which has undertaken the collection of commercial paper has lost the same by reason of its negligence, or has been negligent in failing to discover the loss and notify its principal, it is liable therefor to its principal. It is, of course, true that there can be damage or loss to the principal which is the proximate result of the bank's negligence. It is not negligence for the bank undertaking the collection to employ the United States' mail to forward the paper."

6 A. L. R. 618.

The facts presented to us in this case show that immediately upon the check being stolen from the mails the depository bank notified the tax collector, who in turn notified the taxpayer, who in turn should have notified the payor bank to stop payment on the chack. If the taxpayer was guilty ot laches by failure to notify the payor bank, then he cannot com-

plain. He would be protected further probably for this reason, and that is that the cashier's check was not endorsed in blank by the depository bank, but payment was ordered to be made to another bank, if the usual course was followed, and the theft of this check would not pass title thereto, nor would anyone be authorized to make payment thereof without proper endorsement from the last named endorsee.

We return to you herewith the letters of the tax collector and Mr. Perkins.

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

Op. No. 2685, Bk. 62, P. 194.

TAXES—PART PAYMENT OF TAXES—TIME LIEN ATTACHES—EXTENT OF TAX LIEN—LEVY.

1. Where property is separately assessed for taxes mortgagee may pay taxes on mortgaged property without payment of other taxes.
2. Tax lien attaches on property at the time of the assessment.
3. Tax collector is not required to always levy on personal property for all of the taxes of the taxpayer, especially where the taxpayer fails or refuses to point out personal property on which a levy can be made.
4. Where real property or personal property is assessed by separate tracts, or in separate classes, and there is a mortgage thereon, persons other than the owner may pay the tax on a particular piece of property where his rights would be injuriously affected by a sale, and a vendee, mortgagee or remainderman may pay taxes on property in order to protect his interest.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 22, 1927.

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

MY DEAR SIR: Your letter of the 5th inst. addressed to the Honorable Claude Pollard, Attorney General, has been referred to me for answer. You advise that Honorable James A. Fannin, Tax Collctor of Madison County, has written you advising you that the banks in his county want to pay taxes on personal property they have a mortgage on, and that he thinks it unfair to force them to pay taxes also on the land of the taxpayer, and wants to know if the banks may pay taxes on the personal property, and if they may, if it will relieve the tax collector of making a forced sale of the personal property for the taxes on the real estate.

This Department has heretofore ruled that where real estate is separately assessed that the taxpayer may pay the particular taxes upon separate assessment. The writer has heretofore advised you that personal property being separately assessed

from real property, that the taxpayer may pay the taxes upon the personal property without paying the taxes at that time upon the real property. We now advise you that where certain mortgaged property is separately assessed that the taxes thereon may be paid by the mortgagee without the payment of the taxes on the other personal property by such mortgagee.

Richey v. Moor 249 S. W. 173.

In answering your question it is well that we call your attention to the time that the lien is actually created or attaches. The courts of this State have numerous times held that the lien of taxes is created, attached, and becomes an encumbrance upon the property as soon as the assessment is made.

Carswell & Co., vs. Haberzettle, 87 S. W. 911;
Cruyer vs. Ginnuth, 3 W. C. C. C. A., Section 24;
Mission, etc., vs. Armstrong, 222 S. W. 201 (Com. of App.)

It has ben held in Texas that under Constitution, Article 8, Section 15, poll taxes and personal property taxes do not become a lien on the real property of the person against whom they were assessed, and cannot be enforced against a subsequent grantee of such property.

State vs. Hunt, 207 S. W. 636.

The courts in construing what is now Article 7276 have held that it was the intention of the Legislature, in their opinion, that the law giving the lien on real estate and providing for suit, foreclosure and sale of land, prescribes a specifc remedy for the collection of the taxes therein mentioned without regard to the Statute authorizing the tax collector by virtue of his tax rolls to seize and sell personal property, and especially is that true when the taxpayer fails to point out personal property upon which the levy may be made.

McMahan vs. The State, 147 S. W. 714.

Many states have declared by Constitution and Statute that all of the taxpayer's property shall be liable for all of his taxes, and that the tax lien shall constitute a first and prior lien upon all of said property, and the constitutionality hereof has never been doubted.

The general rule is that taxes are never a lien on property unless expressly made so, and a tax lien is never a prior lien over other liens for the personal taxes of the taxpayer unless expressly so provided by Statute.

State vs. Hunt, 207 S. W. 636.

Section 15 of Article 8 of our Constitution provides that the

annual assessment made upon landed property shall be a specific lien thereon, and all property, both real and personal, belonging to any delinquent taxpayer shall be liable to seizure and sale for the payment of all of the taxes and penalties due by such delinquent; and such property may be sold for the payment of the taxes and penalties due by such delinquent under such regulations as the Legislature may provide.

Article 7072, enacted under said provision, sets out said provision almost verbatim, and provides that the tax collector shall levy on any personal or real property to be found in his county to satisfy all delinquent taxes, any law to the contrary notwithstanding.

Article 7266 provides for the levying upon personal property first. Articles 7273, 7274 and 7275 direct the tax collector to exhaust the personal property before selling the real property for the taxpayer's taxes.

Article 7269 is the only article which provides as to the priority of liens, and under this provision only would the courts be justified in holding that a tax lien is prior to all mortgage liens without regard to the time of the fixing of the mortgage liens. It provides as follows:

"In all cases where a taxpayer makes an assignment of his property for the payment of his debts, or where his property is levied upon by creditors, by writs of attachments or otherwise, or where the estate of a decedent is or becomes insolvent, and the taxes assessed against such or in whole, the amount of such unpaid taxes shall be a first lien upon person or property, or against any of his estate remain unpaid in part all such property; provided, that when taxes are due by an estate of a deceased person, the lien herein provided for shall be subject to the allowances to widows and minors, funeral expenses, and expenses of last sickness. Such unpaid taxes shall be paid by the assignee, when said property has been seized by the sheriff, out of the proceeds of sale in case such property has been seized under attachment or other writ, and by the administrator or other legal representative of decedents; and, if said taxes shall not be paid, all said property may be levied on by the tax collector and sold for such taxes in whomsoever's hands it may be found."

It is, therefore, self evident that the Legislature did not intend to make a tax lien prior to a mortgage lien, the latter being prior in point of time for all of the personal taxes of the taxpayer, but that said tax lien shall only be prior to the contract lien for the taxes on that particular piece of property, but the tax collector could sell said property for the other taxes of the taxpayer, but would have to satisfy the mortgagee out of the proceeds first.

State vs. Jordan, 60 S. W. 1010.

It is, therefore, well settled under the above laws that the tax collector may seize and sell personal property of the delinquent for the taxes due upon the real property, as well as per-

sonal property before resorting to the sale of the realty, and that personal properties in the hands of an assignee are subject to seizure and sale for taxes due on the realty, the exceptions existing in Article 7269.

Wynn vs. Hardware Co., 67 Texas 47;
Opinions of the Attorney General for 1920-22, Page 554.

It is also quite settled that where a mortgage is given upon personal property, and the taxes have been paid upon that particular property, the same cannot be sold for the other taxes of the taxpayer thereby destroying the security of the mortgagee. The tax collector in a case decided by the Court of Civil Appals at Texarkana in 1916 attempted to sell mortgaged property without regard to the rights of the mortgagee, and it was insisted that the lien created by a levy for taxes, though junior in fact was in law superior to the mortgage by virtue of Article 7627 (which is now Article 7269). The court held that that Statute had no application to the facts in this case. That its purpose was, the circumstances mentioned in its existing, to create a lien on the property of the delinquent taxpayer for taxes due by him superior to rights acquired thereto by his creditors in ways specified while he owned the property. It was not intended, and did not operate to give precedence to a junior tax lien on personal property over a contract lien thereon like the one asserted by the mortgagee.

Salt City Co. vs. Padget, 186 S. W. 391.

The only other case which touches upon this question is that of Kirk et al vs. The City of Gorman, 283 S. W. 188, when the court remarked as follows:

"It is competent for the Legislature to make taxes against property superior to a lien upon said property created prior to the assessment of the taxes, but we need not stop to inquire whether or not under the laws of this State, and charter provisions of the City of Gorman, the lien of the plaintiff is peramount to the antecedent mortgage, because the notes declared upon by Brewer and Kirk matured more than four years prior to their amended answer and cross action. They were, therefore, barred by limitation * * *. Regardless of the original priority of the liens, the mortgage has become subordinate to the tax lien."

It is elementary that persons other than the owner can pay the taxes on a particular piece of property where his rights would be injuriously affected by sale, and a vendee, mortgagee or remainderman may pay taxes on land in order to protect his interest.

2 Cooley on Taxation, 3rd Edition, Page 802;
Swope vs. Missouri Trust Co., 62 S. W. 947.

We do not believe that the constitutional and statutory provisions relating to the creation of liens on real and personal property would confer a lien upon all of the property of the taxpayer so that one purchasing any of said property would take the same subject to a lien in favor of the State or County. However, if a certain class of personal property should be rendered or assessed at a certain valuation, it is our opinion that the tax collector could pursue all or any part of that property for the taxes due thereon. However, if some of said class of property was sold to a purchaser, the purchaser would be entitled to have the tax collector exhaust that part of said class still owned by the taxpayer before levying on that which has been sold upon which a lien exists. If the tax collector refused to follow such procedure, then in a court of equity the taxpayer could force him to follow such procedure. However, we do not mean to rule that where different classes of personal property are separately assessed, that the tax collector can pursue one class of personal property in the hands of an innocent purchaser for the other taxes of the taxpayer.

There are three methods provided for securing and collecting taxes; first, foreclosure of and sale under the constitutional lien; second, the summary process of seizure and sale by the collector; and third, suit for taxes and the levy and sale of property in satisfaction of the judgment.

Having provided these three methods of enforced collection of taxes by express and elaborate laws, we are of the opinion that there exists no fourth method, to-wit, that of retaining the lien on each particular tract or class of property by refusing to accept the taxes due thereon when tendered until all taxes are paid. We are of the opinion that the tax against each separate tract or parcel of land, and each separately assessed class of personal property, in so far as the right of payment is concerned, is to be regarded as a separate tax, and may be paid without at the same time paying other taxes. Since the right of payment exists, the statutory receipt should issue correctly describing the property and the tax, limiting the effect, of course, to the property actually involved and the tax actually paid.

Upon the exceptions existing under Article 7269, supra, the lien would, of course, exist and all of the property would be pursued and followed in the hands of a purchaser.

Very truly yours,

R. M. TILLEY,
Assistant Attorney General.

Op. No. 2688, Bk. 62, P. 207.

TAXATION—INTANGIBLE ASSETS TAX—COUNTY ATTORNEY—SUIT FOR INTANGIBLE ASSETS TAXES—COMMISSIONS—TAX COLLECTORS.

Articles 335, 7263, 7264, 7267, 7271, 7272, 7276, 7297, 7326, 7332, 7336, R. C. S. 1925.

1. County attorney has authority to bring a suit against a railroad for delinquent intangible assets taxes.

2. In such suits the county attorney is entitled to retain the commission provided for by Article 335.

3. The commission, under Article 335, is ten per cent on the first one thousand dollars collected for the State and ten per cent on the first one thousand dollars collected for the county, and five per cent on the remainder.

4. The county attorney should pay the money collected by such suit, less his commission, to the state and county treasuries.

5. The tax collector is not entitled to a commission on intangible assets taxes collected by the county attorney when the tax is carried as delinquent on the insolvent list.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 19, 1927.

Honorable W. W. Heath, County Attorney, Grimes County, Anderson, Texas.

DEAR SIR: This department acknowledges receipt of your letter of the 15th instant requesting an opinion relative to a suit for the collection of delinquent intangible assets taxes due the State and County by the I. & G. N. Railway Company for the years 1915 and 1916. Your letter raises directly the following questions:

1. Does the county attorney have authority to bring a suit against a railroad for the collection of delinquent intangible assets taxes?

2. What fee is allowed the county attorney for the collection of said taxes by suit?

3. If the fee is the commission provided by Article 335, is the county attorney entitled to 10 per cent commission on the first one thousand dollars collected for the Sate, and the same commission on the first one thousand dollars collected for the county, or is his commission to be based on the total amount collected for both the State and the county?

4. Should the money collected by suit be paid to the tax collector, or the State and County Treasuries?

1.

Articles 7266, 7267 and 7336 are sufficient authority for the tax collector to seize property of the person or corporation owing the tax. However, this remedy is not the exclusive

remedy. The amount owing by the railroad was a debt to the State and County and there can be no question but that the State had a right at common law to file suit for the recovery of the amount due for this tax. The Statute does not make the statutory remedy of seizure and sale exclusive, and therefore, it is only cumulative of the common law right to bring suit. See City of Henrietta vs. Eustis 87 Tex. 14. In the case of Richey vs. Moore, 249 S. W. 172, Chief Justice Cureton of the Supreme Court wrote an opinion in which it was recognized that a suit of this nature may be brought, for he says that there are three methods for securing and collecting taxes as follows:

"1. Foreclosure of and sale under the constitutional lien imposed on each tract of land for the taxes assessed against it.
"2. The Summary process of seizure and sale by the collector.
"3. Suit for taxes, and the levy on and sale of all lands (except the homestead) in satisfaction of the judgment."

This department has held the same view in an opinion printed on page 432 of the Report and Opinions of the Attorney General for 1924-1926. Other authorities on the proposition that a statute giving a remedy in a case in which the common law gives a remedy, without negativing the existence of the common law remedy, is not exclusive, but merely cumulative, are as follows: Luder's Administrator vs. State, 152 S. W. 220; Texas & S. W. Digest, Vol. 13, page 14807, Section 52; Thouvenin vs. Rodrigues, 24 Texas 468; Sullivan Oil Co. vs. White, 252 S. W. 569; Kampmann vs. Cross, 194 S. W. 437; Texas & S. W. Digest, Vol. 1, page 165, Section 35; 12 Corpus Juris, page 187; 36 Cyc., page 1145.

Article 5, Section 21, of the Constitution, provides that the County Attorney shall represent the State in all cases in the district and inferior courts and makes provisions for regulating his duties in counties where there is a district attorney.

You are advised therefore, that the county attorney has authority to bring a suit against a railroad corporation for the collection of State taxes or intangible assets, and upon orders from the Commissioners' Court he has the same authority to bring a suit for such county taxes.

2.

The next question to decide is what fee is allowed a county attorney in such cases. Article 7297 provides that the county attorney shall institute suit for the recovery of taxes due on *unrendered* personal property. In order to show that it was clearly intended that this Article applies only to unrendered taxes, the same Article provides that suit shall be brought against every person who owned the property at the time such property *should have been listed or assessed for* taxation.

This Article does not state what fee the county attorney shall receive. The statute does not make provision for filing suit for taxes on *rendered* personal property or for taxes on intangible assets, but as stated above, there can be no question but what the State and county have a right at common law to file suit for taxes on personal property. This department has held in an opinion printed on page 486 of the Report and opinions of the Attorney General for 1920, 1922, that the fees provided in the statute for the county attorney for delinquent tax suits applied only to suits for taxes on real estate and that in cases of suits for taxes on personal property, the commission provided by Article 363 of the 1911 Statutes, which is now Article 335 of the 1925 Statutes, applies. Therefore, the writer cannot see any reason why Article 335 should not apply in suits for the collection of intangible assets taxes, as Article 335 is a general law providing for commissions of County Attorneys on collections for the state and county and there is no special statutory provision for such fee.

You are advised, therefore, that the county attorney is entitled in a suit for the collection of delinquent intangible assets to receive the commission provided for by Article 335.

3.

Article 335 of the Revised Civil Statutes contains this clause:

"Such district or county attorney shall be entitled to ten per cent commissions on the first one 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."

You are advised that it is the opinion of this department that under this Article it is the intention of the Legislature that the State and county shall each pay ten per cent on the first one thousand dollars collected for each, and therefore the attorney general making the collection is entitled to treat the amount collected for each just the same as if there had been separate collections at different times.

4.

In answer to the fourth question, you are advised that Article 335 requires the county attorney to pay the money collected into the State and County Treasuries. If the commission under Article 335 is allowed, then the money collected should be disbursed as provided by this Article. The money should not be paid to the tax collector and this means, there-

fore, that the tax collector is not entitled to a commission where the delinquent taxes other than the taxes on real estate, are collected through a suit by the county attorney. Under the terms of this Article, it is necessary that the county attorney pay into the State Treasury ninety per cent of the first one thousand dollars collected for the State and ninety-five per cent of all amounts in excess of one thousand dollars. The same rule applies to the amount collected for the county. If the money should be paid to the collector and he should retain a commission, then the full amount required by Article 335 to be turned into the State and County Treasuries could not be turned in.

After the intangible assets tax of a railroad has gone delinquent, it, as well as all delinquent personal property taxes, is reported on the insolvent list, as provided by Article 7263. On this list after the Commissioners' Court certifies, among other things, that no property can be found in the county belonging to a person out of which to make the taxes due, the collector is entitled to a credit on final settlement of his accounts for the amounts due by the taxpayers as shown on said insolvent list. However, before the collector is entitled to the credit for the insolvent list, he is required by Article 7271 to make an affidavit that he has exhausted all resources to collect the taxes. Therefore, the making of this list, to a certain extent, ends the matter of taxes due, for the reason that the collector is supposed to exhaust his means of collecting the same as provided by Article 7266 and other Articles. Article 7264 specifically provides that the allowance of the insolvent list shall not absolve any taxpayer or property thereon from payment of taxes and also requires the collector to use all necessary diligence to collect the amount due. In this respect the matter is similar to a business institution charging off bad accounts from its assets but if an opportunity arises to collect such account it is done.

The only statutory authority for the county attorney to bring suits for taxes are Article 7326 for taxes on real estate and Article 7297 for taxes on *unrendered* personal property. The statutory method for collecting all other taxes is for seizure and sale by the collector, as provided by Articles 7266, 7267 and 7336, which include the collection of rendered or unrendered intangible assets taxes, as well as rendered personal property taxes.

It seems to have been the settled policy of our State to collect all delinquent taxes by the statutory process of seizure and sale by the collector, but as stated above, the case of City of Henrietta vs. Eustis, 87 Texas 17, held that in the absence of a statutory or constitutional inhibition, the remedy of seizure and sale by the collector was not exclusive and an action could be brought to recover taxes that were due. It must be remembered that at the time of this decision the only

statutory method for the collection of delinquent taxes was the one authorizing the collector to seize and sell property but in 1895 the Legislature provided a method for suit and foreclosure of the constitutional lien for taxes on real estate. (See Report and Opinions of the Attorney General 1924 to 1926, page 433.)

But we do not find where the Legislature has ever adopted a method for suits for taxes on rendered personal property or for taxes on intangible assets; in fact, the Legislature has always seemed to realize that since it has a constitutional right to provide for the seizure and sale of property for personal property taxes and clothed the collector and his tax rolls with the same authority as the Sheriff with an execution, that it would be futile to have the State and County to go to the expense of filing suits and obtaining the judgments many of which would probably be of no value especially since the collector has already made an affidavit that all resources for the collection of the taxes have been exhausted.

However, the County Attorney has a right to bring an action at common law for debt for unpaid intangible assets taxes and when he does bring such action it is not as a suit for taxes, but as a suit for debts owing the State and County growing out of the defendant's liability for taxes. The county attorney is not required to return the money collected over to the tax collector but under the plain provision of Article 335, he is required to pay the same into the State and County Treasuries. Therefore, since that attorney is required to turn the money into the Treasury, the collector is not entitled to any commission on the same, as he does not collect the money as he does other taxes. In this respect it is a different situation from the collection of delinquent taxes on real estate. Article 7332 requires the county attorney to pay delinquent real estate taxes to the collector but as to suits filed by county attorney for debts due the State and county Article 335 is the only provision directing the payment of the money collected.

In writing this opinion the writer has carefully considered a brief on the subject by the Comptroller's Department, but is unable to reach the same conclusion.

The strongest argument presented in this brief is that the money collected by suit should be delivered to the tax collector in order that he might make the proper credits on his books and the proper reports to the Comptroller so that the Comptroller may make the proper credits on his books, but the writer cannot see any necessity for such procedure, as the county attorney could inform the collector and Comptroller that he had collected or settled the item by means of a suit and the collector and Comptroller could make notations on the tax record, but if the collector and the Comptroller should not desire to make a record of the matter, it makes no difference, as

the judgment of the court will be a final determination of the matter.

There has been a well settled policy of law which requires the tax collector to seize property for personal property tax and when nothing has been done by the collector toward collecting the tax and it becomes necessary for the county attorney to file a suit in the nature of a suit for a debt to collect the taxes, the writer does not believe that it was ever the intention of the law to allow the collector a commission on an amount collected by the county attorney. To do so would put a premium upon the failure of an officer to perform the duties required by law and would no doubt cause the county to go to a great expense of litigation and probably take many judgments that would be worthless. In short, it would be doing the very thing that the law has carefully avoided from the very beginning in collecting delinquent taxes.

In conclusion you are respectfully advised that you had a right to bring a suit against a railroad company for delinquent intangible assets taxes; that your compensation for bringing said suit and collecting the taxes is the commission provided by Article 335; and that the commisson on the parts due the State and county are to be figures separately; that the amount collected should be turned in to the State and County Treasuries, less the commission allowed by Article 335.

Very truly yours,

H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2704, Bk. 62, P. 305.

TAXATION—CORPORATIONS—JOINT STOCK LAND BANKS.

1. Joint stock land banks are not national banking institutions.

2. Articles 7165 and 7166, Revised Civil Statutes, taxing shares of stock in banks, do not apply to joint stock land banks incorporated under Section 811, Title 12, United States Statutes.

3. Shares of stock in joint stock land banks are taxable in Texas, but only the shares owned by residents of Texas are taxable, and such shares so taxable only in the county of the residence of the owner, and same cannot be taxed at a greater rate or valuation than other moneyed capital in competition with said banks.

4. In arriving at the value of the shares of joint stock land banks, it is not necessary to deduct the non-taxable assets of the same in order to determine the value of the shares.

5. Joint stock land banks are not required to render their shares for taxation or pay taxes on the same, but same are to be rendered for taxation and taxes paid by the owners.

Construing:

Sections 548, 931, 932, 933, Title 12, U. S. Statutes.
Articles 7145, 7147, 7162, 7165, 7166, 7204, R. C. S. of Texas, 1925.

OFFICES OF THE ATTORNEY GENERAL.
AUSTIN, TEXAS, Sept. 24, 1927.

Honorable Lewis T. Carpenter, Assistant District Attorney, Dallas, Texas.

DEAR SIR: This department acknowledges receipt of your request for an opinion as to whether joint stock land banks are taxable under the laws of Texas. You also ask if the shares of stock of said institutions are taxable, and if so, in what manner.

In reply to the above, you are advised that under the provisions of Sections 931, 932 and 933, Title 12, of the U. S. Statutes the property of joint stock land banks, with the exception of real property is not subject to taxation. But this rule does not apply with reference to shares of stock in these institutions.

Section 932, Title 12, United States Statutes, reads as follows:

"Nothing herein shall prevent the shares in any joint-stock land bank from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the bank is located; but such assessment and taxation shall be in manner and subject to the conditions and limitations contained in section 548 with reference to the shares of national banking associations."

Section 548, Title 12, United States Statutes, reads as follows:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: Provided, that bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

Articles 7165 and 7166, Revised Civil Statutes of Texas, specifically provide a manner for taxing shares in national banks. But joint stock land banks which are incorporated under Section 8811, Title 12, United States Statutes, are not

national banking associations, for which provision is made for taxation under these articles of the Texas Statutes. See Compton vs. Buder, 271 S. W. 770 (Mo.).

Since we have no statute specifically taxing the shares of stock in joint stock land banks, the next question to decide is whether we have any general law taxing the shares of these institutions. Article 7145, Revised Civil Statutes of Texas, reads as follows:

"All property, real, personal or mixed, except as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed."

Article 7147 provides that personal property for the purposes of taxation shall be construed to include stock in corporations (except national banks) out of the State owned by inhabitants of this State.

Article 7162 requires each taxpayer to list all property subject to taxation, and Section 38 of this article requires that the following shall be listed:

"Amount and value of shares of capital stock companies and associations not incorporated by the laws of this State."

The same provision is provided for under Section 38 of Article 7204.

We see, then, even though our statutes have not specifically provided for taxation of shares of stock in joint stock land banks, under the general provisions of Articles 7145, 7147, 7162 and 7204, the same are taxable, for the reason that said associations are not incorporated under the laws of Texas, and we believe that these statutes have the effect of levying a tax against such shares in joint stock land banks as have a taxable situs in this State, or in the language of Article 7147, a tax is levied against those shares ,'owned by inhabitants of this State." The only question let to determine is whether this levy of taxes on said shares violates the provisions of Sections 548 and 932 of the United States Statutes quoted above.

Under Section 932, the shares in joint stock land banks are taxable in the manner and subject to the conditions and limitations concerning national banks under Section 548. The only limitation necessary to notice, as far as this opinion is concerned, is that part of Section 548 which provides that in case shares are taxed, the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital coming into competition with same. By the term "greater rate" is also meant "valuation." See Boyer vs. Boyer, 113 U. S. 689; Cooley on Taxation, Section 1000. Since Section 932 places the same limitation upon taxation of shares in joint stock land banks as is placed upon taxation of shares in

national banks, we believe it correct to say that the shares in joint stock land banks cannot be taxed at a greater rate than shares in other concerns competing with said banks. It is also agreed that the business of joint stock land banks is that of lending money with land as security, or the same as ordinary mortgage companies. Therefore, the shares in joint stock land banks cannot be taxed at a greater rate or valuation than the moneyed capital coming into competition with joint stock land banks.

Under the Texas Statutes, we have no provision taxing the shares of stock in loan companies or other concerns coming into competition with joint stock land banks. However, all of the property of such concerns is subject to taxation under our law. See Article 7145 above quoted. While it is true that the assets of such concerns might consist of some securities which are exempt from taxation under Federal laws, our legislature has not exempted any of the property of such concerns from taxation. The Constitution of Texas specifically prohibits such exemption even if the Legislature should desire to grant the same. See Article 8, Section 2. As a matter of fact, Article 7145 is broad enough to include taxation of United States bonds, but of course we are forced to yield to the superior authority of the Federal Government which has exempted them from taxation. Since our Texas Statutes do not exempt any property belonging to mortgage companies, whether incorporated or unincorporated, can it be said that the taxation of shares in joint stock land banks will be at a greater rate than the moneyed capital of mortgage or loan companies?

It may be said that in order to tax the shares in joint stock land banks it is necessary to tax the shares in loan companies, but such is not the rule. In the first place, the concern in competition with the joint stock land banks may be unincorporated or a partnership without shares of stock, and therefore, no shares could be taxed. Also Section 548 provides that the tax on shares of banks shall not be at a greater rate than the tax on moneyed capital coming into competition with them; it does not say "shares" of the competitor. In Cooley on Taxation, Section 1000 (4th Ed.), which discusses the statute with reference to discrimination against national banks, it is stated:

"If no tax is imposed by the state on shares in state banks, or if such shares of stock are all expressly exempted from taxation, shares of stock in national banks cannot be taxed, subject to the exception that the adoption of a different method of taxing state and savings banks, which in effect but not actually taxes the stock, does not necessarily involve a discrimination."

Under the laws concerning the taxation of shares in national banks, it has been held that in determining the value of the same, it is not necessary todeduct the non-taxable assets

of the bank. See Brown vs. Bank, 175 S. W. 1122. But it may be said that in taxing shares in joint stock land banks, in order to avoid discrimination, it is necessary to allow the owners of stock, in determining the value of same, to deduct the non-taxable assets of the bank, for the reason that the non-taxable assets of mortgage companies under State laws may be deducted and that payment upon the full value of the shares in joint stock land banks will be at a greater rate than upon the moneyed capital of the loan companies which have non-that any or all of the loan companies will have non-taxable assets. But we do not believe that it can be assumed that any or all of the loan companies will have non-taxable property. As heretofore stated, our Texas laws do not exempt any of this property, and if any is exempt, it is by virtue of a Federal Statute. Also any non-taxable property owned by a loan company must be in the nature of Federal bonds or similar instrumentalities. and the same will not be in competition with the business of joint stock land banks. It is agreed that the business of joint stock land banks is that of lending money on land. Any money that a mortgage or loan company might have invested in United States bonds, or other non-taxable securities, is not coming into competition with joint stock land banks. This leaves all of the property of mortgage companies that competes with joint stock land banks subject to taxation under Texas laws. If the entire assets of a mortgage company should be invested in United States bonds, then the company would not be engaged in the mortgage busineys and would not be in competition with joint stock land banks in any sense whatever. Let us take another example: An individual may operate a private business consisting of banking, real estate, and purchasing and selling bonds. As part of his assets, he may own some United States bonds. When he renders his taxes he will not render the United States bonds because of their exemption from taxation under Federal Statutes. Are we going to say that because this individual owns as part of his assets some United States bonds, we must allow national banking institutions to deduct the amount of their Federal bonds in order to determine the value of their shares? One loan company might own a considerable amount of Federal bonds that are exempt from taxation, while another company may not own any property whatever that is exempt. The fact that it is possible for a loan company to own some non-taxable assets does not, in our opinion, render the taxation of shares in joint stock land banks invalid. Our Texas statutes do not make any discrimination against national banks or joint stock land banks.

Some of the most recent decisions of the United States Supreme Court construing Section 548 with reference to discrimination against national banks are Bank of Richmond vs. Richmond, 256 U. S. 635; Bank of Hartford vs. Hartford, 71

L. ed 530 (adv.); Minnesota vs. Bank of St. Paul, 71 L. ed. 535 (adv.); Georgetown Bank vs. McFarland, 71 L. ed 538 (adv.). While none of these decisions are directly in point with the matter before us, yet the general principles enunciated therein are in line with the views expressed above. But we do believe that the case of Hanan vs. First National Bank, 269 Fed. 527 is conclusive. In this case a national bank complained of the statute of Iowa which assessed a tax against its shares of stock. It was maintained that under the State law, private bankers were allowed to deduct the amount of United States securities from the amount of their assessable property, while national bank shares were assessable at their full value, although a part or all of the capital may be invested in such securities and that this system of taxation was violative of Section 5219 (now Section 548). The court disposed of the matter in this language:

> Shares in a national bank are subject to taxation by the states, in accordance with the grant of power conferred by section 5219, and the fact that a part or all of the capital of the national bank is invested in United States bonds or securities, which are exempt from taxation, does not entitle the shareholders to any deduction from an assessment upon the full value of his shares. * * * * * The fact that individuals, such as private bankers, may deduct from the amount of their assessable property the amount of United States securities held by them, is not a discrimination forbidden by Section 5219, as against the owners of national bank shares, assessed at their full value, because section 5219, in requiring other moneyed capital to be assessed at an equal rate, only refers to such moneyed capital as the state has the power to tax, and not to that property which the national power has exempted from taxation. People vs. The Commissioners, 4 Wall. 244,256, 18 L. Ed. 344; Exchange nat. Bank vs. Miller (C.C.) 19 Fed. 372,380; Head vs. Board of Review, 170 Iowa, 300, 152 N. W. 600."

The case of Des Moines Bank vs. Fairweather, 184 N. W. 313 (Ia.) similarly construed this provision of the Federal Statute and said with reference to Section 1321 of the State law:

> "Section 1321 creates no exemption. It merely recognizes such exemption as shall have been created by higher authority. On that question it is not legislative in an affirmative sense. It simply renders obedience to Federal sovereignty. The private banker claims his exemption, if at all, under the federal statute, and not under our statute. If Section 1321 should purport to accomplish uniformity by denying exemption to the private banker, it would be a vain effort. The exemption would still remain. It cannot be said, therefore, that any discrimination is created by the two sections of our statute."

However, as stated at the outset, our statutes have not provided for taxing the shares of these institutions in the manner in which the shares of national banks are taxed. The Legislature has authority to do so, but has never passed any specific legislation taxing these shares. We are simply left with the general provision of law taxing the shares, and therefore, only

those shares owned by residents of Texas are taxable, and the same are taxable only in the county of the residence of the owners. The joint stock land bank is not required to render said shares for taxation or to pay taxes on the same. These shares occupy the same position as shares in other foreign corporations owned by residents of Texas.

Replying to your questions, you are advised that it is the opinion of this department that the shares of stock in joint stock land banks incorporated under the Statutes of the United States are taxable, subject to the following limitations:

1. Only its shares owned by residents of Texas are taxable.
2. Said shares are taxable only in the county of the residence of the owners.
3. The shares cannot be taxed a greater valuation than is placed upon the moneyed capital of mortgage or loan companies, or any business that is in competition with joint stock land banks.
4. In arriving at the value of the shares of stock in joint stock land banks, it is not necessary to deduct the non-taxable assets of said institutions in order to determine the value of the shares.

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

Note—See Cooley on Taxation, Section 989, which sustains fourth syllabus of this opinion and Section 992, which sustains the second syllabus.

Op. No. 2715, Bk. 62, P. 374.

TAXATION—INSURANCE COMPANIES.

1. In listing its credits or debts owing to it for taxation, an insurance company may deduct therefrom any debts which it owes, but is not allowed to deduct its indebtedness from the value of real estate or other personal property.
2. In determining the taxable assets of an insurance company, the value of shares of stock in domestic corporations which list and return their capital and property for taxation may be deducted by the insurance company.

Construing Articles 4754, 7147 and 1747 and 7163.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 11, 1928.

Honorable Tom C. Clark, Assistant District Attorney, Dallas, Texas.

DEAR SIR: This department acknowledges receipt of your letter which reads as follows:

"Will you please give this department an opinion on the following tax question:

"A fire insurance company lists its admitted assets at $1,500,000.00 from which it deducts $500,000.00, said amount being the legal reserve required by law for the company to keep and maintain by reason of its outstanding policies, and real estate assessed at $220,000.00 which, under the statute, is deductable. In addition to the legal reserve and the real estate as authorized under Art. 4754 the insurance company is claiming a $200,000.00 deduction which it owes in the way of vendor's liens against the real estate. Is such a deduction authorized by law? Does Art. 4754 authorize the deduction of industrial stock from the assets of the insurance company?"

The questions propounded by you involve a construction of Article 4754 of the Revised Civil Statutes for 1925, which reads as follows:

"Insurance companies incorporated under the laws of this State shall hereafter be required to render for State, county and municipal taxation all of their real estate as other real estate is rendered. All personal property of such insurance companies shall be valued as other property is valued for assessment in this State in the following manner: From the total valuation of its assets shall be deducted the reserve being the amount of the debts of insurance companies by reason of their outstanding policies in gross, and from the reminder shall be deducted the assessed value of all real estate owned by the company and the remainder shall be the assessed taxable value of its personal property."

This article was construed by the Commission of Appeals in the case of City of Waco vs. Amicable Life Insurance Company, 248 S. W. 332, in which the court held that in determining the company's taxable assets, in addition to deducting its reserve, the insurance company was also entitled to deduct the value of the United States bonds which constituted a part of its assets. The court held that by the passage of the above article, the legislature intended that, in declaring that the total valuation of the corporation's assets should be first ascertained, it was intended, to include only the taxable assets. The opinion also referred to that part of old Article 4764, now Article 4754 above quoted, which states that all personal property of insurance companies shall be valued *as other property is valued*, for assessment in this state and refers to our general statutes concerning the assessment of personal property, and then uses this language:

"We think that the above-quoted language of article 4764 to the effect that the personal property shall be valued as other property for assessment in this state has reference not only to the method of fixing the value, but also to the property required to be listed for taxation."

The effect of the above decision, as we view the same, is to hold that the only effect of Article 4754 is to determine specifically that the reserve of an insurance company is not taxable on the ground that the same is an indebtedness of the company. With this exception, according to this decision, the assets of an

insurance company are taxable as property of other persons or corporations.

Under Article 7147, credits or debts owing to a person are taxable, but in determining the value of the same, this article also allows a deduction from the credits of the amount of debts owing by the person. If the personal property assets of the insurance company in question contain credits in excess of $200,000.00, then the taxable item of credits should be only the difference between the credits and $200,000.00, if the credits are less than $200,000.00, then the taxable assets should not include any credits.

Article 7163 provides that no person shall be required to list for taxation any shares of the capital stock of a corporation which is required to list its capital and property for taxation. Applying this general rule for listing property, we see that the shares of stock in domestic corporations owned by the insurance company should be deducted from its personal property assets in determining its total taxable assets.

Applying the rule laid down by the court in this case, we see that the insurance company should first list its real estate for taxation. In determining the value of the personal property of the company, the gross assets of the company, including its real estate should be determined. But in determining the gross assets the debts owing to the company and the debts owing by the company should be taken into consideration in the manner set out above. From the gross assets so determined, there should be deducted the value of the shares of stock in Texas corporations which are required to list or return their capital and property for taxation. From this remainder, there should also be deducted any other non-taxable assets of the company. The remainder reached after the above deduction will constitute the total assets of the insurance company for taxation. From this amount there should be deducted the reserve, and from the remainder will be deducted the assessed value of the real estate. The last remainder will constitute the assessed taxable value of the personal property.

If we should say that Article 4754 is to be construed so that an insurance company should not be allowed to deduct the debts it owes from its credits or should not be allowed to deduct its corporate stock as provided by Articles 7147 and 7163, we are inclined to believe that such procedure would encroach upon the provisions of Article 8, Section 1 of the Constitution, which provides that taxation shall be equal and uniform, as the same would be denying to an insurance company a right given to all other persons and corporations, and the same would not fall within the rule of uniformity laid down by the court in the case of Norris vs. City of Waco, 57 Texas 635. But we do not believe that the decision of the court in the case of City of Waco vs. Amicable Life Insurance Company intended to deny this right to the insurance company, but on the contrary, from

the language of this opinion, we believe that it was intended that the insurance company should have this right.

You are advised, therefore, in answer to the first question, that the $200,000.00 indebtedness of the insurance company may only be deducted from its credits or debts owing to it in determining the taxable assets of the company and cannot be deducted from the value of the real estate or personal property ascertained in the manner provided by Article 4754.

In answer to your second question, you are advised that in determining the taxable assets of the insurance company, it may deduct the value of its shares of stock in Texas corporations which list their capital and property for taxation.

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

Op. No. 2719, Bk. 62, P. 390.

TAXATION—BANKS—SHARES OF STOCK IN BANK.

1. In determining the value of shares of stock in national or state banks for the purpose of taxation, it is not necessary to deduct the value of shares owned by the bank in other corporations.
Construing Articles 7163, 7165, and 7166, Revised Civil Statutes.
Section 548, Title 12, United States Statutes.

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

Honorable Tom C. Clark, Assistant District Attorney, Dallas, Texas.

DEAR SIR: This department acknowledges receipt of your letter, which reads as follows:

"Will you please give this Department an opinion on the following tax question?

"A bank incorporated under the laws of the State of Texas with a capital stock of $500,000.00 and a surplus of $85,000.00 owns as a part of its assets the capital stock of a mortgage company, with the exception of the qualifying shares of the officers, which said mortgage company is incorporated for $200,000.00 under the laws of this State. The bank owns $350,000.00 worth of the capital stock of a national bank. The mortgage company does not own any stock in the state bank. In valuing the bank stock for purposes of taxation, as provided for by the statute, should the capital stocking in the mortgage company and owned by the bank be deducted from the assets of the bank in arriving at a fair market value of the stock, for purposes of taxation? If such deduction is not to be allowed will the valuation of the stock in the bank on that basis and a separate rendition by the mortgage company of its assets, as provided by law, result in double taxation, such as would be prohibited by constitution?"

The attorney for the bank involved in this question has furnished us with a brief, in which he takes the view that the

bank should be allowed to deduct the stock which it owns in the mortgage corporation.

This question as to the taxation of shares of stock in a national bank arose in the case of Brown vs. First National Bank of Corsicana, 175 S. W. 1122, a decision by the Dallas Court of Civil Appeals, in which a writ of error was denied by the Supreme Court. In this case, the bank sought to deduct from the value of its shares in the bank the value of the shares it owned in certain industrial corporations which had paid taxes on their entire assets. But the court held that this deduction was not allowable. The same view was taken by the Supreme Court of the State of Washington in the case of Pacific National Bank vs. Pierce County, 56 Pac. 937.

Since our statutes tax the real estate and shares of stock in state banks in the same manner in which it taxes national banks (Articles 7165-7166), it seems that the cases above cited should be decisive. But the bank contends that a later decision by the Supreme Court of the United States in the case of Bank of California vs. Richardson, 248 U. S. 476, is contrary to the decision of the Texas court. In this case, the California National Bank owned shares of stock in the Mills National Bank and also in the Mission State Bank. The state levied a tax directly against the California Bank for the value of the shares owned in the Mills and the Mission Banks, and in taxing the stockholders of the California Bank for the value of the shares in that bank, the state refused to deduct the value of the shares in the Mills and Mission banks on which the California Bank had already been assessed for taxes. The court held that under Section 548, Title 12, United States Statutes, the State had authority to tax the California bank for the value of its shares in the Mills National Bank, but that in determining the value of the shares in the California National Bank, the value of the shares in the Mills National Bank should be deducted. As to the shares of stock in the Mission State Bank, the court held that the state was without authority to levy a tax against a national bank for shares owned in a state bank, as the authority granted in present Section 548, Title 12 of the United States Statutes, extends only to taxing the owners of the shares in national banks and not state banks. In short, according to this decision, the state is without authority to levy a tax against a national bank for any purpose, except those permitted by Section 548, Title 12. The court also specifically held that the assessment of the stock in the Mission State Bank as an asset of the California Bank against the stockholders of the California National Bank was valid.

We are unable to agree with the bank's contention that this decision of the Supreme Court of the United States is in conflict with the decision in the Corsicana Bank case, supra. In the California case, the bank was assessed directly on 2501 shares in the Mills National Bank valued at $625,000. This

had the effect of the California National Bank paying taxes on this part of the assets just the same as paying taxes on its real estate. The bank could segregate its assets and say that it, and not someone else, has already paid taxes on a particular item on $625,000, and ask why should the assets be taxed again indirectly by taxing the stockholders. For this reason, as we view this decision, the court took the view that it was the intention of Congress that under Section 548 all assets on which the bank itself had paid taxes should be deducted in determining the value of its shares for taxation. But the same cannot be said for the bank under consideration. It cannot take its asset of $200,000 stock in the mortgage corporation and say that the bank itself has paid taxes on that particular asset, as could the California Bank say with reference to its stock in the Mills National Bank. It is true that the mortgage corporation is assessed for taxes on all of its assets. But the bank, which is merely a stockholder in the mortgage corporation, has not itself paid any of the taxes of the mortgage corporation, and, therefore, there is no reason for allowing the bank to deduct its stock in the mortgage corporation in determining the value of the bank's shares of stock for taxation purposes. If the bank itself had directly paid taxes on stock in the mortgage corporation, then the California Bank case would apply.

But the bank insists that the taxation of shares of stock in banks, as permitted by the Corsicana case, is violative of Article 8, Section 1 of the Constitution of Texas, which requires that taxation shall be equal and uniform. It has been held by our Supreme Court that taxes are equal and uniform within the meaning of this article of the Constitution when no person or class of persons in the taxing district is taxed at a different rate than are other persons in the same district upon the same value or the same thing and when the objects of taxation are the same by whomsoever owned or whatever they be. Norris vs. City of Waco, 57 Tex. 635. We find a similar situation in our method of taxing land as well as notes, the payment of which is secured by a lien on the land. This system has not only been in vogue in Texas for many years, but has been upheld by the Supreme Court of the United States. Poddell vs. New York City, 211 U. S. 446; Savings Society vs. County, 169 U. S. 421.

Let us say that instead of purchasing $200,000.00 worth of stock in the mortgage corporation the bank on December 1st of any year loaned this sum of money to the same mortgage corporation, and took its note as evidence of the debt. On January 1st following, the mortgage corporation still has this money, or other property into which it has been converted, and is, therefore required to list the same for taxation. Under such circumstances would the bank be entitled to deduct the $200,000 note from its assets in determining the value of the shares for taxation merely because the mortgage corporation has paid

taxes on the money represented by the note held by the bank? Certainly not. What then as far as taxation is concerned, is the difference between a bank having a certificate of stock of a mortgage corporation as an asset and a note given by the same corporation for the same amount?

However, the bank contends that Article 7163 expressly provides for the deduction from its assets of the amount of stock of the mortgage corporation that it owns. This article provides:

"No person shall be required * * * * to include in his statement as a part of his personal property which is required to be listed any share or portion of the capital stock, or property, of any company or corporation which is required to list or return its capital and property for taxation."

This article clearly applies only to the owner of shares of stock in a corporation that is required to list all of its capital and property for taxation. It is by virtue of this article that the bank in question is not required to list for taxation its shares of stock in a mortgage corporation; the value of the shares of stock in the bank are listed against the individual stockholders of the bank. Can it be said that a stockholder in the bank is a stockholder in the mortgage corporation? We think not. A certificate of stock in the bank will show no interest whatever in the assets of the mortgage corporation. It cannot even be said that the bank itself owns any of the property of the mortgage corporation, even though it is the owner of shares in the corporation. The stockholders of a corporation are in no proper sense the owners of the assets or property of the corporation. Van Allen vs. Assessors, 3 Wall. 584. Their interest in the assets is only in the residue that remains after payment of all liabilities upon the winding up and liquidation of the affairs of the corporation. In the Van Allen case, the court specifically held that a tax on the shares of stock in a national bank is not a tax on the assets of the property of the mortgage corporation? The bank and the mortgage corporation are separate and distinct entities. The bank. If such is the case, how, then, can we say that a tax on the shares of the bank under consideration is a tax upon the payment of a tax by a stockholder of the second corporation does not constitute payment by the first corporation. Therefore, we are of the opinion that Article 7163 applies only in case the State seeks to tax the shares of the mortgage corporation owned by the bank, and does not apply in the valuation of the shares of stock of the bank assessed against the stockholders.

In the case of Pacific National Bank vs. Pierce County, 56 Pac. 937, the Supreme Court of Washington construed a statute identical with our Article 7163, and held that the same did not authorize the bank to deduct shares of stock it owned in cer-

tain corporations in determining the value of its shares for taxation.

The bank insists that if the shares of stock in the mortgage corporation were owned by an individual or corporation other than a bank, the state could not tax the same and the same could not be listed as an asset of the individual or other corporation, and that a change in ownership to a bank should not cause the same to be taxed indirectly. As we have already seen, under our system of taxation, we tax only the real estate against the bank and the value of the shares against the stockholder. The value of a share in a corporation does not necessarily depend upon the value of the property. The corporation may own property worth a million dollars, yet on account of its liabilities, the shares of stock in the same may be worth nothing. Nevertheless, the property of the corporation is taxed. The value of a share in a corporation may depend upon its profits and gains which have attended its operation or prospect of its future success, the nature and extent of its corporate rights and privileges, and the skill and ability with which its business is managed. Pacific Bank vs. Pierce County, supra. Most of the state courts and the Supreme Court of the United States even hold that in the absence of a statute prohibiting the taxation of shares, as well as the corporate property, the same is not double taxation. Cooley on Taxation (4th Ed.) Sec. 245. But in Texas we are not concerned with this question, as Article 7163 specifically prohibits the taxation of shares of a corporation in the hands of a stockholder where the corporation pays taxes on its entire assets. In the case of Amoskeag Savings Bank vs. Purdy, 231 U. S. 373, the Supreme Court of the United States sustained the tax imposed upon a shareholder in a suit that, while not exempting the real estate of the bank situate in the same state, allowed no deduction of its value in the computation of the taxable value of the shares.

The fact that the owners of shares of stock of domestic corporations are not required to list them for taxation does not constitute an exemption, but is, under our statutes, in effect an exemption of the shares from taxation. United States bonds and other securities are also exempt from taxation in the hands of an individual just as shares of domestic corporations, but numerous decisions hold that in valuing the shares of stock in a national bank for taxation, it is not necessary to deduct non-taxable securities. Van Allen vs. Assessors, 3 Wall. 573; Palmer vs. McMahon, 133 U. S. 660; Home Savings Bank vs. Des Moines, 205 U. S. 503; Hannan vs. First National Bank, 269 Fed. 527; Des Moines Bank vs. Fairweather, 184 N. W. 313; Adair vs. Robinson, 25 S. W. 754; Brown vs. First National Bank of Corsicana, 175 S. W. 1122. As non-taxable United States securities cannot be deducted by the stockholders of a bank in determining the value of their

shares, why should we not extend the same rule to include non-taxable shares of stock in domestic corporations?

The case of Gillespie vs. Gaston & Thomas, 65 Tex. 599, cited by the bank, is not in conflict with the views expressed herein. Under the laws of Texas at the time of this decision, state banks were taxed in the same manner as other corporations, and the court merely held that Article 6864 of the Revised Statutes for 1879, which is the same as present Article 7163, applied, and that under our statutes, both the corporation and shares of stock could not be taxed. Under our present law, however, state banks are not taxable as other corporations. The case of City of Marshall vs. State Bank, 127 S. W. 1083, also cited by the bank, merely holds that the state no longer has authority to tax the personal property of a state bank, but can only tax the real estate and levy a tax against the stockholders, as in the case with national banks. This case has no application to the question under consideration.

You are advised, therefore, that it is the opinion of this department that in valuing the shares of the bank for taxation, it is not necessary to deduct the value of the shares owned by the bank in the mortgage corporation.

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

Op. No. 2726, Bk. 62, P. 428.

TAXATION—GROSS RECEIPTS TAX—REPORTS AND PAYMENTS TO BE MADE WHERE BUSINESS IS TRANSFERRED TO OTHER OWNERSHIP—ARTICLE 7073, REVISED CIVIL STATUTES, CONSTRUED.

1. Where one subject to a gross receipts tax transfers his business to other parties during a quarter of the year, no tax is to be paid by him at the termination of that quarter.
2. A party to whom a business is transferred for valuable consideration should pay a beginner's tax of fifty dollars for the privilege of doing business during the first quarter, or remaining portion thereof, in which he begins business where he is liable to a gross receipts tax.
3. One who acquires a business, the engaging in which subjects him to the payment of a tax based upon gross receipts, must, on the first day of the quarter succeeding his acquisition of the business, render to the Comptroller of Public Accounts a report showing the gross receipts of said business during the preceding quarter by himself and his predecessors in ownership, and pay a tax computed on such gross receipts.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 15, 1928.

Honorable S. H. Terrell, Comptroller of Public Accounts, Capitol.

DEAR SIR: Your Chief Auditor, Mr. Martin, recently referred

to this office a letter from the firm of Terry, Cavin and Mills of Galveston, Texas, which relates to the payment of gross receipts taxes by the Galveston Gas Company and its business successor, the Galveston Gas Corporation.

The facts, as we understand them and upon which we base this opinion, are as follows:

The Galveston Gas Company has been in business for many years and has uniformly made to your office the gross receipts tax reports required by law, and has paid the tax. On December 10, 1927, the Galveston Gas Corporation came into existence, and later, took over as of date, December 1, 1927, all properties assets, and receipts of the Galveston Gas Company. The questions put to you by Terry, Cavin and Mills and upon which you request the opinion of this office, are:

1. What tax, if any, should be paid by the Galveston Gas Company?
2. What tax should be paid by the Galveston Gas Corporation for doing business during that portion of December, 1927, during which it was engaged in business?
3. To what, if any, refund is the Galveston Gas Company entitled in view of the fact that it did not do business during the month of December, 1927?
4. What report should be made by the Galveston Gas Corporation on January 1, 1928, and what tax should be paid by it for the first quarter of 1928?

You are advised that, in the opinion of this office, the questions should be answered as follows:

"1. No tax should be paid by the Galveston Gas Company. That company paid on October 1st, a tax for the privilege of doing business in the months of October, November and December, for the tax is construed as being paid in advance for the privilege of doing business during the succeeding quarter.

"2. The Galveston Gas Corporation should pay a beginner's tax of $50.00 for doing business during the month of December, 1927, under the terms of Article 7073, Revised Civil Statutes.

"3. We must respectfully decline to answer your third question, for it is no part of the duties of this office to advise as to the possibility of recovering taxes paid without protest into the Treasury through your office.

"4. The Galveston Gas Corporation should report the entire gross receipts of both the Galveston Gas Company and the Galveston Gas Corporation during the last quarter of 1927, and pay a tax upon this basis for the first quarter of 1928. This is entirely equitable for the measure of the tax upon the privilege of doing business during the quarter (with the exception of the first quarter when the "beginner's tax" is exacted) succeeding payment is the volume of business done during the quarter preceding payment, and it is not to be supposed that the volume of business will be appreciably increased or decreased by the change in ownership, and, if so, this is a give-and-take which is to be borne and received by the State or the taxpayer, as the case may be."

We wish to point out that the fact that the transferor of the business does not see fit to utilize the privilege of doing business which he bought from the State by paying the tax in

advance has no bearing upon the case, nor is the privilege which he has bought transferable. The transferee cannot complain that he has been injured in any way, for he has paid simply that tax (the beginner's tax) required by the statute, and pays for nothing which he does not receive, and this is an occupation tax. In the instant case this process of computation, it is clear, makes it possible to carry out the intent of the statute. You will immediately note, upon consideration of this opinion, that under it a very close question will arise where the transfer is made *upon the first day of a quarter.* In every such instance, the transaction should be very closely scrutinized for evidences of fraud, and in no event should validity be imputed to a transfer made upon some day other than the first day of a quarter but purporting to be "as of" the first day of the quarter. Under the statute as drawn, in the absence of fraud, it is apparent that if a bona fide transfer is made upon the first day of a quarter, the tax for said first quarter is only $50.00, irrespective of the gross receipts of the business for the preceding quarter. It is clear to our minds that the intention of the Legislature was to provide that the occupation tax for the privilege of doing business for the first quarter, or a fraction thereof, should be fifty dollars, irrespective of the amount of business done during that quarter. It is probably true that the reason for this is that the Legislature did not anticipate a situation where an accurate estimate could be made of the volume of business to be done in the first and did not contemplate a situation such as we have outlined, where a transfer is made upon the first day of the quarter, and where such means of reasonably accurate measurement exists. We cannot, however, say that because the Legislature *might* have provided that the tax for the first quarter should be measured by the receipts for the preceding quarter, where the business had been carried on during said preceding quarter or a fraction thereof, by the beginner's predecessors in ownership of such business, it *did* so provide, whereas in fact it's intention to impose a fifty dollar tax in such cases is clear from the terms of the statute, which accordingly is not subject to construction upon this point. One entering upon a business is a "beginner" therein, even though the business has been going on for many months under other ownership.

Yours very truly,

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

Op. No. 2728, Bk. 62, P. 437.

TAXATION—CITIES AND TOWNS—MUNICIPAL CORPORATIONS—PRIORITY OF TAX LIENS—SPECIAL ASSESSMENTS.

1. The lien of the state and county for taxes is not superior, but is equal, to the lien of a city for taxes.

2. Where a city has a lien on real estate for taxes, it is not necessary to make the city a party to a suit for state and county taxes.

3. The lien of the state and county for taxes is superior to the lien of a city for assessments for paving, sidewalks, or other improvements.

4. In a suit for state and county taxes, it is necessary to make the city or person holding the certificate of assessment a party to the suit.

Construing: Articles 1090, 1175 and 7328 Revised Civil Statutes.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 7, 1928.

Honorable David E. Mulcahy, County Attorney, El Paso, Texas.

DEAR SIR: This department acknowledges receipt of your letter in which the following questions are submitted:

1. Is the lien of the state and county for taxes superior to the lien of the city for taxes?

2. Where a city has a lien on real estate for delinquent taxes, is it necessary to make the city a party to a suit for state and county taxes?

3. Is the lien of the state and county for taxes superior to the lien of the city for assessments for paving, sidewalks, or other improvements?

4. Where a city has acquired a lien for improvements, is it necessary to make the city a party to a suit for state and county taxes?

We will discuss these questions in the order set out above.

1.

In 26 Ruling Case Law, Section 361, Page 404, we find the following statement:

"As between taxes assessed by a state and by counties, cities and towns, there is no precedence granted to the taxes of the larger and more important governmental subdivisions, but the liens for all of such taxes are equal."

In Cooley on Taxation (4th Edition) Section 1241, it is stated:

"Independent of statute, there are no priorities as between city and state or county taxes."

In the case of Paul Bellocq vs. City of New Orleans, 31 La. An. Rep. 471, the Supreme Court of Louisiana held that where property is sold for state taxes, such sale does not operate to

discharge a lien in favor of city taxes upon the same property. The court further says:

"This question is of great importance in every point of view. If it be true that the state tax primes every other lien to such an extent that a sale under its lien extinguishes all others, then the power of taxation delegated by the state to cities and parishes might become, if not inoperative, at least unproductive of benefit. A sale for the compulsory payment of the state taxes would deprive cities and parishes of the power to compulsory collect theirs. * * * * * When the Legislature gave to the city the power to tax, and confided to her officers the movement of the machinery necessary to realize the tax, it can not have been intended to invent a clog which at any moment might peremptorily stop its working. This would be offering a stone where one asked for bread. Taxes are the pabulum of government. Without that food the political body languishes and dies. The State did not create the city, and indue it with corporate lige, and in the same instant benumb and palsy those functions, without the exercise of which life is soon extinct. * * * * * We think the state and city taxes are concurrent privileges."

In Dennison vs. City of Beokuk, 45 Iowa 266, the Supreme Court of Iowa held that a sale for state and county taxes does not divest the lien which a city may have for city taxes or a sale for city taxes does not divest the lien which the state and county may have for state and county taxes.

In Justice vs. Logansport 101 Ind. 326, the Supreme Court of Indiana says that municipal corporations in levying taxes are instrumentalities of government, and taxes levied by them are, in legal effect, levied by the state, so that the lien for such taxes is of equal rank and priority to taxes levied for state and county purposes.

Other authorities which hold that there are no priorities of state, county, and city taxes are: Nashville vs. Lee, 80 Tenn. (12 Lea) 452; St. Clair vs. Jones, 108 N. E. 256 (Ind.); Bowe vs. City of Richmond, 64 S. E. 51 (Va.); Gowland vs. City of New Orleans, 28 So. 358 (La); Adams vs. Osgood, 60 N. W. 869 (Neb.), and Knowles vs. Morris, 65 Atl. 782 (Del.).

Since we have no statute in Texas concerning the priority of taxes, we will follow the general rule as expressed by the weight of authority above cited, and advise you that the lien of the state and county for taxes is not superior, but is equal, to the lien of a city for taxes.

2.

Article 7328, Revised Civil Statutes, provides that in a suit for delinquent state and county taxes, the proper persons, including all record lien holders, shall be made parties to such suit. We believe the record lien holders mentioned in this article are those lien holders that appear of record in the county clerk's office, and said article is not intended to include a city having a lien for unpaid taxes. Since a sale of the property for state and county taxes does not affect the lien of

a city for unpaid taxes, and since the purchaser at such sale will take the same subject to the lien of the city, we do not believe that it is necessary to make the city a party to the suit.

3.

As to local assessments, the general rule as expressed by Ruling Case Law, Section 361, Page 404, is that a lien for general taxes takes precedence over a lien for a special assessment. But the rule is not the same in all states. See Cooley on Taxation (Fourth Edition), Section 1241. However, the weight of authority seems to favor the general rule as express-in Rule Case Law. See McCollum v. Uhl, 27 N. E. 152 (Ind.); State v. Dunning, 223, Pac. 8 (Wash.); Loveless v. City of Chelalis 233, Pac. 301 (Wash.); Bennet v. Denver, 197 Pac. 768 (Col.); Maryland Realty Company vs. City of Tocoma, 209 Pac. 1 (Wash.); City of Ballard v. Way, 74 Pac. 1067 (Wash.); McMillan v. Tacoma, 67 Pac. 68 (Wash.); Holmes v. Winheimer, 44 S. E. 82 (S. C.); State v. Fursteneau, 129 N. W. 81 (N. D.).

However, we have a statute in Texas, to-wit: Article 1090, which authorizes a city to create a lien against any property subject to execution and authorizes a city to execute in its name assignable certificates declaring the liability of the owners and their property for the payment of such assessments, and said article also provides:

"Such assessments shall be secured by and constitute a lien on said property, which shall be the first enforcible claim against the property against which it is assessed, superior to all other liens and claims, except state, county and municipal taxes."

The provisions of this article not only apply to the smaller cities and towns of the state, but will also apply to those cities operating under the Home Rule Amendment to the Constitution, even though cities of the latter class might attempt under Article1175, Section 16 to have a different provision. See City of Amarillo v. Tutor, 267 S. W. 697, and Brown vs. Fidelity Investment Company, 280 S. W. 567.

While this article merely states that the lien for assessments is not superior to the lien for general taxes, yet in the light of the general rule and authorities above cited, we believe that the same is to be construed as making the lien for assessments inferior to the lien for general taxes.

4.

Since the lien for special assessments is inferior to the lien for state and county taxes, and since the sale of the property for state and county taxes will cut off the lien for special assessments, we are of the opinion that under Article

7328, a city or any person holding a certificate showing the liability of the property for payment of an assessment is a necessary party to a suit for state and county taxes. The lien for assessment is entitled to be paid if there is sufficient amount from the proceeds of sale after paying the general taxes, and the holder is entitled to judgement accordingly. As a matter of fact the liens for the city assessments are usually held by individuals and appear of record, and in such cases under the clear provisions of Article 7328 it is necessary to make the lien holders a party to the suit.

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

Op. No. 2729, Bk. 62, P. 442.

TAXATION—SLEEPING CAR COMPANIES.

1. Article 7063, Revised Civil Statutes, 1925, does not undertake to exempt sleeping car companies from payment of ad valorem taxes.
2. The Legislature has the authority to tax the sleeping car business and provide that the payment of the tax prescribed shall be a substitute for and in lieu of all other taxes including ad valorem taxes.
3. There being no provisions of the law regulating the assessment and collection of ad valorem taxes upon sleeping car companies, none can be collected.

Construing: Art. 7063, R. C. S. 1925.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 5, 1928.

Honorable Norman G. Atkinson, County Judge, Houston, Texas.
MY DEAR SIR: Referring to your inquiry as to whether or not, under the laws of Texas, ad valorem taxes may be collected from the Pullman Company, and in which you refer to an act passed some years ago levying a gross receipts tax upon sleeping car companies, providing that it shall be in lieu of all other taxes, you question the effect of this law to relieve the Pullman Company of ad valorem taxation and its validity if it undertakes to do so, and ask to be advised.

The statute to which you refer is now Article 7063 of the Revised Civil Statutes, 1925, and reads as follows:

"Every sleeping car company, palace car company, or dining car company doing business in this State, and each individual, company, corporation, or association leasing or renting, owning, controling, or managing any palace cars, dining cars, or sleeping cars within this State for the use of the public, for which any fare is charged, shall, on the first days of January, April, July and October of each year, report to the Comptroller under oath of the individual or to the president,

treasurer or superintendent of such company, corporation or association, on, showing the amount of gross receipts earned from any and all sources whatever within this State, except from receipts derived from buffet service, during the quarter next preceding. Said individuals, companies, corporations and associations, at the time of making said report, shall pay to the Treasurer of this State an occupation tax for the quarter beginning on said date equal to five per cent of said gross receipts as shown by said report. **The tax herein provided for shall be in lieu of all other taxes now levied upon sleeping cars, palace car or dining car companies,** except the tax of twenty-five cents on the one hundred dollars of capital stock of such car companies as provided by law."

It will be noted that the exception in this act which was passed at the First Called Session of the 30th Legislature (1907) is that the tax levied shall be "in lieu of all other taxes *now levied* upon sleeping cars, etc." At the time this act was passed, there was no law levying or providing for the assessment and collection of an ad valorem tax against sleeping car companies, and if any of the statutes were broad enough to authorize such taxation, none of them provided any method for assessment and collection such as would be necessary in order to effectively assess and collect the tax. While the State has the unodubted authority to provide for the assessment and collection of an ad valorem tax upon sleeping car companies, this right has never been made effective by any legislation directed to the subject.

The law on the subject at the time of the passage of this act, in so far as transportation companies are concerned, was limited to the taxation of railroad companies, and was as is contained in Articles 5073, 5082 and 5083, Revised Statutes, 1895. The first of these articles requires railroad companies to list their real and personal property in the several counties where the road bed was located. Article 5082 requires railroad companies to list the acreage in land exclusive of right-of-way, the whole length of the railroad and the value thereof per mile, and all personal property of whatsoever kind or character except rolling stock, in each county. Article 5083 requires railroad companies to make a sworn statement to the assessor of the county in which its principal office is located setting forth the true and full value of the rolling stock, this to be certified to the Comptroller of Public Accounts and by him apportioned to the several counties through which the road runs in proportion to the distance through each county

These statutes do not apply to sleeping car companies, and there was at that time and is now no law fixing a method of assessment and collection of ad valorem taxes as to them. Therefore, a proper construction of the Act of 1907, in so far as it attempts to make the taxes levied in lieu of all other taxes "now levied upon sleping cars," would not be that the tax levied was in lieu of ad valorem taxes, since at that time there were no provisions of law at all, under and by virtue of which sleep-

ing car companies might be required to assess their property for such taxation. This being true, the act would not be construed as carrying an exemption in violation of the provisions of our Constitution relating to uniformity of taxation.

The question naturally arises as to whether or not if the statute, to which reference has been made, might be construed as exempting sleeping car companies from the ad valorem tax, it would be invalid as being in conflict with our Constitution. The applicable constitutional provision is Section 1, Article 8:

"Taxation shall be equal and uniform. 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."

A queston identical in all fundamental respects to the one here was before the Supreme Court of Mississippi in the case of Vicksburg Bank vs. Worrell, reported in Southern Reporter, Vol. 7, Page 219. The provision of the Constitution of Mississippi was the same as ours, that is, that "taxation shall be equal and uniform throughout the state," and "All property shall be taxed in proportion to its value, to be ascertained as directed by law." The act under consideration in the Mississippi case, provided for a privilege tax to be paid by banks, varying in amount according to the capital stock, or *assets* of the banks, and declared that "the privilege taxes imposed upon and paid by such banks shall be in lieu of all other taxes, State, county and municipal, upon the shares *and assets of the said banks,*" (which included its real estate and personal property). The act was assailed as being violative of several provisions of the Mississippi Constitution, including the one hereinbefore quoted. The court, in passing upon the question, used this language:

"It is admissible for the Legislature to tax a business, and to provide that payment of a tax prescribed for the privilege of pursuing it shall be a substitute for, and in lieu of, all other taxes on the means employed in it. * * * The Constitution establishes the rule of equality and uniformity in the imposition of taxes, but absolute equality is not attainable, and large discretion must be left to the Legislature in its effort to execute the constitutional mandate; * * * If the Legislature deems it wise to compound for all other taxes on a particular kind of business by receiving a prescribed sum as a substitute for all taxes, it must be assumed by the courts that it was the legislative determination that the sum fixed was a proper equivalent for the taxes obtainable in a different mode, and that it was a proper exercise of legislative power. This results necessarily, from the legislative control over the subjects of taxation, restrained only by constitutional requirements, obligatory alike on the Legislature and the courts. Where the particular arrangement of taxation provided by legislative wisdom may be accounted for on the assumption of compounding or commuting for a just equivalent, according to the determination of the Legislature, in the general scheme of taxation, it will not be condemned by the courts as violative of the Constitution."

In view of the peculiar class of property involved in your inquiry, and the legislative history of this State, the quotation from the opinion of the Supreme Court of Mississippi is peculiarly applicable.

The 30th Legislature, during which the act involved was passed, undertook a general revision of many of our tax laws, including amendments of the methods and rules governing the assessment and collection of ad valorem taxes. It also sought out numerous other means of revenue by taxation of various kinds. It substantially amended and increased the effectiveness of the Intangible Tax Board; it levied gross receipts taxes upon practically every class of corporation doing business in the State; express companies were assessed 2½% upon gross receipts; telegraph companies, 2¾%; electric light, gas, and power companies, ½ of 1%; collecting agencies, ½ of 1%; stock car, refrigerating car, and tank car companies, 3%; pipe line companies, 2%; life insurance companies, 3%; other insurance companies, 2%; wholesale dealers in refined petroleum products, 2%; street car companies ¾ of 1%; wholesale liquor dealers ½ of 1%; dealers in pistols, 50%; textbook companies, 1%; telephone companies, 1½%; oil producing companies, ½ of 1%; terminal companies, 1%, and sleeping car companies, 5%. It is noticeable that the amount imposed upon sleeping car companies is practically double the amount imposed upon any other business, the nearest in line being stock, refrigerator, and tank car companies, and there is a general provision in the law exempting all persons who are taxed upon gross receipts thereunder from the payment of taxes on intangible assets.

At the time these laws were passed, and during the process of testing some of them in the courts, I was a member of the Attorney General's Department, and am somewhat familiar with the discussion during their passage through the Legislature. As first introduced, sleeping car companies were included in the intangible tax law. The general nature of the business conducted by them was discussed and presented to the Legislature, and it was common knowledge that these companies owned no real estate in Texas, and that the equipment used by them had no fixed situs; that the company had no general offices in Texas, and that its cars were in and out on the various railroad lines entering into and going out of the State. There was a legislative intent in the law fixing the gross receipts tax upon sleeping car companies that it be sufficiently high to be a computation and adjustment of all other taxes, except the capital stock tax. The Legislature did not have an intent to *exempt* such corporations from ad valorem tax, but the purpose was to impose upon them a tax which would be in the nature of a commutation of all taxes to be paid by them except the capital stock tax. All other corporations against which gross receipts taxes were levied had

real estate and personal property within the bounds of the State subject to ad valorem taxes, and there was in existing laws, ample methods provided for the assessment and collection of such tax, and in view of the fact that these companies would be required to pay the additional ad valorem tax, they were assessed a smaller percentage of occupation tax. The purpose of the legislature was, as is expressed by the Supreme Court of Mississippi, "to compound and compute for a just equivalent" all other taxes to be paid by sleeping car companies, and my opinion is that the Legislature had the authority to do this under the provisions of our Constitution.

There is anther question involved. Assuming that the law is invalid in that it undertakes to commute for a fixed sum all other taxes, or to exempt from ad valorem taxation, and that, therefore, notwithstanding the attempt of the Legislature to do so, sleeping car companies are subject to the ad valorem tax, there is no method provided by existing laws under which such taxes may be assessed and collected. This question was before the United States Circuit of Appeals, Sixth Circuit, in the case of Tamble vs. Pullman Company, 207 Federal, at Page 30. This was a writ of error from the United States Court for the Middle District of Tennessee, and an opinion by Honorable Edward T. Samford of that court, (now Justice of the Supreme Court of the United States). The suit was an action by the Pullman Company against the tax collecting officers to recover taxes and penalties paid under protest. The right was based upon the claim that neither the county collecting officers nor the State Board had jurisdiction to assess the property for taxation in that it never had any taxable situs within the State of Tennessee and none had been fixed by law. The situation there, as is clearly evident from the opinion of the court, was the same as it is in our State now, that is, there was no statute in existence contemplating or providing for any ad valorem assessment of sleeping car companies. The Circuit Court of Appeals, upon this question, adopted the opinion of Judge Sanford, from which I quote:

"In order that a state may tax such changeable and movable property used by a foreign corporation within its borders, it must by some appropriate legislation fix a taxable situs for such property and provide a method and basis for its assessment. The mere fact that property of a foreign corporation is in a state on a given date does not of itself give it a taxable situs there, when it has not come to rest within the state for a definite time so as to become part of the general mass of property of the state and acquire an actual situs for taxation.

"Upon the point that the tax upon the plaintiff's cars is void unless the State of Tennessee has by an act of Legislature provided for their taxation, the present case is ruled by Marye vs. Baltimore & Ohio R. R. Co., 127 U. S. 117, 8 Sup. Ct. 1037, 32 L. Ed. 94, in which it was held that a tax sought to be imposed and collected by the State of Virginia upon movable property, engines and cars, of a Maryland corporation, could not be collected because the State of Virgina had enacted no law applicable to the taxation of such property.

"This peculiar property, which has furnished the topic of so much discussion, is held to be situated, in the absence of a special statute, in the town where the principal office of the corporation is, that is, at the corporate residence. Without the help of a statute, it is incapable of acquiring a permanent locality or situs separated from the owners residence.

"It is clear that the provision of Article 2, Sec. 28, of the Constitution of Tennessee requiring all property to be taxed according to its valuation, is not self executing and that the Legislature must provide a method of valuation and assessment before it can be enforced.

"An examination of the assessment acts under which the right to assess the plaintiff's property is claimed, namely, chapter 258 of the Act of 1903, and chapter 602 of the Acts of 1907, discloses no provision for the taxation of property of this character. While these acts provide generally that all property shall be assessed for taxation except such as is excluded in certain specific exemptions, the methods of assessing the tax provided in those acts are only applicable, so far as personal property is concerned, to property having an actual situs in a given county where it can be regularly assessed for taxation. There is no provision whatever in either of these acts fixing a situs for taxation upon movable and transitory property of non-residents, such as the cars in question not having an actual situs within any given county, or providing any method whatever for its assessment.

"I am hence constrained to conclude that, as on the facts alleged in the declaration and set forth in the findings of the State Board of Equalization, these cars had no actual situs in Davidson County, and as the State of Tennessee, while having the right so to do, has never seen proper to provide for their taxation in any manner, either indirectly, through proportionate taxation of the capital stock of the plaintiff, under the rule laid down in Pullman Palace Car Co. vs. Pennsylvania, or by direct taxation of the cars themselves, fixing a situs for such taxation and the method for its assessment, or providing, as it might have done, that in view of the movable character of the property such taxation should be upon an average basis of cars in actual use in Tennessee instead of on specific cars under the rule laid down in Marye vs. Baltimore & Ohio R. R. Co. and American Transit Co. vs. Hall, there was not, during the periods of time for which this tax was sought to be made, any legislation of the State providing for their assessment.

"This right of taxation never having been made effective by the State by legislation directed to this subject, in the absence of such legislation the court therefore has no alternative except to hold that the back assessment of the taxes in question, being made, without legislative authority, is, upon the facts alleged, void and of no effect."

I think the discussion of this question by the emminent judge of the court in the case above cited is applicable to the situation in Texas, and since the Legislature of this State, although it has the authority to do so, has not made effective by any legislation directed to the subject such a right, and having provided no method for the valuation, assessment and collection of ad valorem taxes from sleeping car companies, and the provisions of our Constitution requiring that all property shall be taxed according to its value not being self-executing, in the absence of such method, the assessment and collection cannot be made.

It is evident to my mind that if the act in question should be held invalid by the adoption of a construction which would make it invalid on account of the exception, the effect would

be to destroy the entire act including the assessment of 5 per cent upon the gross receipts. This would mean that the State would lose an approximate average of taxes of $75,000.00 per year. In the absence of a decision of the court upon which a construction might be based or a certainty of invalidity, the result being to so materially affect the State revenue, it would be beyond the function of this department to hold the law unconstitutional.

Yours very truly,

CLAUDE POLLARD,
Attorney General.

Op. No. 2733, Bk. 62, P. 465.

TAXATION — GROSS RECEIPTS TAXES — INTANGIBLE TAXES — ARTICLES 7105,7060, 7067, 7116, REVISED CIVIL AND CHAPTER 286, GENERAL LAWS 40TH LEGISLATURE CONSTRUED.

1. Chapter 286, General Laws, Fortieth Legislature, does not relieve an electric street railway company from payment of a tax of one-half of one per cent of its gross receipts from its sales of electricity.
2. All parties of whatsoever nature operating toll bridges, are liable for the payment of taxes upon all properties specifically used in said toll bridge business and upon the intangible assets of said business as contemplated by Chapter 4, Title 122, Revised Civil Statutes.
3. An electric street railway company which charges tolls upon travelers using bridges operated incidentally to its business as a street railway company, is not by operation of Article 7116, Revised Civil Statutes, relieved from payment of the tax of one-half of one per cent of its gross receipts from its sales of electricity imposed by Article 7060, Revised Civil Statutes.

Articles 7105, 7060, 7067, 7116, Revised Civil Statutes, and Chapter 286, General Laws 40th Legislature, construed.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 23, 1928.

Hon. S. H. Terrell, Comptroller of Public Accounts, The Capitol, Austin, Texas.

DEAR SIR: This will acknowledge receipt of your recent letter enclosing brief in letter form from Messrs. Baker, Botts, Parker and Garwood of Houston, Texas.

For the purposes of this opinion, the corporate history of the El Paso Electric Company, given by its attorneys, is adopted as true, and we state it briefly as follows:

"El Paso Electric Company is a Texas Corporation, organized as "El Paso Electric Railway Company." By charter amendment its name has been changed to "El Paso Electric Company." The original purpose of the corporation as stated in its charter was:

" 'The purposes of this corporation shall be to construct, acquire, maintain and operate street and suburban railways within and near the City of El Paso, Texas, for the transportation of passengers.'

"Under that purpose clause it has been operating a street railway system within the City of El Paso, Texas. In 1903, by Chapter 44 of the Laws of the 28th Legislature, street railway companies using electricity as a motive power for the operation of its lines were authorized to supply and sell electric light and power to the public and municipalities and to acquire and otherwise provide the necessary appliances therefor. The Company then amended its charter so that its purpose clause thereafter read as follows:

" 'The purposes of this corporation shall be to construct or acquire with power to maintain and operate street railways and suburbans, railways and belt lines of railways within and near cities and towns for the transportation of freight and passengers; with power also to construct, own and operate Union depots; to supply and sell electric light and power to the public and municipalities so long as this Company uses electricity as the motive power for the operation of its lines, and to that end to acquire or otherwise provide the necessary appliances therefor; and for such other purposes as may from time to time be authorized by the laws of the State of Texas.'

"Under and by virtue of the power given under this law, which is now Article 6545 of the Revised Statutes of Texas, 1925, and its charter as so amended, the Company has been and is now engaged in the operation of a street railway system using electricity as its motive power and the sale of electric light and power to the public and municipalities. Primarily, therefore, the Company is a street railway corporation, having, however, express statutory and charter power to sell electricity to the public."

Taking into consideration the corporate history of the Company, its attorneys assert that the Company is not required to pay the gross receipts tax prescribed by Article 7060 of the Revised Civil Statutes of Texas.

Article 7060, of the Revised Civil Statutes, reads in part, as follows:

"Each individual, company, corporation or association owning, operating or managing or controlling any gas, electric light, electric power or waterworks, or water and light plant within this State, and charging for gas, electric lights, electric power or water, shall make quarterly, on the first days of January, April, July and October of each year, a report to the Comptroller under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the gross amount received from the business done within this State in payment of charges for gas, electric lights, electric power and water for the quarter next preceding. * * * * * The amount of the tax is then based on a percentage of the gross receipts according to the population of the town."

It will be noted that under the terms of this Statute the Company is liable for and has in fact been paying a gross receipts tax on the basis of one-half of one per cent of its gross receipts from its sales of electricity.

The Company no longer pays the tax imposed by Article 7067 upon the gross receipts derived from street railway fares, because Chapter 286 of the General Laws of the Fortieth Leg-

islature passed in 1927, expressly repealed Article 7067. Said Chapter 286 reads as follows:

SECTION 1. That Article 7067 of the Revised Civil Statutes of Texas, 1925, imposing an occupation tax based upon their gross receipts, upon each individual, company, corporation, or association owning, operating and controlling any interurban, trolley, traction, or electric street railway in this State and charging for transportation on said railway, be and the same is hereby repealed.

SECTION 2. In lieu of the tax imposed upon such individual, corporation, or association as provided in Article 7067 of the Revised Civil Statutes of 1925, the said individual, company, corporation or association shall be required to pay the franchise tax now imposed in Chapter 3, of Title 122, of the Revised Civil Statutes of 1925, or which may hereafter be imposed by law.

SECTION 3. The fact that the income of the individuals, companies, corporations and associations named in Section 1, have been so seriously impaired that the payment of such occupation tax constitutes an unjust burden upon them, renders it impossible for them to earn a reasonable return upon their investments, and jeopardizes the public service rendered by them, creates an emergency and an imperative necessity for the suspension of the Constitutional Rule requiring that all bills be read on three several days and that this bill be in force from and after its passage, and it is so enacted."

It is the contention of the attorneys for the Company that it was the intention of the Legislature to substitute a franchise tax in lieu of *all* occupation taxes, to the payment of which the company might be subject, and that accordingly in addition to releasing the company from liability for an occupation tax measured upon its gross receipts from its street car business, and imposed by Article 7067, Revised Civil Statutes, Chapter 286, also released the Company from its liability for payment of an occupation tax based upon its gross receipts from its sales of electricity imposed by Article 7060.

In the opinion of this department the contention made by the attorneys for the Company, though ably and powerfully presented, is not well grounded, and we advise you accordingly, that Chapter 286, General Laws, Fortieth Legislature, does not relieve the El Paso Company from the payment of the gross receipts tax imposed by Article 7060, Revised Civil Statutes.

The entire purpose of Chapter 286 was to repeal Article 7067 of the Revised Civil Statutes, and to relieve street railway companies from payment of the occupation tax imposed *by that Article.*

Section 1 of the Act expressly repeals Article 7067.

Section 2 of the Act requires that street railway companies shall pay the franchise tax now imposed by Chapter 3, of Title 122, Revised Civil Statutes, 1925, "in lieu of the tax imposed upon such individuals, companies, corporations or associations *as provided in Article* 7067 of the Revised Civil Statutes of 1925." (Italics ours.) To our minds, the language just quoted conclusively disposes of the contention that it was the intention of the Legislature to substitute a franchise tax in lieu of

all occupation taxes to which the railway companies might be liable.

It is to be noted that Chapter 286 merely repeals one Article imposing a tax and does not purport to have any effect upon other taxes imposed by other statutes.

Attorneys for the Company submit as an additional reason for the release of the company from the occupation tax imposed by Article 7060, the following:

> The El Paso Electric Company and the El Paso & Juarez Traction Company (which operates the street railway system in Juarez, Mexico,) jointly own two international bridges under Act of Congress, across the Rio Grand River between El Paso and Juarez, for the purpose of operating street cars across said bridges. For persons who desire to use the bridges either as pedestrians or in vehicles, tolls are charged, and therefore counsel argue, the El Paso Electric Company is subject to the intangible tax prescribed by Article 7105, Revised Statutes, imposing an intangible tax on certain companies. Under Article 7106 and 7107, the Company has duly filed the report required by those Articles, of companies falling within the purview of Article 7105. Under the report and under the facts stated therein the Company would not and does not actually pay any intangible tax whatever.

Article 7116, Revised Civil Statutes, states that:

> "Whenever any individual, company, corporation or association, embraced within the eighth article of this chapter, shall pay in full, and within the year for which same may be assessed, all its State and county taxes for that year upon all its intangible properties as determined, fixed and assessed under the provisions of this chapter, such individual, company, corporation or association shall thereby be relieved from liability for and from payment of any and all occupation taxes measured by gross receipts for or accruing during that year under any law of this State; but no such individual, company, corporation or association shall be entitled to any such exemption, except for the year for which it shall, before same shall became delinquent, pay all its aforesaid intangible State and county taxes for that year."

Under the facts and law above set out, counsel contend that the El Paso Electric Company is subject to the payment of the taxes contemplated by Chapter 4, Title 122, and that having duly filed its report thereunder it is thereby exempted from liability for and from payment of the tax of one-half of one per cent of its gross receipts from its sales of electricity, which tax is imposed by Article 7060, Revised Civil Statutes.

The questions to be decided are:

1. Is the company subject to the payment of the taxes contemplated by Chapter 4, Title 122?

2. If it is subject to the tax contemplated in said Chapter and Title, upon what properties and assets is the tax imposed:

3. If it is subject to said tax and files its report as provided by the Statutes, from what, if any, taxes is it relieved?

Chapter 4, Title 122 of the Revised Civil Statutes is a composite of two legislative enactments, Chapter 146, Acts of the

29th Legislature at its regular session (1905), and Chapter 17 of the Acts of the 30th Legislature at its First Called Session (1907).

The company is doing a toll bridge business and it falls within the broad language of the Statute. It must therefore be subject to the intangible tax, for if one company engaging in the toll bridge business is subject to a tax another company engaging in the same business is *not* subject to the tax, then the equality and uniformity of that tax is, to say the least, questionable. It does not follow, however, as contended, that *all* the property of the company is subject to the tax or that the intangible assets of another business in no way related to the toll bridge business in which this company is with uncertain authority engaging, are taxable under Article 7105. Neither does it follow that the exemption of Article 7116 applies to taxes upon gross receipts from any business other than a railway, ferry, bridge, turn-pike or toll business. Exemptions from taxation are strictly construed in favor of the taxing power.

From a reading of the entire act and a consideration of contemporaneous statutes we arrive at the conclusion that the Legislature intended to impose a tax upon the properties specifically used by parties of every nature in the *railway, ferry, bridge, turn-pike or toll business, and the intangible assets of those businesses.*

The obvious intention of the Legislature in enacting Article 7116 was to relieve all parties from payment of taxes upon the gross receipts from businesses the properties and intangible assets of which had previously been taxed. We have indicated above that in our opinion only those properties specifically used in the enumerated businesses and the intangible assets of those businesses are taxable within the contemplation of Chapter 4 of Title 122. The reason for the exemption therefore disappears and the alleged exemption in the instant case goes with it. It is true that Article 7116 says, among other things, that "such individual, company, corporation or association shall thereby be relieved from liability for and from payment of *any and all* occupation taxes measured by gross receipts for or accruing during that year *under any law of this State.*" The language of legislatures is habitually broad, but its operation is limited always by rules of reason. No logical reason can be assigned why the payment of taxes upon properties used in one business and the intangible assets of that business should relieve parties from payment of taxes upon the gross receipts *from other businesses.*

You are advised accordingly that the El Paso Electric Company is liable for the payment of taxes upon its properties specifically used in its toll bridge business and the intangible assetts of that business as contemplated by Chapter 4, Title 122, Revised Civil Statutes.

You are advised further that Article 7116, Revised Civil Statutes does not relieve the El Paso Electric Company from payment of a tax of one-half of one per cent of its gross receipts from its sales of electricity, which tax is imposed by Article 7060, Revised Civil Statutes.

It not being shown that any tax is sought to be imposed upon the gross receipts of the toll bridge operated by the company, we do not pass upon the liability of the company for such tax, but we are impressed by counsel's contention that a company *subject to* the intangible tax receives the exemption benefits of Article 7116, although no tax in fact be paid, and are inclined to think that the company would be relieved from payment of any such gross receipts tax.

We desire to acknowledge the very courteous statements concerning this office made in the letter presented to you by counsel for the El Paso Electric Company.

Respectfully submitted,

PAUL D. PAGE, JR.
Assistant Attorney General.

Op. No. 2737, Bk. 62, P. 486.

TAXATION—DELINQUENT TAX SUITS—FEES—DISTRICT CLERK—SHERIFF—COUNTY ATTORNEY.

1. In suits for delinquent taxes on real estate, the district clerk is entitled to receive only a fee of one dollar and fifty cents or one dollar, according to whether judgment is rendered or the taxes paid and the suit dismissed, and is not allowed to charge the ordinary fees authorized for civil suits.
2. In suits for delinquent taxes on real estate, the sheriff is entitled to receive the same fees that he receives in any civil suit, except that his fee for selling the property and making deed thereto is limited to one dollar.
3. In suits for delinquent taxes on real estate, the county attorney is not entitled to receive any commission on the taxes collected, but is entitled to receive only a fee according to the number of tracts involved in the suit.
4. In suits for delinquent taxes on personal property, the county attorney is entitled to the commission provided by Article 335, and the district clerk and sheriff are entitled to the same fees that they will receive in any civil suit.

Construing Articles 335 and 7332.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 21, 1928.

Hon. Thomas H. Lewis, County Attorney, Matagorda County, Bay City, Texas.

DEAR SIR: This department acknowledges receipt of your letter in which you ask to be advised of the proper fees that

the district clerk, sheriff, and county attorney are entitled to receive in delinquent tax suits. You enclose a copy of an opinion in which it is held that the district clerk is entitled to receive the regular statutory fee for civil cases in addition to the fee of one dollar or one dollar and fifty cents, depending upon whether judgment is taken or the suit is dismissed and the taxes paid.

1.

Prior to the year 1923 there was no doubt but that in a suit for delinquent taxes on real estate the district clerk was entitled to receive a fee of only one dollar and fifty cents or one dollar, according to whether the taxes are paid before or after judgment. Article 7691, Revised Civil Statutes, 1911; Hill vs. Jahns, 165 S. W. 67; Bonougli vs. Brown, 185 S. W. 47; Brown vs. Bonougli, 232 S. W. 490.

In the opinion enclosed by you it is insisted that under a clause of an act of the Third Called Session of the Thirty-eighth Legislature (1923) Page 184, which clause is included in Article 7332, Revised Civil Statutes, 1925, that the district clerk is now authorized to charge the regular fees of a civil suit in addition to the fee of one dollar or one dollar and fifty cents for each suit. This clause reads as follows:

"But **these fees shall be paid in lieu of the fees provided** for officers where such suits are brought as herein provided **and all fees provided for the officers herein mentioned shall be in addition to fees now allowed by law** to such officers except where otherwise herein specially provided and shall not be accounted for by said officers as 'fees of office.'"

The first part of this statute reads almost identical with the last clause of Article 7691 of the Revised Civil Statutes for 1911, which read as follows:

"But these fees shall be in lieu of the fees provided for such officers where suits are brought as hereinbefore provided."

We see, therefore, that the Act of 1923, which is now included in Article 7332, contained the same provision that theretofore precluded the clerk from charging fees in excess of the fee of one dollar or one dollar and fifty cents, but did contain an additional clause which provided that "all fees provided for the officers herein mentioned shall be in addition to the fees now allowed by law."

Are we going to say that merely because of the last clause that it was intended to allow the clerk to charge the additional fees? If so, what effect are we going to give to the first clause which provides that the fees shall be "in lieu of" the fees provided for officers? We believe that a proper construction of the act is that the Legislature merely intended that the

fees in tax suits shall be in addition to fees that officers are allowed to retain under law or in addition to the maximum fees allowed by law.

We also believe that the case of Duclos vs. Harris County, 298 S. W. 417, an opinion by the Commission of Appeals, is conclusive of the question. In this case suits were instituted by municipal corporations other than the county. The district clerk collected the same fees that are collected in civil suits generally. The court held that the clerk was allowed to collect only the fee of one dollar or one dollar and fifty cents, and held that the clerk was allowed only one hundred seventy-two dollars and fifty cents for one hundred and fifteen tax judgments and eight hundred and thirty-one dollars for eight hundred and thirty-one dismissals, or a total of one thousand three dollars and fifty cents. The reason for the holding is that Article 7343 made available to cities and independent school districts the laws of the state for the purpose of collecting state and county taxes, and since the clerk was allowed only one dollar and fifty cents or one dollar for state and county taxes he is limited to the same amount for taxes by cities and independent school districts.

You are advised, therefore, that it is our opinion that in suits for delinquent taxes on real estate the district clerk is entitled to collect only a fee of one dollar and fifty cents where a judgment is taken, or a fee of one dollar if the suit is dismissed, and is not entitled to collect the fees allowed under the general law for civil suits.

2.

The original act concerning fees for delinquent tax suits is found in the Acts of 1895, Page 50. Section 8 of this Act provides for the fees of officers, including the sheriff, as follows:

"The sheriff shall be entitled to a fee of two dollars for selling, and making deed thereto, each tract or lot of land that he sells under judgment for taxes, which fee shall be taxed as costs in the suit, and the district clerk shall be entitled to a fee of three dollars in each case, to be taxed as costs of suit."

This Act was amended by the Acts of 1897, Page 136, and with reference to the sheriff's fees, provided as follows:

"The sheriff shall be entitled to a fee of one dollar for selling and making deed thereto to each purchaser of land that he sells under judgment for taxes, which fee shall be taxed as costs of suit; * * * * * and, provided, further, that where suits have been brought by the State against delinquents to recover tax due by them to the State and county, the said delinquent may pay the amount of the tax, interest, penalties, and all accrued costs to the county collector during the pendency of such suit, * * * * * * and the District Clerk shall receive only one

dollar, and the sheriff only one dollar in each case; but these fees shall be in lieu of the fees provided for such officers where suits are brought as hereinbefore provided."

We see that under the original act of 1895 that the fee of the sheriff was two dollars for selling and making deed to the land. The statute made no provision for a fee for serving citation, and the fee of two dollars for selling the property and making deed thereto was not specifically made exclusive. It seems that it was the intention of the Legislature to limit only the fee of the sheriff for selling the property and making deed to the same and not allow him the commission that he would be entitled to in case of ordinary sales of real estate in actions between private individuals. However, it does seem that by the amendment of 1897, above quoted, it was the intention of the Legislature to allow the sheriff a fee of only one dollar for all services in the event that the taxes are paid before a judgment is taken.

The Act of 1897, above quoted, was carried forward in identical language as Article 7691 of the Revised Civil Statutes for 1911 and remained a law until the second called session of the Thirty-eighth Legislature, 1923, Page 38. Before the amendment of the law in 1923, the matter was passed upon in the case of Hill vs. Johns, supra. In that case the question of excessive cost of the officers was raised. This was a case in which a judgment had been taken and the land was sold and the cost bill contained these items:

Issuing order of sale and return	$ 1.50
Attorney fees	12.15
Sheriff's fees	5.56
Clerk's fees	2.50

The court cited Article 7691, Revised Civil Statutes, 1911, and said that under the provisions of that article, the fee of the county attorney was limited to three dollars and the district clerk's fee was limited to one dollar and fifty cents and the county clerk's fee was limited to one dollar. It did not seem to make any reference or criticism of the sheriff's fee, and, therefore, since this was a case in which judgment was taken, it must have been the intention of the court to permit all costs that the sheriff might incur, except, of course, he would be limited to the fee of one dollar for selling the property and making the deed. If he had been limited to the fee of one dollar in this case, then he would not have been entitled to the fee of five dollars and fifty-six cents, for which amount no question was raised. In the case of Bonougli vs. Brown, supra, the only attack made on the sheriff's fee was the commission he retained, which was clearly illegal.

But even if Article 7691 as amended by the Act of 1897, did intend to limit the sheriff to a fee of one dollar in cases where

the taxes were paid before judgment, we do not believe that under recent amendments such is the case. Under the acts of the Second Called Session of the Thirty-eighth Legislature, 1923, Page 38, we find the following:

"The sheriff shall be entitled to a fee of one dollar for selling and making deed thereto to each purchaser of land that he sells under the judgment for taxes, which fee shall be taxed as costs of suit. * * * * * The sheriff for executing citation shall receive the same fees as the law now allows him for similar services in tax suits."

The same provisions of this act with reference to the sheriff's fee were carried forward in the amendment by the acts of the Third Called Session of the Thirty-eighth Legislature, Page 183.

The same provision has been carried forward in the 1925 Revised Statutes, Article 7332, and with reference to the sheriff's fees, this article reads as follows:

"The sheriff shall be entitled to a fee of one dollar for selling and making deed thereto to each purchaser of land that he sells under judgment for taxes; and for executing citation he shall receive the same fees allowed by law for similar services in tax suits."

We see, then, that under the Act of 1923 and under Article 7332 the former act, which limited the sheriff's fee to one dollar in cases in which the taxes were paid before judgment, has been removed and the article now providing for small fees when the taxes are paid before judgment no longer include the sheriff. But, of course, the former provision limiting the fee to one dollar for selling property and making deed to the same is still in existence.

Since the Acts of 1923, the law has provided that the sheriff's fee for executing citation shall be the same as allowed for similar services *in tax suits*. Just what the Legislature means by this is a little difficult to determine. To say that the sherff shall receive the same fees as for similar services in tax suits without making a provision for sheriff's fees in tax suits is meaningless. However, the Legislature might have meant by said expression that in tax suits he shall receive the same fees as now allowed by law for similar services. But even if such were not the intention of the Legislature, we do not find any limitation anywhere in the statute on the sheriff's fees for serving citations; the only limitation in the statutes is one limiting his fees for selling the property.

We advise, therefore, that in suits brought for the collection of delinquent taxes, the sheriff is entitled to the same fees as in any other civil action, except that his compensation for selling the property under an order of sale and making deed thereto is limited to one dollar.

3.

In Opinion No. 2343, rendered by this department on May 11, 1921, and printed in the Biennial Report for that period, it was held that the fees allowed the county attorney according to the number of tracts in suits for delinquent taxes on real estate are exclusive, and that he is not entitled to the commission provided by Article 363 of the Revised Civil Statutes for 1911, which has been carried forward as Article 335 of the 1925 statutes. We concur in this opinion, and, therefore, advise you that in suits for delinquent taxes on real estate the county attorney is entitled to receive any commission on the taxes collected, but is entitled to receive only a fee according to the number of tracts involved in the suit.

4.

The opinion above given with reference to the fees of officers applies only to suits for delinquent taxes on real estate, and has no application whatever to suits for delinquent taxes on personal property.

In Opinion No. 2646 by this department on April 14, 1926, and printed in the Biennial Report for that period, Page 432, it was held that a suit as at common law for debt may be instituted in a court having jurisdiction of the amount for the collection of taxes due the state and county. In Opinion No. 2688, dated May 19, 1927, not yet published, it was held that in suits brought by a county attorney for taxes other than delinquent taxes on real estate, he is entitled to the commission provided by Article 335. See also opinion No. 2287, dated February 12, 1921, and printed at Page 485 of the Biennial Report for that period.

The fees provided by Article 7332 clearly apply only to suits for delinquent taxes on real estate, and, therefore, in suits for taxes on personal property the sheriff and district clerk will receive the same fees that they receive in any civil suit.

Yours very truly,

H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2740, Bk. 62, P. 517.

CONSTITUTIONAL LAW—TITLE OF STATUTES—GASOLINE TAX—PROVISO.

1. The provisions of Section 35 of Article 3 of the Constitution of Texas are to be construed liberally to effect the intention of the Legislature. The title of a statute must express the subject, but need not be an index, or summary of the provisions of the act. Exceptions and

provisos in a statute are not required to be expressed in the title. The proviso of Chapter 93 of the Acts of the Regular Session of the 40th Legislature, providing for a gasoline tax of two cents on and after September 1st, 1928, is valid and not in conflict with the Title of the Act which properly construed merely levies an occupation tax on wholesale dealers in gasoline.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, July 12, 1928.

Honorable S. H. Terrell Comptroller of Public Accounts, Austin, Texas.

DEAR SIR: This will acknowledge receipt of your letter of July 10th, which reads as follows:

"Chapter 93 of the Acts of the Regular Session of the 40th Legislature amended Chapter 5 of the Acts of the Third Called Session of the 38th Legislature, Article 7065, Revised Civil Statutes of 1925, and Section 1 thereof, quoting said Article reads almost verbatim with the original act, viz: Chapter 5 of the Acts of the Third Called Session of the 38th Legislature, with the exception that the tax rate is changed to three cents, instead of one cent.

"Section 2, however, of Chapter 93, Acts Regular Session of the 40th Legislature, reads as follows:

> That any all laws in conflict herewith be and the same are hereby repealed to the extent of such conflict. Provided that on or after September 1, 1928, the gasoline tax herein levied shall be only two cents per gallon, instead of three cents per gallon.

The Caption of said amended act read as follows:

> An Act to amend Chapter 5 Acts of the Third Called Session of the 38th Legislature, Article 7065, Revised Civil Statutes of 1925, by providing for an occupation tax upon wholesale dealers in gasoline equal to three cents per gallon on all gasoline so sold by any such dealer; repealing all laws in conflict with said amendment; and declaring an emergency.

"You will note that nowhere in the caption quoted is there any reference to the rate of the tax changing from three cents to two cents per gallon on September first, 1928, as provided in section 2 of the amendment.

"Inasmuch as a number of prominent members of the legal fraternity have taken the position that the three cent tax should be continued after September first owing to the defect referred to in the caption, I am writing to ask an official opinion of your department in the premises.

"It will be noted that the emergency clause of the amended act recites that '—the revenues now available to said public free schools are insufficient to provide for an efficient public school system—.' My Deparment is now collecting gasoline tax at the rate of more than $1,500,000.00 monthly. Should the rate of tax drop to two cents per gallon on September 1st, and remain at that rate. the available public school fund would lose more than $1,500,000.00 annually, and the Highway fund depleted more than $4,500,000.00 each year.

"I will thank you for a prompt response in this matter, so that I may have proper report forms prepared, in the event of any change, and advise those reporting as to their status."

The questions you raise are to be determined in the light of Section 35, of Article 3 of the Constitution of Texas, which reads as follows:

"No bill (except general appropriation bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall bevoid only as to so much thereof, as shall not be so expressed."

The purpose of this provision of the Constitution was to put an end to the practice of bringing together in one bill matters having no necessary or proper connection with each other; to prevent so-called "log-rolling" legislation; to prevent surprise or fraud in the Legislature by means of provisions in bills by which the titles give no intimation, and finally, to apprise the people of the subject of legislation under consideration.

In construing a statute with this provision of the Constitution in view, it is incumbent upon us to ascertain the intention of the Legislature, and if possible by fair construction uphold it. The constitutional provision is to be construed liberally rather than to embarrass legislation by a construction the strictness of which is unnecessary to the accomplishment of the beneficial ends for which it was adopted. McPherson vs. Camden Fire Insurance Company, 222 S. W. 211.

In the Constitution of 1876 the word "subject" was substituted for the word "object", which had theretofore appeared in previous Constitutions. In this connection "subject", is less restricted than "object". "Subject" deals with the matter to which the statute relates; "object" with what it proposes to do. Stone vs. Brown 54 Texas 330; Giddings vs. San Antonio, 47 Texas 548. Under previous constitutions it might be argued with much force that the object of this legislation was to levy a three-cent gasoline tax; under the present Constitution, we think it clearly appears that the subject of the present statute is "taxation", or construing it more strictly "taxation of the occupation of wholesale dealers in gasoline." The amount of the tax is not the subject but a detail of legislation. It has been many times held that the title is not required to be either an abstract, a synopsis, or an index of the contents of the act, and that the details of the legislation are not required to be stated in the caption. Lowery vs. Red Cab Co., 262 S. W. 147; People vs. McBride, 234 Illinois 146; 84 N. E. 865

Our conclusion is that the amount of the tax is a detail of legislation and surplusage in so far as the title is concerned. This more plainly appears by an examination of the title of the original act passed by the 38th Legislature. The amount of the tax nowhere appears in the title.

We come then to the question as to whether the privisos found in section 2 of the present act to the effect that on and after September 1, 1928, the gasoline tax shall be only two cents per gallon, not being expressed in the title is void

under the Constitution. There can be no question but that the intention of the Legislature clearly appears and unless the provise is void, effect must be given it. Bearing in mind the purpose of this clause of the Constitution, we think we may say without hesitation that this provision is germane to the subject of the act, and that its inclusion within the act would not operate as a surprise or fraud upon the Legislature. In fact, it is well known that the debates in the Legislature went into great detail as to the amount of the tax and the time when the reduction should take effect.

Be that as it may, it is not essential that the title of a bill should recite the provisos and exceptions, and the fact that they do not appear in no way affects the constitutionality of the act. 25 Ruling Case Law 857; State v. Schlitz Brewing Company 104 Tenn. 715, 59 S. W. 1033; Monaghan v. Lewis, 5 Pen. (Del.) 218, 59 Atl. 948.

The conclusion is and you are so advised that Chapter 93 of the Acts of the Regular Session of the 40th Legislature is valid and section 2 thereof in nowise conflicts with Section 35 of Article 3 of the Constitution. Effect, therefore, must be given to the intention of the Legislature, and on and after Sept. 1, 1928, the gasoline tax levied by this statute is to be two cents per gallon insead of three cents per gallon which is provided for by the act up to that date.

If this statute will result in bringing into the State Treasury a lesser amount than could be secured by a three cent tax, then responsibility must rest with the Legislature. This Department and yours can only follow the statute as it is written. In the present instance it is the responsibility of the Legislature to enact the law, the responsibility of this Department to interpert it, and the responsibility of your office to execute it.

Respectfully submitted,

D. A. SIMMONS,
First Assistant Attorney General.

Op. No. 2742, Bk. 62, P. 531.

TAXATION—GROSS RECEIPTS TAX—OCCUPATION TAX—ELECTRIC LIGHT COMPANIES.

1. Electric light companies that pay an occupation tax based upon gross receipts are not exempt from the payment of the occupation tax provided by Subdivision 18 of Article 7047.

2. An electric light company, having its machinery and apparatus for generating or manufacturing electricity in one city and supplying electricity for lighting purposes to other cities, is subject to the payment of a state and county occupation tax for each city served.

Construing: Articles 7047, Sec. 18; Article 7060; Article 7078.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, August 3, 1928.

Honorable S. H. Terrell, State Comptroller, Capitol.

DEAR SIR: This department acknowledges receipt of your letter in which you submit two questions, as follows:

1. Are electric light companies that are required to pay a gross receipt tax under Article 7060, Revised Civil Statutes, exempt from payment of the occupation tax provided by Subdivision 18 of Article 7047?

2. If such companies are required to pay both taxes, then should they pay only one tax for the State under Article 7047 and only one tax in each county, regardless of the number of cities or towns served, or are said companies liable for both state and county occupation taxes for each city served?

Article 7060 provides for an occupation tax based upon the gross receipts of each company operating electric light or power works. Subdivision 18 of Article 7047 also provides for an occupation tax of a certain amount to be collected from each electric light company operating in a city or town, the amount of the tax depending upon the population of the city or town. It is true that both statutes above mentioned impose occupation taxes upon the business of operating electric plants, but this does not make either tax objectionable. The double taxation which is held invalid is generally confined to property taxes and does not apply to the imposition of two or more occupation taxes. Cooley on Taxation (4th Ed.), Sections 228 and 233.

Article 7078 specifically provides that the gross receipts taxes levied on the various occupations shall be in addition to all other taxes now levied by law. At the time of the adoption of Article 7060, Subdivision 18 of Article 7047 was in force and was evidently in mind. Article 7116 exempts from the gross receipts tax all companies that are required to pay an intangible assets tax. But no provision is found exempting those that pay a gross receipts tax from the payment of the occupation tax under Article 7047, and therefore, both taxes must be paid.

In opinion No. 2333, dated April 19, 1921, and printed at page 580 of the biennial report of this department for 1920-22, it was held that an electric light company engaged in the manufacture of electricity for lighting purposes, and having its machinery and apparatus for generating or manufacturing electricity in one city and supplying electricity so generated to other cities, is subject to the payment of an occupation tax for each city so served. In addition to the reasoning and authorities cited in the above opinion, your attention is called to the first clause of Article 7047 which reads as follows:

"There shall be levied on and collected from every person, firm, company, or association of persons, pursuing any of the occupations named in the following numbered subdivisions of this article, an annual occupation tax, which shall be paid annually in advance except where herein otherwise provided, on every such occupation or separate establishment, as follows: * * *"

There are enumerated thirty-nine different occupations, including electric light companies under Subdivision 18. Therefore, Section 18 which levies the tax against "each electric light company" and that part of the first clause which reads "every company" must be of the first clause which reads "every company" must be read in connection with the last words of the first clause which levies the occupation tax against every "separate" establishment. Subdivision 22 of Article 7047 levies an occupation tax against the owner of every theatre. If a person should own and operate three theatres in three separate cities in the same county, would it be said that the owner is required to pay only one state tax and one county tax? We believe not. The statute has assessed the tax against each separate establishment and for each separate establishment, there must be paid a separate state tax and a separate county tax.

You are advised, therefore, in answer to your second question that electric light companies subject to the occupation tax prescribed by Subdivision 18 of Article 7047 are required to pay a separate state tax for each city served, and a separate county tax for each city served where the tax has been levied by the commissioners' court.

Yours very truly,

H. GRADY CHANDLER.
Assistant Attorney General.

Op. No. 2747, Bk. 62, P. 547.

FIXING AD VALOREM TAX RATE.

1. The law fixes the time at which the State Tax Board shall meet, and prescribes definite rules by which it shall be controlled for fixing the ad valorem tax rate, and the provisions of Article 7041-7044 prohibit a meeting of the Board being held after the expiration of the time fixed by law to change the ad valorem tax rate previously fixed.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, November 2, 1927.

Honorable Dan Moody Govenor of Texas, Capitol.

DEAR GOVERNOR: I have your communication of October 27th asking for a construction of Articles 7041-7044, Revised

Statutes, 1925, which control the fixing of the ad valorem rate of taxation.

You state that the Tax Board held its meeting in July at the time fixed by statute, and that the judgment of the majority of the Board at that time was that the statute did not give any latitude as would authorize it to take into consideration in fixing the tax rate any further change in general conditions throughout the State, and that, therefore, the only matters taken into consideration in fixing the rate, other than those mentioned in Article 7043, was the expected income of the penitentiary system.

It is stated that since the meeting of the Board, conditions have changed materially and the finances of the State are substantially better than anticipated at the time the Board met, and further, that it was estimated from the Comptroller's report at the time of the meeting of the Tax Board that the general revenue would have to its credit on September 1, 1927, an amount which actual facts have developed to be considerable less than the actual balance.

You then give a statement as to the improvement in conditions, in so far as the penitentiary system is concerned, and state that more money has been received in the general revenue fund during the last three months of this year than was received for the same three months for the preceding year; that the State is prosperous and that the average man's condition is generally better than it was at this time last year, and "in the light of the developments of the last three months, it is apparent that a lower state ad valorem tax rate would yield sufficient money to the General Revenue Fund to meet every obligation of the State Government." It is further stated that when "the Board met in July, it was the opinion of the majority that it was required to follow literally the language of the statute and consider only the matters mentioned in fixing the rate with the exception of taking into consideration the expected income of the penitentiary."

You then state that "it seems to my mind that the provisions of Articles 7041-7044, Revised Civil Statutes, providing the means of fixing the rate, in all probability constitute an implied inhibition against such a proceeding," that is, a meeting now to reduce the rate.

After a very careful consideration of the history of the legislation and the purposes for which it was enacted, and full conference with the members of my department, I have reached the conclusion that you are right in your opinion that the provisions of these statutes constitute an implied inhibition against a meeting of the Board now and a reduction of the rate at this time. I have reached this conclusion rather reluctantly because of the fact that a reduction would, as suggested by you, enable the citizens of Texas to pay less taxes this year, but with the policy of the legislation and with the defects of the

law and the desirability that it be amended, this department has no function to perform, its responsibility and obligation being met in a proper construction of the law.

The original act was passed at the Regular Session of the 30th Legislature, which adjourned April 12, 1907, by an enactment which became effective ninety days after adjournment, (Chap. 98, General Laws of the 30th Legislature, Page 195). This act created what is known as the "State Tax Board" imposing upon it the obligation" to calculate the ad valorem taxes to be levied and collected each year for State purposes." As is well known by those informed on the subject, at this time there had been periodical deficiencies in the State Revenue by the uncertain methods used without the restraint of any sort of rule or regulation in fixing the ad valorem rate, and the purpose of the law was to fix a definite method, and as stated in the emergency clause, to provide "an adequate tax rate for State purposes to pay existing deficiencies and to provide sufficient funds for the proper maintenance of the State Government." This law constituted the Governor, State Comptroller, of Public Accounts, and State Treasurer as the "State Tax Board." and required the tax assessors of each county to send to the Comptroller of Public Accounts a certified statement showing the amount of property in his county subject to taxation, said statement to be sent "on or before the First day of August of each year." This act required the State Tax Board to meet "within five days" after the Comptroller of Public Accounts has received "such certificates" for the purpose of calculating the ad valorem rate of taxes to be levied for State purposes.

The provisions of the original act as to the rules to be followed in estimating this rate have never been changed by any amendment since, and the original act contained the expressed provision that in calculating the said rate, the Board shall do so by the following rules, and *"in no other manner."* These rules are and have always been rigid and mandatory, and the State Tax Board does not now, and has never had, any authority to deviate from them in fixing the tax rate or to take into consideration any other element than these rules. They are formulated upon the basis of the valuations of property for ad valorem taxes upon the one side, and the appropriations made by the Legislature and the amounts which might become due by the State upon the other, using a latitude of 20 per cent to meet emergencies. These rules, briefly stated, are:

First. The Board shall find from the certificates made by the tax assessors the value of all property in the State subject to ad valorem taxation.

Second. They shall find by adding together the appropriations made by the Legislature and such other sums which may become due by the State during the following fiscal year, the

total sum for which the State will be liable during the following fiscal year.

Third. They shall find by adding "all sums paid into the State Treasury as taxes for State purposes from all sources other than ad valorem taxes and except those going into the Available School Fund" during the first half of the current calendar year and the latter half of the last preceding calendar year, the total sum paid into the State Treasury from said sources during said time.

The above rules clearly set out what the State Tax Board shall find and there is nothing left to the discretion of the Board in making these findings, and referring to that portion of your letter which has the statement that "it was estimated from the Comptroller's report, etc.," I have to say that the law does not leave the matter open to estimates but requires the Board to find the sums actually paid into the State Treasury during the first six months of 1927, that is to say, from January to June, inclusive, of 1927, and the last six months of 1926. Any estimate that might be made by the Comptroller or the Board as to what would probably be paid in by the First of September, 1927, would not be authorized under this rule.

After finding the above items, the law then provides a definite, rigid method whereby the Board shall determine the rate; that is, from the sums which will or may become due by the State during the next succeeding fiscal year; they shall subtract the sum "which was paid" into the State Treasury as taxes for State purposes during the first half of the current year, and the latter half of the preceding year. The remainder, as stated in the statute, represents "the taxes." To this remainder, they are required to add 20 per cent of it. The law makes this remainder plus the added 20 per cent the dividend, and requires that it shall be divided by "the total valuation of all property within the State divided by 100." The quotient thus obtained is, by the terms of the law, made the number of cents on the $100.00 to be collected for the current year for State purposes. This quotient is the rate, and the Tax Board has no authority to adopt any other, either less or greater. If the Legislature had not intended that it should be the exact rate, it would have been folly to have added to the statute the proviso "that said quotient shall not be run to not exceed the rate fixed by the Constitution, it is and must be the ad valorem tax rate for the State.

The purpose of the law is manifest, and that is to provide in lieu of an uncertain indefinite method of determining the rate of taxation, a definite and certain one in order that on the one hand, there might not be a deficit in the Treasury (which was the declared purpose of the original law), and on the other hand, that no more taxes might be levied than was necessary to support the Government. When this rate is fixed, it is required to be certified to the tax assessor of each county by

registered letter and published "for thirty days in some newspaper published in the State and having a general circulation therein." The purpose of the Legislature was to fix a time for the Board to meet sufficiently long subsequent to the assessments made by the tax assessor for the current year, and sufficiently long prior to the time that the law requires that his rolls be completed, approved by the commissioners' court, and delivered to the tax collector in order that he might begin the collection of taxes on the first of October as required by law.

As heretofore stated, the original act fixed this time of meeting at "within five days after the First day of August." Under an act which became effective ninety days after April 12th, the same Legislature at the First Called Session which adjourned May 12, 1907, amended the law so as to require the meeting of the Tax Board "within five days after the fifteenth day of August," under a law which became effective ninety days after May 12. The emergency clause of this amendment states that the property over the State was being assessed at a much higher valuation than heretofore, which fact would result in increasing the burdens of taxation" unless the rates to be calculated and collected thereon are adjusted to the increased values." At this time evidently developed the same situation as appears now, which was that in the interim between the enactment of the original act and the amendment, it appeared that the valuations of property had increased, and therefore, the date of meeting of the Board was delayed in order that this might be taken into consideration in fixing the rate.

The 31st Legislature at its First Called Session which adjourned April 11, 1909, amended the law again, in so far as the time of the meeting of the Tax Board is concerned, and in that respect only, so as to require the certificate of the assessor to be mailed to the Comptroller on or before the 15th day of July, and the Board to meet five days thereafter, which amendment is still the law, and is carried forward into the Revised Statutes of 1925. It is evident from the history of the legislation that the Legislature had in mind two things:

First. To make certain the rules, the application of which should determine the ad valorem tax rate and to eliminate this subject from the uncertainties of political campaigns and take it without the realm of the thing that so often occurs—a promise to reduce taxes, so that it might always be certain that there would be no deficiency in the public revenue on the one hand, and no excess of revenue on the other, which might not be adjusted at a succeeding year by the application of fixed rules.

Second. To fix a time when this should be done in the interim between the time fixed by law during which the assessor should complete his assessments and by the commissioners' court, and delivered to the tax collector.

When the board has met at the time requested by law and has definitely determined the rate of ad valorem taxes under the rigid and definite rules prescribed by law, its function for the calendar year. Occasionally, this might bring about a situation such as confronts us this year, as indicated in your communication, but this very situation by the rigid application of the rules next year, will of itself bring about a reduction of the tax rate next year, so that there is in it what the renowned Emerson has declared to run through all of the activities of life: "the law of compensation."

There is another reason why this should be the law, and that is that the statutes definitely fix the time within which the tax assessor shall make his assessments and report to the commissioners' court, fix a definite time within which the assessor shall complete his rolls and be approved by the commissioners' court and delivered to the Comptroller of Public Accounts, and a definite time, (which has already passed this year), for the collector to begin the collection of taxes. My information is that a duplicate of these rolls, as required by law, have practically all been approved by the commissioners' courts of the various counties, one copy delivered to the tax collector of the county, and the other already delivered to the Comptroller of Public Accounts; that he has approved these rolls and has paid the assessors of the counties in Texas for making the assessments based upon these rolls. So that a change in the rate now by the State Tax Board would bring about an indeterminable confusion and probably result in the situation of such indefiniteness as to the legality of rolls as would prevent either the State or the County being able to maintain any suit to collect delinquent taxes. There is no law in this State under the terms and provisions of which these rolls can now be changed by any authority, County or State. The commissioners' court has no jurisdiction over them under the law, certainly, the tax collector would have no authority to change the copy in his office. Neither would the Comptroller have any authority to change his, and this situation but emphasises the sound reason of the law which fixed a definite time for the State Tax Board to meet and perform its functions. Probably the date of meeting is too early, probably the law which fixed the date as "within five days after August 15th" would more nearly meet the situation in our State, but these are matters of legislation.

You are, therefore, advised that I concur in your opinion that the provisions of Articles 7041-7044 constitute an inhibition of a meeting of the Tax Board now to change the ad valorem rate, a situation as regretful to me as to the several members of the State Tax Board.

Yours very truly,

CLAUDE POLLARD,

OPINIONS RELATING TO MISCELLANEOUS

Op. No. 2655, Bk. 62, P. 7.

REPEAL BY FINAL TITLE OF REVISED STATUTES 1925 OF SPECIAL OR LOCAL LAWS:

HOLDING that the final title, REVISED STATUTES 1925, has not repealed Special Road Law of Young County, which is a Special Law and Local.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 17, 1927.

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

DEAR SIR: In reply to your communication of the 14th instant wherein you seek the opinion of this department as to whether or not the Special Law enacted by the Legislature, 1915, House Bill 671, Special Law, Young County, creating road law enacted and passed at the regular session of the 34th Legislature, (Gammel's Laws of Texas, Vol. 17, Page 266), and as to whether or not Final Title, Section 19, repealed said law.

I beg to advise that it is the opinion of this department that said road law was not repealed by the Final Title, Revised Statutes, 1925, for the following reasons:

House Bill 671, Chapter 81, Special Laws of the regular session of the 34th Legislature was in its nature local, and provided among other things for the governing and maintenance of the road system for Young County Texas, and which made the County Commissioners of said, county, Ex-officio Road Commissioners, prescribing their duties as such and provided for their compensation as road commissioners, and provided for Deputy Road Commissioners, defining their duties, and for the working of County convicts on public roads in said county, and for their compensation, and for the condemnation of land for road purposes in said county, and for taking timber, gravel, and other material for the improvement of said roads, and repealing all laws in conflict with said Act.

Final Title, Revised Statutes, 1925, reads in part as follows:

"Be it further enacted: Section 2, repealing clause—that all civil statutes of a general nature in force when the Revised Statutes take effect, and which are not included herein, or which are not hereby expressly continued in force, are hereby repealed."

Section 19, which is an exception to the repealing clause is as follows:

"That all laws, civil or criminal, of a local nature, operating in par-

ticular counties, cities or towns, or of a temporary nature, operative when these statutes go into effect, and all laws of a private nature operating of particular persons, or corporations, are not affected by the repealing clause of this Title.

It is the opinion of this department that said law hereinbefore mentioned pertaining to the roads of Young County is purely local in its nature, in that, it provides solely for the maintenance, repealing, etc., of roads in and for Young County, and therefore, said law comes within the exception of said Act under Section 19, and said law was expressly and specifically excepted from the general repealing clause.

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

Op. No. 2657, Bk. 62, P. 17.

CONSTITUTIONAL LAW—RIGHT OF LEGISLATURE TO PASS AN ACT TO BECOME EFFECTIVE UPON ADOPTION OF CONSTITUTIONAL AMENDMENT.

The Legislature of Texas is without authority to enact a law to become effective only in the event of a certain constitutional amendment being adopted. Such a law would be unconstitutional and void.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 28, 1927.

Honorable Tom Finty, Jr., Secretary, Educational Survey Commission, Dallas, Texas.

DEAR SIR: You desire to know whether the Legisalture has authority to enact a law to become effective only in the event a certain amendment is adopted. In other words, whether a law which is unconstitutional may be passed with a provision that its effectiveness is suspended until a constitutional amendment is adopted, which would then make such a law valid.

You are advised that it is the opinion of this department that the Legislature does not have the authority to pass such a law, and that such a law, if passed by the Legislature, would be invalid. While it is well settled that a law may be passed to take effect upon the happening of a future event (See 12th Corpus Juris, p. 65, Aurora vs. United States, 7 Branch, 382, Ainsley vs. Ainsworth, 69 S. W. 884, Locke's Appeal, 13 Am. Reports, 716), still, there are certain requirements to be met before such a law would be valid:

1. It must be a law in presenti to take effect in future. Ex Parte Wall. 48 Cal., 279, 315; 17 Am. Reps. 425.
2. The law must be complete in itself. Aurora vs. United

States, 7 Branch, 382; Cooley on Constitutional Limitations (7th Ed.) p. 163; Arms vs. Ayar, 61 N. E. 851; Rouse vs. Thompson, 228 Ill. 522; 81 N. E. 1109.

3. The subject matter must be within the competence of the Legislature. Rex vs. Carlisle, 6 Ont. L., 718; and

4. The condition cannot be a mere idle or an arbitrary one. State vs. Parker, 26 Vt., 357.

In view of the first three requirements it is our opinion that a law such as you have inquired about cannot be a valid law in presenti, but is a void law, because in conflict with the Constitution, and cannot be made valid upon the happening of a future event. In other words, while a law having the requirements above can be passed to become effective upon the happening of an event in the future, the happening of an event cannot be made the basis of rendering or making valid a void or invalid law. We believe that such an act would come within the condemnation of the law holding that an invalid and unconstitutional law being void cannot be validated by the subsequent amendment to the Constitution conferring authority on the Legislature to pass such a law. (See Seneca Mining Company vs. Secretary of State, 82 Mich. 573, 47 N. W. 25, 6 Ruling Case Law, page 35.

Very truly yours,

D. A. SIMMONS.
First Assistant Attorney General.

Op. No. 2659, Bk. 62, P. 27.

MOTOR CARRIERS—LEGISLATURE MAY UNDER THE CONSTITUTION CONFER UPON RAILROAD COMMISSION THE POWER TO REGULATE.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 2, 1927.

Honorable Walter H. Beck, House of Representatives Capitol.

DEAR MR. BECK: You submit for the consideration of this Department, House Bill No. 50, which is an act to regulate motor traffic over the public highways of the State, and requiring the Railroad Commission of Texas to supervise and regulate the public services rendered by such vehicles, with the inquiry as to whether or not under the Constitution, this duty can be imposed upon the Railroad Commission.

Section 2 of Article 10 of the Constitution of 1876 declared railroads in existance, and those thereafter constructed, to be public highways, and railroad companies common carriers. It imposed upon the Legislature the duty to pass laws to cor-

rect abuses, prevent unjust discrimination and extortion in the rates of freight and passenger tariffs, and from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on such railroads, and enforce all such laws by adequate penalties.

While this provision of the Constitution was in effect at each biennial session of the Legislature for many years prior to 1890, bills of various import were introduced designed to regulate railway companies in the matter of discrimination of passenger and freight. For many years prior to that time, there had been a persistent endeavor to bring about by Legislative act, the creation of a commission to regulate railway companies in the matter of discrimination of passenger and freight charges.

At the session of the Legislature of 1889, the discussion became very intense and at times acrimonious over the passage of an act creating a Railroad Commission, for the purpose of regulating the affairs of railway companies. In this Legislature, there were many great men, whose minds differed as to the advisability of such a law, and as to the constitutionality of it, and the press of the day contained many editorials dealing with the subject. On January 26th, 1889, Ex-Govenor John C. Brown, President of the Texas & Pacific Railroad, delivered an argument against further railroad regulation by legislation, and against the enactment of the Railroad Commission law. An editorial of the daily paper of the times said that he was a gentleman of distinguished ability, and handled his subject in a masterly manner, and that "he made all that it is possible for anyone to make out of his side of the question", A few days later, the Honorable A. W. Terrell spoke in favor of the Commission Bill, and in answer to the argument made by Governor Brown. It was urged by those who opposed the Act, that such legislation would have a deterrent offect upon capital, which contemplated locating in the State, and retard railroad development.

On the 7th of February, the Honorable Thos. J. Brown, at that time a member of the House of Representatives (afterwards, Justice of the Supreme Court), made the opening argument in the House of Representatives, in favor of the Commission Bill. His argument was directed most particularly to the Constitutional feature. It is said of his argument "as a lawyer of long experience and pronounced ability, one of the leaders of the Bar of the State, his deductions are entitled to general respect, and the greatest deference." His position was that there was no prohibition in the Constitution, and that no question could arise of the right of the Legislature to pass such a law. His speech was described as a "clear out" exposition of the reasons for the People's demand for a Railroad Commission law". On March 2nd, 1889, he spoke at Sherman in favor of the Bill; an interesting side-light being that Senator

McDonald from Lamar County, had expressed a desire to meet him at Sherman and "roast him alive" in reply to his speech, but failed to appear.

On March 5, 1889, it was stated in the press, that the bill which was demanded by the people in general, which the Democratic Party had endorsed and which the House of Representatives had passed almost unanimously, and which the Governor had written he would approve, and when it came to a vote in the Senate was defeated; that it was debated in this body for ten days, and that able men on each side of the controversy participated in the debate.

Honorable A. W. Terrell advocated its constitutionality; Hon. O. M. Roberts expressed his opinion, through the press, that it would be unconstitutional, for the reason and the only reason, that the Constitution imposed upon the Legislature the obligation to pass laws, fixing the maximum rate of charges for the transportation of passengers and freight and this power could not be delegated to any other body.

On March 10th, 1889, the Austin Daily Statesman carried an editorial stating that the measure had been killed by the Senate and prophesied serious discussion by the Democratic Party in the campaign of 1890, with the statement that the Senate had defeated the demands of the people for a commission that would protect them.

It is a matter of common history as to the discussions which took place in the campaign the year following. The failure to pass the law of 1889 was not because of the constitutional objection urged thereto, but was simply the success of the line of argument presented, that to place such authority in the hands of three men would retard the development of railroads, and the general advancement of prosperity of the State. The above history is not only interesting, but pertinent to the inquiry for the reason that it is evident from it that the constitutional amendment afterwards adopted was not intended to be, and in fact was not, a limitation upon the power of the Legislature, or a mandatory injunction that any of its inherent power be exercised in any particular way. There was no specific provision in the Constitution as it existed at that time, which denied the power to the Legislature to regulate railroad rates, or the affairs of railway companies. The regulation was clearly within its police power.

In 1890, just following the stormy session of the Legislature of 1889, Article 10, Section 2 of the Constitution was amended so that it reads now as follows:

"Railroads heretofore constructed or which may hereafter be constructed in this state, are hereby declared public highways, and railroad companies, common carriers. The Legislature shall pass laws to regulate railroads, freight and passenger tariffs, to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State. and enforce the same by adequate penalties; **and to the further accomplishment of**

these objects and purposes, may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable. (Declared adopted December 19, 1890.)

The amendment made was an addition to the old article in the following words:

"And to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies invested with such power as may be deemed adequate and advisable."

Under this amendment, the Railroad Commission Act was passed. It was not incumbent upon the Legislature to create the Railroad Commission as a separate and independent organization, but it had full authority to invest other officers of the Government with the same powers that were granted to the Railroad Commission.

For instance: The Constitution expressly provides that the following officers mentioned therein, in addition to the duties imposed upon them by the Constitution, shall perform such other duties as may be required by law," namely: the Secretary of State, the Attorney General, the Comptroller, the Treasurer, the Commissioner of the General Land Office, the Commissioner of Insurance and in fact, almost every officer whose duties are prescribed by the Constitution may be required to perform any other duty imposed by law.

Certainly under these provisions, the Legislature could have imposed upon either of these officers mentioned or any combination of them, the duty of carrying out the provision of any law which might be enacted to regulate railroad freight and passenger tarriffs, or any other regulation of railway companies.

The fact that the agency created under the amendment of the Constitution was designated as the Railroad Commission, gives no particular sanctity to this agency, which would exempt it from being required to perform any other duties that the Legislature may see fit to impose upon it. Its duties are nowhere defined in the Constitution, except that it is an agency for the accomplishment of certain objects and purposes to be invested with such power as may be deemed adequate and advisable therefor.

The amendment of the Constitution was brought about by the culminating acrimony of the debates of the Legislature of 1889, the history of which demonstrated that the will of the people had been defeated by a failure to establish by law, a commission to regulate the affairs of railway companies. It was more the expression of a popular demand that a certain thing be done, rather than the granting of the constitutional power to do it.

It is axiomatic that the Legislature of the State have all power in the matter of legislation, that is not either expressly,

or by necessary implication denied to them by their respective constitutions. A long time ago it was definitely decided by the courts, both Federal and State, that the functions of commissions created for the purpose of regulating railroad rates and other activities, is the delegation neither of a legislative nor judicial power, and therefore, not an infringement of any constitutional provision, which keeps separate and distinct the three departments of the Government. Likewise it has been definitely determined that the promulgation of rules and regulations, and the decisions of commissions created for these purposes, from which appeals may be taken to the courts, do not violate the Fourteenth Amendment of the Constitution of the United States. The State Legislature is omnipotent in the matter of passing laws, except in so far as there is some prohibition in the Constitution against it. Instead of being a grant of power to the State Legislature, the Constitution is simply a restriction and limitation made by the people of its inherent power. This being true, it cannot be held that the constitutional provision under examination is either a restriction upon the Legislature as to the kind of agency it shall create, or a requirement that any particular kind shall be created. Therefore, the line of authority, holding that where an office is created by the Constitution, and the powers and duties of the officer are prescribed, that the Legislature cannot enlarge, or restrict such duties has no application to this provsion.

The exact question was before the Court of Civil Appeals in the case of the City of Denison vs. Municipal Gas Company, reported in the 257 S. W. page 616, which involved the validity of an act of the Legislature granting to the Railroad Commission the power to regulate and control gas utilities. In holding that the Act was constitutional, the court said:

"A reading of the excerpt from the Constitution first above copied (which is the one under discussion) does not reveal the creation of a Railroad Commission thereby, nor the specific purpose that such commission shall be created. No careful analytical consideration of it can impart that effect. The mandate is laid upon the Legislature in this provision to regulate tariffs, correct abuses and prevent discriminations and extortion. The explicit permission to establish means and agents with such powers as the Legislative discretion may dictate to accomplish the required objects, is embodied in the last clause of the section. This, however, is neither a grant of power and authority, nor a definite command to exercise power and authority. At most, it is, in our view, a mere recognition of the police power, which already inherently rested in the Legislature; no constitutional restriction thereon having ever been imposed."

Honorable W. H. Atwell, Judge of the United States Supreme Court for the Northern District of Texas, had before him for decision, the same question as here involved, except that the business to be regulated was different, in the case of Oxford

Oil Company, et al vs. Atlantic Production Company. In deciding it, he followed the opinion of the Court of Civil Appeals in the Denison vs. Municipal Gas Company case, holding that the Legislature had the authority under the Constitution to impose upon the Railroad Commission the duty to establish rules and regulations for the drilling of oil wells, etc.

We think the above pronouncement cannot be successfully controverted. This being true, the Legislature is not prohibited from imposing any other duties upon the Commission in addtion to the regulation of railroad affairs, that it may deem advisable. In fact, the history of legislation shows that the same Legislature that created the Railroad Commission gave it full power to regulate the rates of express companies, a business radically different from that of railroads, conducted by independent organizations in a different manner, and does not come within the provision authorizing the agency established to prevent discriminations and extortion "in the rates of freight and passenger tariffs on the different railroads in this State." The power of the Legislature to impose this duty upon the commissioner has never been disputed.

It is quite common in this State for the Legislature to impose upon other officers of the Constitution, whose duties are therein prescribed in great detail, many other obligations and duties. The Governor of the State, the duties of whose office are not followed in the Constitution by a general provision that the Legislature may impose others upon him, has been made the member of numerous and various Boards, and likewise, the Lieutenant Governor, the creation of whose office and the prescription of whose duties is in the same status, has had imposed upon him, many additional dutes to those named in the Constitution. The Secretary of State, the Attorney General, the Superintendent of Public Instruction, the Commissioner of Banking and Insurance, have each likewise had imposed upon them other duties than those prescribed n the Constitution. Except for always keeping clearly defined, the demarcation of the departments of the Government, and not imposing upon the members of any department a duty that belongs to the other, it has been the policy of our Legislature from time to time where new and additional regulations of industries, corporations and individuals are necessary to impose upon existing officers, additional duties to avoid the expensve and disorganizing effect of the creation of new boards and institutions to enforce the law.

Wherever a restriction upon legislative power has been enforced in the matter of delegating authority to existing boards or agencies, it has been upon the fundamental proposition that it was necessary to enforce such restraint in order to accomplish the purposes of the Constitution. Certainly no such argument can prevail to defeat the power of the Legislature to impose upon an agency established primarily for the regulation

of railroads of the State, the further obligation and duty to supervise and regulate the public services rendered by motor bus companies engaged as common carriers of passengers over the public highways of the State. On the contrary, it seems, even if it might be conceded that the Railroad Commission is a constitutional office with duties prescribed by the Constitution, and those duties to prevent discriminations and extortion in freight and passenger tariffs and regulate such tariffs, that the proper regulation of the operation of and the tariff to be charged by motor bus companies likewise engaged as common carriers in the transportation of passengers, might be a necessary incident to such constitutional duties imposed upon the Railroad Commission.

I quote from Pond on Public Utilities, Section 723:

"The proper adjustment of the service of motor vehicles operating as common carriers to that of rail and electric carriers is of the greatest importance and required early attention and practicable and equitable solution."

And from Section 732:

"The policy of state regulation of motor vehicles, operating as common carriers is legislative and administrative."

And from Section 754:

"The power of the State thus to regulate the use of its public throughfares, is as fully established and generally recognized, as the police power itself, upon which it is founded."

In discussing these general principles, the Supreme Court of Utah in the case of Gilmer vs. Public Utilities Commission, p47 Pac. 284, said, in speaking of operation of motor busses over the public highways by the plaintiff in error:

"In making the weekly trip he may not seriously have affected the receipts of the railroad, while in making daily trips, he may so reduce its receipts as to make it impossible to pay the operating cost of the railroad. Its rates must thus be increased, or it must go into the hands of a receiver, while the bus line is reaping a large reward by serving territory only served by the railroad company. The railroad rates may thus have to be increased to such an extent as that those living in the sparsely settled territory can no longer afford to pay the rates, and thus development must cease altogether."

So that, instead of the imposition of the additional duties upon the Railroad Commission of the regulating of motor busses, engaged as common carriers of passengers, defeating the purposes of the Constitution, in creation of the Railroad Commission, it can with more reasonableness be said that these purposes would be more fully carried out if both classes of public carriers were placed under the regulating hand of the

same agency. The character of business to be regulated is the same. There is no inconsistency in the duties to be performed as to each. The purpose of regulating one is germane to that of regulating the other.

I will not go into a discussion of that line of authority of cases involving the validity of act creating commissions and other agencies to regulate the rates of railroads and other public service corporations on the issues as to whether the authority conferred was legislative, or judicial, for the courts of the country have long since settled this question, and established the principle that the acts of these agencies are administrative, and therefore, within the power of the Legislature to authorize. This being true, it has for many years been definitely settled that the Legislature might create such railroad commissions, with such powers and jurisdiction as are conferred upon it, without violating any principle of the Constitution, in so far as it might prohibit the delegation of legislative or judicial authority to any other branch of Government from that which the Constitution placed it.

I think now that it is practically universally conceded that the Legislature of Texas could have created the Railroad Commission and granted it the power and authority it now has, without the amendment of the Constitution of 1890, and that the only purpose of the amendment was to express in no uncertain terms, the demand of the people in protest against action of the Legislature of 1889 in failing to create an agency to control and regulate the affairs of railroads. It was the culmination of a political situation then existing, expressing a demand of the people, which the Legislature could not indefinitely ignore. This being true, there cannot be found in the Constitution a single provision which would forbid the Legislature from taking away any power that the Railroad Commission now has, or from repealing altogether the act creating it. If it can take away a power, it can add additional power, because its duties are not fixed in the Constitution, so as to make the authority conferred upon it unyielding to the pressure of existing conditions.

The Legislature could repeal the Commission Act and impose upon other officers of the Government, the duties it now performs just as it could have imposed these duties upon these officers in the beginning. The agency created for one particular purpose mentioned in the Constitution may be used as an agency to carry out any other purpose of the Government.

No reasonable analogy can be drawn from those provisions of the Constitution creating particular offices, definitely prescribing the duties of the officers, containing no general provsion that other duties may be imposed upon them, nor, from the constitutional provisions creating courts and defining their jurisdiction. So long as the Legislature does not impose upon

this administrative body the judicial, executive or legislative functions of the Government, just so long may it be omnipotent in imposing upon it other duties and responsibilities than those of regulating the transportation of freight and passengers, and the other affairs of railway companies.

We think that the provisions of Article 16, Section 30 fixing the term of office of the Railroad Commissioners, "When a Railroad Commission is created by law," does not affect the opinion we have heretofore expressed.

You are advised that it is our opinion that the duties and obligations sought to be imposed upon the Railroad Commission by House Bill No. 50 may be accomplished without violating the provisions of our Constitution.

I have not examined the Bill critically to determine as to whether or not there is involved any question of attempting to regulate private carriers, as was before the court in the case of Frost vs. Railroad Commission of California, 240 Pac. Page 26, and 46 Supreme Court Reporter (U. S.) 544. Care should be taken that the principle announced in this decision of the Supreme Court be not infringed, and I will suggest therefore that Section 1 (c) be amended so as to contain an express provision, excluding from its terms "private carriers". This may be done by inserting a provision at the end of this section as follows:

> "And holding themselves out as carriers for the public."

I regret the delay of the answer to your inquiry, but pressure of business of the department has prevented an earlier response.

Sincerely yours,
CLAUDE POLLARD,
Attorney General.

Op. No. 2660, Bk. 62, P. 39.

STATE INSTITUTION HAS THE RIGHT TO WITHDRAW REQUISITION AT ANY TIME PRIOR TO LETTING OF CONTRACT BY BOARD OF CONTROL.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 3, 1927.

State Board of Control, Capitol.

GENTLEMEN: I acknowledge receipt of your inquiry of January 17, in which you ask to be advised as to the authority of the Board of Regents of the University to withdraw from the Board of Control, requisitions for furniture and furnishings of the Littlefield Dormitory Building.

An answer has been delayed to comply with the request of attorneys representing one of the bidders under a previous ad-

vertisement, for permission to state to me the facts in regard to the controversy from their standpoint.

I received this statement on January 28th, and it is in exact conformity with what you and other members of the Board of Control have previously stated to me. My previous advice to you, given orally, as referred to in your letter, was to the effect that the Board of Regents of the University had the right to withdraw a requisition for furniture and furnishings, and the specifications filed for furniture and furnishings, at any time prior to the awarding of a contract by the Board of Control, but if the action of the Board of Control had been such as that contractual relations had been entered into between the Board of Control and one of the bidders, that the requisitions could not be withdrawn.

The law regulating the subject matter under inquiry, is all contained in Chapter 3 of the Revised Statutes of 1925. Under its provisions, exclusive power is granted to the Board of Control to purchase all supplies used by each department of the State Government, and each eleemosynary institution, etc., the University of Texas and each other State school hereafter created; "such supplies including furniture and fixtures, and all other things, except strictly perishable goods, technical instruments and books."

Article 664 imposes upon the Board of Control the duty to frame and transmit to each institution, a system of rules and regulations for such supplies as have been designated by them as perishable and such special supplies for educational institutions to which each institution shall conform. Under these provisions, the Board of Control has the exclusive right to purchase all supplies, including furniture and fixtures, except those which have been by it designated as perishable, and as special supplies for educatonal institutions.

All contracts shall be made after full notice by advertisement once a week for not less than four weeks in at least four leading newspapers of the State selected by the Board, and shall be within the limits of the appropriations made by the Legislature. Each bidder is requred to file with his bid the usual Anti-Trust affidavit, the form of which should be prepared by the Attorney General, and all bids and proposals shall, when required by the Board, be accompanied by samples or designs furnished by the bidder.

In the matter of equipment, it provided that "Furniture or equipment for educational institutions, shall be such as is especially adapted or designed for such institutions;" and further that "furniture or equipment for educational institutions shall be of the particular kind and make as requisitioned by such institution *and approved by the Board.*"

The above are all of the provisions of the law relating to the subject matter. My construction of which, is that the exclusive power to purchase furniture and equipment for the University

of Texas, is with the Board of Control; that such furniture and equipment must be as is especially adapted or designed for such institution ,and must be of the particular kind and make as requisitioned by such institution, and that the Board of Control has the discretionary power to be reasonably exercised to approve or disapprove of any particular kind and make of furniture and equipment, notwithstanding the requisition of the institution. After the requisition is made, and it, as to kind and make has been approved by the Board of Control, the institution making the requisition has no further control over the matter, but it is within the exclusive province of the Board of Control to advertise for bids, pass upon the compliance with the advertisement by the bidders and award the contract, without let or hindrance upon the part of the institution.

There is nothing in the law which prevents an institution, after the requisition has already been made for a particular kind and make of furniture or equipment, to withdraw it in the proper manner and within the proper time.

If the Board of Control has not entered into any contractual relation with any bidder on a requisition made, it may be withdrawn by the institution and another requisition made for a different kind and make of furniture and equipment. I think that the institution has no authority to fix the price, or a maximum price of furniture or equipment requisitional. This is within the province of the Board of Control in accepting or rejecting bids.

When the requisition is filed by an educational institutional for a particular kind and make of furniture or equipment, the first duty of the Board is to approve or disapprove the requisition. If approved, the duty then arises to advertise for bids, and if bids offered comply with the terms of the advertisement, and are accompanied by the Anti-Trust affidavit, proper deposit and the furnishing of samples or designs, (if the Board requires such samples or designs), to reject all bids made, or to award the contract.

In doing these things the power of the Board is unhampered by any control of the educational institution making the requisition. Since, however, the educational institution has the primary right to specify the particular kind and make of furniture and equipment desired, although the requisition in this regard may be approved by the Board, it would have the power, prior to that time, that the Board has entered into contractual relations with a bidder, to withdraw the requisition and specify a different kind and make of such furniture and equipment. The facts in the particular case before me disclose that the Board of Control, in performing its functions under the requisition made by the University of Texas, has not entered into any contractual relationship with any bidder, and, therefore, the University was acting within its authority in withdrawing the requisition.

While there appears to be some little controversy as to just what has occurred in this particular matter, I think the above is a correct conclusion from the facts presented to me.

It appears that there is some indication of a controversial attitude between the two agencies of the Government (the Board of Control and the Board of Regents of the University), growing out of this particular matter. This, as we all understand, is always to be regretted, and ought not to exist, and I hope that perfect harmony will prevail amongst all of the State's agencies.

The Legislature has seen proper to fix, as one of the functions of the Board of Controll, the absolute power to make purchases for the various educational and other institutions and departments of the Government, and to prescribe certain rules and regulations governing the matter. When these have been prescribed, they ought to be faithfully followed and every assistance and co-operation rendered in the matter of providing all supplies and other things needed by the State's various departments and institutions, and I would like to co-operate hearily with all the State's agencies in bringing about that co-operaton, whch is necessary to the faithful carrying out of the activities of the Government.

Very truly yours,
CLAUDE POLLARD,
Attorney General.

Op. No. 2661, Bk. 62, P. 43.

CONSTITUTIONAL LAW—"HOUSE" AS USED IN ARTICLE 3, SECTION 11, MEANS TWO-THIRDS OF A QUORUM—TWO-THIRDS OF A QUORUM MAY EXPEL A MEMBER.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 8, 1927.

Honorable R. L. Bobbitt, Speaker, House of Representatives, Austin, Texas.

MY DEAR MR. BOBBITT: In response to an oral request through your parliamentarian for a construction of Article 3, Section 11, of the Constitution, you are advised:

This Article provides, eliminating language not pertinent, that: "each house may, with the consent of two-thirds, expel a member."

The inquiry presented is as to whether or not this provision of the Constitution means two-thirds of the members elected, or two-thirds of the quorum present. The general rule for the interpretation of Constitutions in this regard is given in Cooley's Constitutional Limitations, Seventh Edition, page 201, as follows:

"A simple majority of a quorum is sufficient, unless the Constitution establishes some other rule; and where by the Constitution a two-thirds

or three-fourths vote is made essential to the passage of any particular class of bills, two-thirds or three-fourths of a quorum will be understood, unless the terms employed clearly indicate that this proportion of the members or of all those elected is intended."

Similar provisions of the Constitution of the United States, and other States have been made before the courts in several cases, a few of which I will cite for your guidance.

In the case of State vs. Missouri Pacific Railway Company, (Supreme Court of Kansas) 152 Pacific 777, the court had before it a Constitutional provision relatng to the passage of a bill over the veto of the Govenor, similar in all respects to that of our Constitution regulating same. It required that there should be a two-thirds vote of "each House" to pass a bill over the Governor's veto. The Supreme Court of Kansas held that this meant two-thirds of a quorum of each House, supporting the opinion by Cooley on Constitutional Limitations hereinbefore cited. The case went to the Supreme Court of the United States, and was affirmed without dissent, Chief Justice White rendering the opinion of the court, which is reported in 248, United States Reports, Page 276. Discussing the provisions of the Constitution of the United States relating to the submission of Constitutional amendments, which likewise contains a provision that this shall be done by a two-thirds vote of each House, and in construction of this provision of the Constitution, Justice White said:

"While there is no decision of this court covering the subject in the State courts of last resort, the question has arisen and been passed on, resulting every case in recognition of the principle, that in the absence of the expressed command to the contrary the two-thirds vote of the House required to pass a bill over a veto, is two-thirds of a quorum of the body as empowered to perform other legislative duties."

In the case of Missouri, Kansas & Texas Railway Company vs. Simmons, Supreme Court of Kansas, reported in 88 Pacific 551, the court had before it a provision of the Constitution that the Legislature may increase the number of Judicial districts "whenever two-thirds of each House shall concur." In holding that this meant two-thirds of a quorum of each House, the court said:

"Where a two-thirds vote (or other proportion) of a legislative body that is prescribed as necessary for any purpose, two-thirds of those who are present and constitute a quorum is understood, unless special terms are employed clearly indicating a different intention."

In the case of State vs. McBride, Supreme Court Missouri, 29 American Decisions 636, the court had before it the provisions of the Constitution requiring an amendment to the Constitution to be submitted by "two-thirds of each house," and

held that this two-thirds meant two-thirds of the quorum of each house."

The case of Smith vs. Jennings, Supreme Court of South Carolina, 45 Southeastern Reporter 821, they having under consideration a provision of the Constitution that required a two-thirds vote of each house to pass a bill over the Governor's veto, definitely decided that this did not mean two-thirds of the total membership, but "two-thirds of the quorum." The court said:

"While the Constitution in Article 3, Section 3 declares that the House of Representatives shall consist of one hundred and twenty-four members, it also declares in Section 11, Article 3, that a majority of each house shall constitute a quorum to do business. A quorum therefore possesses the power of the whole body in all matters of business, wherein the action of a larger proportion of the entire membership is not clearly and expressly required. When the Constitution speaks of 'two-thirds of that House,' as the vote required to pass a bill or joint resolution over the veto of the Governor, it means two-thirds of the House as then legally constituted, and then acting upon the matter. Whenever the framers of the Constitution intended otherwise, the purpose was expressly declared as in Article 15, Section 1; 'a vote of two-thirds of all members elected shall be required for an impeachment,' and in Article 16, Section 1, wherein proposing amendments to the Constitution, 'two-thirds of the members elected to each House' must agree thereto."

In the case of Loubat vs. Leroy, Supreme Court of New York, Abbott's New Cases, Vol. 15, page 1, the court had before it the provision of the Constitution of a voluntary association providing for the expulsion of a member by a two-thirds vote of its governing committee, and it was held that this meant two-thirds of the committee voting, a quorum being present.

We cite, without attempting to brief, for lack of time, the following cases:

Farmers Union Warehouse vs. McIntosh, Appellate Court of Alabama, 56 Southern, 102;
City of North Platt vs. North Platt Water Works Company, Supreme Court of Nebraska, 76 Northwestern, 906; and
Zeiler vs. Central Railway Company, Court of Appeals of Maryland, 35 Atlantic, 932,

in which cases, the same principle was announced, as those from which we have quoted.

An examination of the various provisions of our Constitution discloses that the framers have exercised great care in prescribing the proportion of membership necessary to accomplish the different purposes; in some instances, prescribing a certain proportion of the members elected; in some instances, a certain proportion of the members present and voting, etc., and in all cases where a greater proportion is necessary than a mere majority of the quorum, it has been definitely specified.

The provision under consideration fixes as the number necessary to carry out the purpose in view, two-thirds of the House, and following the line of authority which we have cited, this must be construed to mean two-thirds of a quorum of the House.

You are advised, therefore, that if a quorum of the House is present and two-thirds of that quorum vote to expel a member, it is sufficient under the Constitution to accomplish this purpose.

We regret that the time within which we were required to prepare this opinion was not sufficient to enable us to more fully brief the authorities we have cited, and to cite additional authorities.

Very respectfully,

CLAUDE POLLARD,
Attorney General.

Op. No. 2662, Bk. 62, P. 48.

COUNTY COMMISSIONERS — CHARITIES — APPROPRIATIONS OF PUBLIC FUNDS—PUBLIC PURPOSES.

1. The Commissioners' Court of a county has no authority except that conferred upon it by the Constitution and laws of this state.
2. Commissioners' Court has no authority to appropriate public funds to charitable organizations managed and controlled by private individuals.
3. Constitution of 1876, Art. 3, Sec. 50, 51 and 52; Art. 8, Sec. 3; Art. 11, Sec. 3, and Art. 16, Sec. 6 referred to, and held to prohibit the appropriation of public funds to charities operated by private individuals.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 4, 1927.

Hon. E. W. Nicholson, County Judge, Wichita Falls, Texas.

DEAR SIR: This is to acknowledge receipt of your letter of January 25th, addressed to the Attorney General, in which you ask if the County Commissioner's Court has authority to donate money out of the county treasury to the Children's Aid Society of West Texas. The memorandum accompanying this letter indicates that this organization is entirely charitable in its nature, the scope of its activities being the supervision and care of delinquent and orphan children and foundlings, providing them with food and medical attention, and where possible placing them in homes.

The purpose is most laudable and praiseworthy, and we approach the question with a desire to sanction such an appropriation if the law will permit.

Certain provisions of the present Constitution of Texas

which appear to bear directly or indirectly upon this question may be quoted.

Article 3, Section 50, of the Constitution of Texas provides that the Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association or corporation, whether municipal or otherwise, or to pledge the credit of the State in any manner whatever for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever.

Article 3, Section 51, provides 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.

Article 3, Section 52, provides that the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the state to lend its credit or to grant public money or thing of value in aid of, or to any individual, association of individuals or corporation whatsoever, or to become a stockholder in such association, corporation or a company.

Article 8, Section 3, of the Constitution of Texas, provides that taxes shall be levied and collected by general laws and for public purposes only.

Article 11, Section 3, of the Constitution of Texas, provides that no county, city or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in any wise loan its credit, but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law.

Article 16, Section 6, of the Constitution of Texas, provides that no appropriation for private or individual purposes shall be made.

Chapter 2 of Title 44 of the Revised Civil Statutes of 1925, prescribe the powers and duties of commissioners' courts. Certain powers of the court are specified by Article 2351. This article reads as follows:

"Each Commissioners' Court shall:

11.—Provide for the support of paupers and such idiots and lunatics as cannot be admitted into the lunatic asylum, residents of their county, who are unable to support themselves. By the term 'resident' as used herein, is meant a person who has been a bona fide inhabitant of the county not less than six months and of the state not less than one year.

12.—Provide for the burial of paupers.

15.—Said court shall have all such other powers and jurisdiction, and shall perform all such other duties, as are now or may hereafter be prescribed by low."

The Commissioners' Court is created by the Constitution and

is a body exercising delegated powers. It has no authority except that conferred upon it by the Constitution and laws of this State. Bland vs. Orr, 90 Tex. 492, 39 S. W. 558; Mills County vs. Lampasas County, 40 S. W. 404; Baldwin vs. Travis County, 88 S. W. 484; Section 18, Article 5, Constitution of Texas.

There has been some conflict of opinion in the various states as to the extent to which public funds could be used by city, county and state authorities for public charitable purposes. Bound up in this question, of course, is the one as to the authority of the particular body to expend public money, and also another as to whether the purpose for which the money was appropriated was a public purpose.

In Ruling Case Law, Number 7, page 936, we find the following general statement:

"Counties being created for purposes of government and authorized to exercise to a limited extent a portion of the power of the state government, have always been held to act strictly within the powers granted by the legislative act establishing them. Accordingly, the statute is to them their fundamental law, and their power is co-extensive with the power thereby expressly granted, or necessarily or reasonably implied from its granted powers. in general, the power to incur obligations and to levy taxes on the people of the county and on their property, is given to counties by statute; but this is a power that must be exercised only in the furtherance of county or public purposes."

In the 7th edition of Cooley's Constitutional Limitations, pages 696-8, the general principle is cited as follows:

"In the first place, taxation having for its only legitimate object the raising of money for public purposes (a) and the proper needs of government, the exaction of moneys from the citizens for other purposes is not a proper exercise of this power, and must therefore be unauthorized. In this place, however, we do not use the word **public** in any narrow and restricted sense, nor do we mean to be understood that whenever the legislature shall overstep the legitimate bounds of their authority, the case will be such that the courts can interfere to arrest their action. There are many cases of unconstitutional action by the representatives of the people which can be reached only through the ballot-box; and there are other cases where the line of distinction between that which is allowable and that which is not is so faint and shadowy that the decision of the legislature must be accepted as final, even though the judicial opinion might be different. But there are still other cases where it is entirely possible for the legislature so clearly to exceed the bounds of due authority that we cannot doubt the right of the courts to interfere and check what can only be looked upon as ruthless extortion, provided the nature of the case is such that judicial process can afford relief. An unlimited power to make any and everything lawful which the legislature might see fit to call taxation, would be, when plainly stated, an unlimited power to plunder the citizen.

"It must always be conceded that the proper authority to determine what should and what should not constitute a public burden is the legislative department of the State. This is not only true for the State at large, but it is true also in respect to each municipality or political division of the state; these inferior corporate existences having only such authority in this regard as the legislature shall confer upon them. And in determining this question, the legislature cannot be held to any narrow

or technical rule. Not only are certain expenditures absolutely essential to the continued existence of the government and the performance of its ordinary functions, but as a matter of policy it may sometimes be proper and wise to assume other burdens which rest entirely on considerations of honor, gratitude or charity. The officers of government must be paid, the laws printed, roads constructed, and public buildings erected; but with a view to the general well-being of society, it may also be important that the children of the State should be educated, the poor kept from starvation, losses in the public service indemnified, and incentives held out to faithful and fearless discharge of duty in the future, by the payment of pensions to those who have been faithful public servants in the past. There will therefore be necessary expenditures, and expenditures which rest upon considerations of policy only, and, in regard to the one as much as to the other, the decision of that department to which alone questions of State policy are addressed must be accepted as conclusive."

The question as to what is a public purpose for which money raised by taxation may be appropriated necessarily comes up in a variety of ways. One of these which has come before the courts a number of times has to do with appropriations for county fairs, state fairs and world-wide expositions. The Supreme Court of Tennessee in case of Shelby County vs. Tennessee Centennial Exposition Company, 96 Tenn. 653, 36 S. W. 694, held that the county authorities were authorized to appropriate money for an exhibit to the Tennessee Centennial Exposition since the purpose was public and the expenditure was to advance the present and prospective happiness and prosperity of the people. In the case of Daggett vs. Colgan, 92 Cal. 53, 27 Am. St. Rep. 95, the court held that a statute making appropriations for a state exhibit at the World's Fair in Chicago was for a public purpose and that the Legislature was not limited by necessity alone in determining what is a public purpose and for the public good, but is vested with a large discretion which cannot be controlled by the court except when its action is clearly evasive; and that unless restrained by the Constitution, the state under its general authority to provide for the public welfare may make appropriations to celebrate important events in the history of the country and may confer such power upon municipal corporations. A similar appropriation by the Legislature of Kentucky is upheld in Norman vs. Ky. Board, 93 Ky. 537, 20 S. W. 901. The Supreme Court of Washington, however, in the case of Johns vs. Wadsworth, 80 Wash. 352, 141 Pac. 892, held that under a constitutional provision prohibiting counties from incurring indebtedness for any other than "strictly" county purposes, and another providing that "no county, city, town or other municipal corporation shall hereafter give any money or property, or loan its credit or money, to or in aid of any individual, association, company or corporation except for the necessary support of the poor and infirm," a donation by the county commissioners to a private corporation organized for holding a county fair is unauthorized, and the act of the Legis-

lature purporting to authorize it is invalid. Attorney General Looney on May 29, 1913, gave an opinion to county judge of Shelby County, Texas, that an appropriation by the commissioners' court to aid a county fair or to make an exhibit at the state fair was unauthorized in Texas.

The Supreme Court of Illinois in the case of Dunn vs. Chicago Industrial School for Girls, 280 Ill., 613, 117 N. E. 735, held that the payment to the school, which was an incorporated Catholic school under the control and management of the Roman Catholic Church by Cook County of an amount less than the actual cost of clothing, medical care and attention, education and training in useful arts and domestic science for Catholic girls committed thereto by order of the juvenile court act as authorized by the Juvenile Court Act is not a violation of Section 3 of Article 8 of the Constitution of that state, which provides that neither the state nor any county, city or town shall appropriate or pay any public funds in aid of any church or for any sectarian purpose or to help support any school controlled by any church. The same ruling was followed in the case of Dunn vs. Addison Manual Training School, 281 Ill. 352, 117 N. E. 993, as to appropriations made for children committed to the manual training school which was under the direct control of the Lutheran Church.

The Superior Court of Delaware in the case of State vs. Levy Court, 1 Pen. 597, 43 Atl. 522, held that an appropriation by the levy court of a county under legislative authority contained in its charter, to an industrial school was not invalid since the appropriation was for "the maintenance and education of each boy committed to an industrial school" and was not an appropriation of money to the private corporation as such within the prohibition of the state Constitution.

In the case of Hager vs. Kentucky Children's Home Society, 119 Ky. 235, 83 S. W. 605, an appropriation had been made by an act of the Legislature of $15,000 annually to a private corporation organized under the laws of the state for purely charitable purposes, and conducted solely to seek out destitute children and provide them homes where they would be under the supervision of the institution during their minority. This appropriation was held not to be repugnant to Section 177 of the State Constitution providing that the credit of the state shall not be loaned to any corporation, and that the state shall not make a donation to any corporation. The contention was made that the appropriation was a donation since the state did not appoint the officers of the corporation, could not remove them, and did not control the expenditure of the money. The court held this was untenable since under the provision of the act of the Legislature the appropriation was not paid until the corporation had executed a bond to the state stipulating that all the money so appropriated would be applied to homeless and destitute children of the state and that the corporation

would file an annual verified statement and settlement with the auditor of public accounts, showing when, where and how the funds had been applied. The court further said:

"The Constitution provides that taxes shall be levied for public purposes only, and forbids the donation or loaning by the state of its credit to any individual or corporation. Sections 171-177, Const. That the purpose of the appropriation in this case is a public one is too clear, in our opinion, to require more extended argument. Obviously appropriations of money out of the treasury must be measured by the same test as that by which it is raised by taxation and put into the treasury. If taxes could not be imposed for a purpose, money already in the treasury could not be appropriated to that purpose."

"These authorities clearly settle that the vital point in all such appropriations is whether the purpose is public, and that, if it is, it does not matter whether the agency through which it is dispensed is public or is not; that the appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means. The limitation put upon the state government by the people is as to what things it may collect taxes from them for, to which it may apply their property through taxation; not upon the means by which or through which it will do it. It may well and wisely be left to the legislature to say how it will dispense the state's charities. Varying conditions, improved methods of treatment changing circumstances affecting the ability of the people to provide for such charges, all bear upon the legislative discretion, and doubtless find a proper application in the measures finally adopted by that body."

The case of Ingleside Association v. Nation, 83 Kan. 172, 109 Pac. 984, was a proceeding in the Supreme Court of Kansas by mandamus to compel the state auditor to issue a warrant for $400.00 appropriated by the Legislature to the Ingleside Association, a charitable instituton which furnished a home for homeless and aged women. The Constitution of Kansas provided that charitable institutions should be fostered and supported by the state, subject to such regulations as might be prescribed by law. The court said:

"Under these laws, this association is recognized as a charitable institution worthy of the fostering care of the state, and the small sum provided by this appropriation is not entitled to be dignified by a suggestion that the state is supporting this association, but it is sufficient to denominate it as a small sum given to foster and aid a worthy charitable enterprise. We are unable to see wherein this appropriation can be fairly criticized. It carries out the constitutional provision that the state shall foster such benevolent institutions as the public good may require. The state has investigated through its proper officials, and found the association to be worthy of assistance. The appropriation is one which seems to be proper and commendable. The auditor should issue the warrant."

In the case of In re House, 23 Col., 87, 46 Pac. 117, the question turned on the authority of the county to use public funds to pay for the treatment of indigent inebriates. The state constitution declared that

"No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not

under the absolute control of the state, nor to any denominational or sectarian institution or association."

This provision was held to be limited to the disbursement of state funds only and did not prevent the county from paying a private institution for curing its indigent inebriates.

In the case of State v. Seibert 123 Mo. 424, 24 S. W. 750, an appropriation made by the legislature "for the suport of the indigent insane in the insane asylum of the city of St. Louis who belonged to the state outside the city of St. Louis," was sustained under a provision of the Constitution authorizing the Legislature to appropriate the money for the support of the eleemosynary institutions of the state. The insane asylum in question was not a state institution, but belonged to and was controlled entirely by the city of St. Louis. The Supreme Court of Missouri held that there was no prohibition in the Constitution against dispensing public charity through the agency of a private institution.

In the case of Underwood v. Wood, 93 Ky., 177, 19 S. W. 405, it was held that a statute authorizing payment to a private academy of school children who attend it who would otherwise attend the public schools was unconstitutional. This same rule as to schools is approved in the case of Ussery v. City of Laredo 65 Tex. 406, where our Supreme Court held that public school funds can be used only for the public schools of Texas.

In Rogers v. White, 14 Ala. App. 482, 70 So. 994, an act of the Alabama Legislature authorizing the payment of $150.00 per month by the board of Revenue of Jefferson County to Secretary of the Birmingham Bar Association was held to violate Section 94 of the Constitution of 1901, forbidding the Legislature to authorize any county to grant any credit or public money to or in aid of any individual, association or corporation.

In Kingman v. City of Brockton, 153 Mass. 255, 26 N. E. 998, it is held that the statute authorizing the city to apropriate money for the erection of a memorial hall for soldiers and sailors is constitutional and for a public purpose. This can be justified, the court says, on the same ground as statutes appropriating money for monuments, archways, publication of histories, decorations upon public buildings which inspire the sentiment of patriotism and respect for the memory of worthy individuals. However, the maintenance and support of a G. A. R. Post is not a public purpose and money cannot be raised by taxation to pay for the erection of a building, a portion of which is to be set aside for the use of such a post as long as it exists.

In Bennett v. City of La Grange, 153 Ga., 428, 112 S. E. 482, the Supreme Court of Georgia held that an appropriation of $75.00 per month to the Salvation Army to be used in the

public charity of the city and accounted for monthly was a violation of the constitutional provision that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religionists or any sectarian institution."

In Wilkesbarre City Hospital v. County of Luzerne, 84 Pac. 55, the Supreme Court of Pennsylvania held that a constitutional provision which declared "the general assembly shall not authorize any county, city, bourough, township or incorporated district to obtain or appropriate money for, or to loan its credit to any corporation, association, institution or individual," is violated by a law enabling a private incorporated hospital to make requisition upon a county for the payment of its charges for the support of patients under treatment, even though they be paupers. As the court says:

> "It is not a payment of any debt incurred by the county, but is a transfer of the money by operation of the act of assembly from the treasury of the county to that of the hospital. The hospital exercises no municipal function, but takes as a private institution by a mere act of appropriation. It is under no obligation to open its doors to municipal inspection or visitation, and cannot be controlled or called to an account for the moneys drawn upon requisition—once paid the money is beyond the control of the county. Thus, its expenditures may be lavish, and the public funds are liable to be misdirected or squandered, without check, through extraordinary charges and unfair requisitions."

In Miller v. Tucker, 105 So. 774, the Supreme Court of Mississippi holds that the county board of supervisors have no authority to vote public funds to a private charitable organization to be dispensed according to the judgment and discretion of such private persons or organization. It holds that while the board of supervisors may support paupers at the public expense, this authority does not extend to persons not declared to be paupers by some public authority. The duty of determining who are paupers was vested in the board of supervisors and the court held such board could not delegate its authority to agencies not authorized by law. Appropriations made to the King's Daughters used by that organization for the relief and support of the poor and an appropriation made to the Ladies of Charity for supplying transportation for poor people in returning to their homes after being treated in the charity hospital were held to be unauthorized and beyond the authority of the board of supervisors. And so, too, in the same case an allowance made to the Young Men's Business Club to cover expenditures for a county agricultural exhibit at the state fair was held to be beyond the authority of the county supervisors.

The case of St. Mary's School vs. Brown, et al, 45 Md. 310, was a suit by taxpayers to restrain the mayor and city council of Baltimore from granting appropriations to certain charitable institutions. It was held that city officials have no authority

to make appropriations, by the exercise of the taxing power, to sustain or aid institutions, however benevolent and charitable their character, which do not owe their creation to the municipal power conferred on the city of Baltimore, and were not created for the city by the state legislature as instruments of municipal administration, but which are separate and distinct corporations, composed of private individuals and managed and controlled by officers and agents of their own, and over which the city has no supervision or control, and for the management of which there is no accountability to the city whatever. The court says:

"It is certain, we suppose, that the city council could have no power to make appropriations to these institutions simply as such, nor because merely of the very humane and laudable objects and purposes for which they were created by their founders and promoters; it is only because of the actual services and benefits rendered the city that any claim could be urged for their support from the city treasury. And if this be so, what guarantee has the city that services or benefits will accrue, commensurate with the appropriations that are made? The same principle that would sustain these appropriations, would equally sustain appropriations of every private school and charity in the city."

"We do not design, however, to be understood as intimating that it would not be competent for the mayor and city council to contract for the care, maintenance and training of those subject to its power, or who have claims upon its charity, of the class of those cared for, maintained and trained, in the St. Mary's Industrial School for Boys, the St. Mary's Industrial School for Girls, and the St. Vincents' Infant Asylum of Baltimore. If the city has not provided for such persons, or if they can be better taken care of and trained in those, or such institutions, than in the institutions of the city, we can perceive no good reason why the city may not arrange and contract for such care and training . . . Its exercise, however, to be valid, must be with the limitation, that the subject matter of the contract be kept within the power and control of municipal authority, and that complete accountability be provided for, and thus make the institutions contracted with, pro hac vice, municipal agencies."

In a few of the cases cited, the decision turned on the extent of the constitutional prohibition against granting aid to individuals, associations or corporations. Under the Constitution of Texas no distinction appears between the prohibition upon the power of the Legislature and that imposed upon counties and cities. Considering the provisions of our Constitution, and recognizing the fact that the county commissioners' court has only such powers as the statutes permit, we can reach no other conclusion, however much we may regret it, than that the commissioners' court is without authority to make appropriations from the public funds to any charity controlled and operated by private individuals however worthy the charity may be.

Yours very truly,

D. A. SIMMONS,
First Assistant Attorney General.

Op. No. 2665, Bk. 62, P. 65.

CONSTITUTIONAL LAW—CONSTITUTIONAL CONVENTIONS—RESOLUTION OF LEGISLATURE—VOTE REQUIRED.

1. Where the Constitution contains no express provisions relative to calling a convention to draft a new constitution or to revise the existing Constitution, the Legislature is authorized to submit to a vote of the people the question of calling such a convention.

2. The proper method of procedure in the Legislature is by joint resolution.

3. Such a resolution may be adopted by a majority vote in each House, a quorum being present.

4. Article XVII of the Constitution of 1876 applies strictly to Amendments to the Constitution and does not constitute a limitation on the power of the Legislature to initiate proceedings for a constitutional convention.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 16, 1927.

Senator R. A. Stuart, State Senate, Capitol.

DEAR SIR: Your letter of the 14th inst., addressed to the Attorney General, has been received in which you make the following inquiry:

"Please give me an opinion as to whether or not the enclosed Senate Joint Resolution providing for a Constitutional Convention will have to be passed by a two-thirds majority vote of the Senate or whether or not it can be passed by a majority of those present and voting as is provided for the passage of other bills. Please let me have your opinion on this matter at your earliest convenience as the vote has already been taken upon this question and I am holding the matter in abeyance awaiting your opinion."

The question is not without difficulty, but a consideration of the various constitutions under which the State of Texas has existed makes the conclusion which we have reached at least persuasive.

The Constitution of 1845, Section 37, Article 7, provides as follows:

"The Legislature, whenever two-thirds of each house shall deem it necessary, may propose amendments to this Constitution."

It further provides that if it appears a majority of all citizens voting for representatives have voted in favor of such proposed amendments, and two-thirds of each house of the next Legislature shall, after such election and before another, ratify the same amendments, they shall be valid to all intents and purposes as parts of this Constitution. (Sayle's Texas Statutes, Vol. 4, Page 212.)

The Constitution of 1861, Section 37, Article 7, provides as follows:

"The Legislature, by a vote of two-thirds of all the members of each house, shall have the power to call a convention of the people for the purpose of altering, reforming or amending the Constitution."

It further provided that the Legislature by a vote of two-thirds of each house, may propose amendments to the Constitution, which amendments shall be proposed and if a majority of the votes cast be in favor of the amendment, and two-thirds of each house of the Legislature of the next regular session shall ratify said amendments so voted by the people, the same shall be valid to all intents and purposes as parts of the Constitution of the State of Texas. (Sayle's Texas Statutes, Volume 4, Page 249.)

The Constitution of 1866, Section 37, Article 7, provides as follows:

"The Legislature, by a vote of three-fourths of all of the members of each house with the approval of the Governor, shall have power to call a convention of the people for the purpose of altering, amending or reforming the Constitution of this State; the manner of electing, delegates to the convention, the time and place of assembling them, to be regulated by law." (Sayle's Texas Statutes, Volume 4, Page 325.)

The Constitution of 1869, Section 50, Article 12, makes no provision with reference to the calling of constitutional conventions, merely providing as follows:

"The Legislature, whenever two-thirds of each house shall deem it necessary, may propose amendments to this constitution, etc."

The Constitution of 1876, Section 1, Article 17, does not provide for a method of calling a constitutional convention, but provides as follows:

"The Legislature, at any biennial session, by vote of two-thirds of all the members elected to each house to be entered by 'yeas' and 'nays' on the journal, may propose amendments to the Constitution, to be voted upon by the qualified voters for members of the Legislature, etc."

From the above, you will see that the various constitutions provided for amendments to the existing constitution with two-thirds vote for each house, while the constitution of 1861 and that of 1866 in addition, provided for calling a constitutional convention. The frst of these required a two-thirds vote of all the members of each house, while that of 1866 provided for a three-fourths vote of all the members of each house and the approval of the Governor.

These provisions with reference to calling a convention were eliminated in the constitution of 1869 and that of 1876.

The constitutional authorities, whose texts have been consulted by us in this investigation, agree that where no method of revision of the constitution is provided in the existing constitution, the Legislature is authorized to submit to the people the question of calling a convention for the purpose of drafting a new constitution or revising the old one, and that the proper method of procedure in the Legislature is by joint resolution.

We think the wording of Article 17 of the present constitution of Texas clearly shows that it refers only to amendments proposed by the Legislature and has no reference to the power of the Legislature to refer to the people the question of calling a constitutional convention. This belief is strengthened by the fact that such provisions have heretofore appeared in constitutions of Texas, along with amendment provisions similar to the present one. The fact that a general limitation on the power of the Legislature, and the vote required to call a convention in the past, has been eliminated from the present constitution would indicate that the formal limitation no longer applies. If there is no limitation, this joint resolution clearly may be adopted by the same vote required on other such resolutions, namely: a majority vote of the members present, a quorum being present.

Our conclusion in this respect is strengthened by an investigation of the vote by which the Legislature in 1875 adopted the resolution calling the constitutional convention, which resulted in our present constitution. At that time the House of Representatives consisted of ninety members (Section 7, Article 3, Constitution of 1869), and the Senate consisted of thirty senators (Section 10, Article 3, Constitution of 1869). The resolution calling the constitutional convention was joint resolution number 452. It passed the Senate on January 23, 1875, by vote of twenty-three to three. Pages 161-162, Senate Journal, 1875. The resolution passed the House of Representatives March 4, 1875, by vote of fifty-six to twenty. Page 473, House Journal, 1875. While each vote was in excess of two-thirds of the members present and voting, the vote in the House was slightly less than two-thirds of the entire membership of the House.

Since the present constitution has no express limitation on this matter, and since the resolution merely proposes to the people the call of a convention which must be voted upon by the people, who choose their delegates and again vote upon the finished product of the convention, it is our opinion that this Joint Resolution Number 2 may be adopted by a majority vote in each House.

Very truly yours,

D. A. SIMMONS,
First Assistant Attorney General.

Op. No. 2667, Bk. 62, P. 78.

ALIENS—REPORT OF OWNERSHIP OF LANDS IN TEXAS.

1. Under the terms of Article 176 of the Revised Statutes of 1925 all aliens owning lands in this State, without distinction as to whether such lands are subject to escheat under the terms of Articles 166 and 167 and succeeding articles, are required to file written report of such ownership, as prescribed in Article 176.

2. An alien corporation, within the terms of Articles 166 and 175 of the Revised Statutes of 1925, is, as defined in Article 174, a corporation in which the majority of the capital stock is legally or equitably owned by aliens prohibited by law from owning land in Texas.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, February 19, 1927.

Mr. J. F. Ewers, City Attorney, Mission, Texas.

DEAR SIR: Your letter of the 14th inst., addressed to the Attorney General, has been received, and in reply beg to advise that the law (Article 4399) inhibits this Department from giving legal advice to anyone besides certain officers of the State Government, not including city attorneys. In view of the public importance of the question submitted, we, however, take this occasion to declare our opinion thereon for the guidance of all parties concerned, and especially all alien owners of land in this State.

The question is whether it is necessary that aliens, coming within the exceptions set out in Article 167, file reports on ownership of lands, as required of all aliens by the terms of Article 176. This question we answer in the affirmative.

Article 167 provides as follows:

"**This title** (being styled 'Aliens') shall not apply (a) to any land now owned in the State by aliens, not acquired in violation of any law of this State, so long as it is held by the present owners; (b) nor to lots or parcels of land owned by aliens in any incorporated town or city of this State, (c) nor to the following classes of aliens, who are, or who shall become bona fide inhabitants of this State."

The classes of aliens who, being or becoming bona fide inhabitants, are excepted by the ensuing terms of this article is here unimportant, the intended scope of the exceptions as indicated by the words "this title" being the point of inquiry.

It will be noted that the corresponding portion of Chapter 134 of the Acts of 37th Legislature, being Article 16 of the Revised Statutes of 1911 as then amended, is virtually in the same terms as the present Article 167.

"**All aliens and ALL ALIEN CORPORATIONS now owning lands in this State** shall on or before the last day of January, 1926, file a written report under oath with the clerk of the county court of the county in which such land is located, giving the name, age, occupation, personal

description, place of birth, last foreign residence and allegiance, the date and place of arrival of said alien in the United States, and his or her present residence and postoffice address, and the length of time of residence in Texas, the foreign prince, potentate, state or sovereignty of which the alien may at the time be a citizen or subject, and the number of acres of land owned by such alien in such county, the name and number of the survey, the abstract and certificate number, the name of the person or persons, from whom acquired, (the date when acquired) and shall either describe said land by metes and bounds, or refer to recorded deed in which same is so described, which report shall be known as "Report of Alien Ownership." All aliens AND ALL ALIEN CORPORATIONS hereafter purchasing, or in any manner acquiring lands located in Texas, shall, within six months after such purchase, or acquisition, file with the county clerk of the county in which such land is located, a "Report of Alien Ownership," in terms as above required. Any alien or ALIEN CORPORATION who may now own land in Texas, or who may hereafter acquire any land in Texas, by purchase or otherwise, who does not within the time prescribed in this article, file the reports herein provided for, shall be subject to have such land forfeited and escheated to the State of Texas. The reports herein required shall, when the alien is a minor or insane person, be filed by the parents or guardian of such alien. The county clerk of such county shall file and record the reports above provided for in a separate volume, to be entitled 'Record of Alien Owned Lands' for said county. The recording of such reports shall be paid by the alien owner."

In quoting the above we have underscored language here specifically important, capitalized interpolations of the codifiers and bracketed the omitted parts of the codified act, Art. 21 (d) of Chapter 134 of the Acts of the 37th Legislature.

There is an apparent conflict between Art. 167 and Art. 176 as to what aliens are required to make report of ownership of land, the first article providing that *this title* shall not apply to those aliens therein mentioned, and the latter article of the same title requiring *all* aliens, without distinction, to make reports as to their ownership of land. *Literally interpreted* there can be no doubt that the scope of Art. 176 is cut down by the exceptions set out in Art. 167; and such has heretofore been the construction of this department as declared in the opinion of December 2nd, 1922 (Opinions, 1922-24, page 513). *Sensibly interpreted,* according to the clear intent of the Legislature, it it seems to us that Art. 176 is not so restricted but applies to all aliens alike, the conflict in the provisions of the law being more apparent than real.

"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." Edwards vs. Norton, 92 Tex. 152, quoted in Lewis' Sutherland Statutory Construction, (2nd Edition, Sec. 363."

The history of the alien land law of this state develops the legislative intention in the language used in the present law.

Chapter 8, First Called Session, Acts 1892 in Section 1, prohibited alien acquisition or ownership of lands, "except as here-

inafter provided," and in Sec. 2 provided, "this act shall not apply to land now owned * * * * * nor to any alien etc.,"—then stating the exceptions to similar effect as in the present Art. 167. Upon codification in 1911 these two sections became respectively Arts. 15 and 16, the latter being changed only by the necessary substitution of the word "title" for the word "act." There was no report whatever of alien ownership required by this law, and the penalty for alien ownership was nothing but condemnation of the land.

In the present law, as enacted in 1921, the Legislature simply followed the terms of Art. 16 of the old law, providing that "this title shall not apply to any land now owned * * * nor to the following classes of aliens." At the same time it prohibited alien acquisition or ownership of land, and put a penalty of absolute forfeiture thereon. Besides this it amended the old law, as stated in the title, by "requiring reports of certain property holdings to *facilitate the enforcement of this act*," adding thereto Art. 21 (d), now Art. 176, requiring reports on ownership of lands from "all aliens now owning lands" and "*all* aliens hereafter purchasing."

The restruction in or exceptions to the application of the old law necessarily referred only to the prohibition against alien ownership or purchase of land, for there was no report requirement nor anything else to which it could refer. Said prohibition and restructions or exceptions thereto are carried forward into the present law by the 1921 amendment, and, as there expressed, certainly carry the same meaning. For any implication that the restructions and exceptions of Art. 167, expressed in practically the same language as in the old law, should carry a further and extended meaning as applied to the then added provision as to report on alien ownership, one must resort to artificial rules of construction and ignore the common sense intent to the contrary. The reasonable probabilities are that the Legislature intended to apply the restrictions no further than they were applied in the old law, that they used the words "all aliens" in Art. 176, advisedly, and with a new purpose in view, and that any apparent conflict between Arts. 167 and 176 was lost sight of and not intended. Thus interpreted full effect is given to the exceptions stated in Art. 167, and also to the broad terms of Art. 176, and both function in the law.

The purpose of the enactment of Art. 176 was doubtless, as stated in the title, to facilitate the enforcement of the act which had for its primary aim the prohibition, with certain exceptions, of alien acquisition and ownership of lands. Yet would the requirement of the report of ownership from those aliens only whose lands were under the terms of the law subject to forfeiture, effect such purpose? Interpretation previously given to the law would practically amount to committing to aliens the determination of the rather difficult legal question

as to whether they come within the exceptions set forth in Art. 167, and supposing they could be trusted to determine this question fairly and correctly, the requirement of the report would hardly be likely to facilitate the enforcement of the law. Can it be reasonably expected that an alien not coming within the exceptions, whose property is therefore subject to forfeiture under law, would himself make a written report of that fact to the county clerk? If he fails to make such report his lands are subject to forfeiture, but if they are already certainly subject to forfeiture, he could still, under Art. 171, as under the common law, convey the fee simple title thereto at any time before the institution of escheat proceedings by the Attorney General or the District or County Attorney. His report of ownership could be in effect a confession of guilt, and could not in the nature of things be expected of him. Indeed we would venture the guess that there is no "RECORD OF ALIEN OWNED LANDS," as required, kept by any county clerk in this state; and this for the simple reason that the statute, as previously interpreted is practically unworkable.

On the other hand it is manifest that if all aliens alike are required to make reports of their ownership of land, and their lands are not necessarily subject to forfeiture, the penalty of a forfeiture for not making such report may well facilitate the enforcement of the primary purpose of the law—the elimination, with certain exceptions, of alien ownership of land in Texas. The details required to be stated in the report, as set out in Art. 176, and underscored in the quotation thereof in the early part of this opinion, are themselves indicative of an intention in the law to put the officers of this State in possession of the facts which would control the application of the exceptions allowed as to alien ownership of land. For instance, the statement of the length of time of residence in Texas would have no bearing except on the question of the alien's bona fide inhabitancy in this State, which is one of the conditions of the exceptions stated in Art. 167. Again, the statement of the date when the land was acquired could have no purpose except in its bearing on the period of ownership allowed under other provisions of the law. Why state these things unless it be to inform the officers intended to enforce this law on the question, which is for them rather than the alien to determine, whether a particular case comes within the exceptions of the law?

Your inquiry does not extend to the interpretation of the terms "al alien corporations" in Art. 176, but it is in a manner here incidentally involved. We believe that those terms, as well as similar terms used in Art. 166, are not intended to apply to corporations organized in foreign countries owning lands in this State, but rather to the character of alien corporation defined in Art. 174, that is, corporations whether domestic or foreign, in which the majority of the capital stock is legally or

equitably owned by aliens prohibited by law from owning land in Texas. If there were any doubt about this upon the face of the 1925 codification resort to the act itself would clear the doubt insamuch as the expression "alien corporations"is then found to be an interpolation of the codifiers, justified only by the terms of Art. 174.

We, therefore, beg to advise you that all aliens owning lands in this State, whether they come within the exception noted in Art. 167 or not, including corporations of the kind just referred to, are required by the terms of Art. 176 to file written reports under oath with the clerk of the county court of the county in which such land is located in the terms and under the conditions stated by law.

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

Op. No. 2671, Bk. 62, P. 109.

STATE BOARD OF ACCOUNTANCY—OFFICER—ARTICLE XVI, SEC. 33 AND SEC. 40.

1. A member of the Texas State Board of Accountancy is an officer within the meaning the Constitution of Texas, and he is prohibited by Sec. 33 of Article XVI from receiving salary or compensation from the state for serving as agent, officer or appointee while continuing a member of that board.

2. A member of the Texas State Board of Accountancy is not prohibited from contracting with the state for auditing work, provided that board has nothing to do with the contract or the work covered thereby.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 18, 1927.

Mr. J. A. Phillips, Second National Bank Building, Houston, Texas.

DEAR MR. PHILLIPS: We have before us your request that the Attorney General advise you as to whether or not your acceptance of a tendered appointment of a place on the State Board of Accountancy would prevent you from bidding on or making contracts with the State or its subdivisions on accounting and auditing work.

The provisions of the Statutes relative to accountants and the State Board of Public Accountancy are found in Articles 31 to 41, both inclusive, of the Revised Civil Statutes of 1925. From these articles it appears that the main duty of the Board is to examine applicants for certificates as certified public accountants. The expenses of the Board are not paid out of public funds but from the revenues derived from fees paid by

applicants for examination and by the annual fee of those listed as certified public accountants. Article 39 expressly provides that expenses of members of the board attending meetings shall be paid out of this fund, but otherwise the members of the board serve without compensation.

Section 40 of Article XVI of the Constitution of Texas provides:

"No person shall hold or exercise, at the same time, more than one civil office of emolument, except that of justice of the peace, county commissioner, notary public and postmaster, unless otherwise specially provided therein."

Public office has been defined to be the right, authority and duty created and conferred by law by which, for a given period either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public. Kimbrough vs. Barnett, 93 Tex. 301, 310. We take it from this and other authorities that one appointed by the governor as a member of the State Board of Public Accountancy would be an officer, although there seems to be no requirement that he give bond, take an oath of office, and although it expressly provides by Statute that he shall serve without compensation.

If this were the only provision of the Constitution on the subject, it would be apparent that one could be a member of this board and at the same time serve the State or its subdivisions in an additional capacity, for the reason that the limitation of Section 40, on the right of a person to hold more than one office, is to a civil office of emolument. There is no emolument payable to members of this board from any source.

However, Section 33 of Article XVI is a further limitation upon the holding of office and it reads as follows:

"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."

We take it that any accounting work you expect to do for the State would be for compensation. While membership in this board is not an office or position of profit, it undoubtedly is an office or position of honor. Therefore, we can advise without hesitancy that being a member of the State Board of Public Accountancy under the Constitution you could not be paid compensation as an agent, officer or an appointee of the State or any of its subdivisions. If, however, the employment you have in mind is as an independent contractor and not

as an agent, officer or appointee of the State, we have found no provision of the Constitution or law which would prevent you from accepting such a contract while serving as a member of the State Board of Public Accountancy. We take it that this board has nothing to do with letting such contracts or fixing in any manner the compensation therefor.

Very truly yours,
D. A. SIMMONS,
First Assistant Attorney General.

Op. No. 2672, Bk. 62, P. 113.

GAS UTILITY.

A corporation producing gas to be sold to a concern which transports this gas to municipalities held a gas utility under Article 6050, Revised Statutes for 1925.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, March 18, 1927.

Honorable Clarence E. Gilmore, Chairman, Railway Commission of Texas, Capitol.

DEAR SIR: Your letter of the 9th instant addressed to the Attorney General together with the file in the matter of the Hickory Oil & Gas Corporation, has been handed to me for attention.

You desire to know whether the Hickey Oil & Gas Corporation is a gas utility as defined by Article 6050 of the Revised Statutes of Texas for 1925.

From the file we gather the following facts, which are made the basis of the inquiry:

1. Hickory Oil and Gas Corporation has a permit to operate in the State of Texas, among other things. to acquire, own and dispose of oil, gas, and other mineral.
2. It owns five wells in Eastland County.
3. The production of these wells is sold to the Texas Company Producing Department, whose gas lines are connected at the wells of the Hickory Oil and Gas Corporation, and the gas therefrom is then transported through the Texas Company's lines to the casinghead gasoline plant of Chesnut & Smith, where the gasoline is extracted and the gas is passed into the main lines of the Texas Company, and by the Texas Company sold to various municipalities.
4. Hickory Oil and Gas Corporation has a verbal contract to sell gas to the Texas Company, the gas being sold on a monthly basis, and either party may quit the sale or receipt of gas at any time.

It is believed that the above constitutes a sufficient statement of facts upon which an opinion, as to whether this constitutes a gas utility, is based.

You are advised that it is the opinion of this department that under the above statement, the Hickey Oil & Gas Corporation is, under Article 6050, a gas utility.

Article 6050, Revised Statutes for 1925, is as follows:

"The term 'gas utility' and 'public utility' or 'utility,' as used in this subdivision, means and includes persons, companies and private corporations, their lessees, trustees, and receivers, owning, managing, operating, leasing or controlling within this State any wells, pipe lines, plant, property, equipment, facility, franchise, license, or permit for either one or more of the following kinds of business.

"1. Producing or obtaining, transporting, conveying, distributing or delivering natural gas: (a) for public use or service for compensation; (b) for sale to municipalities or persons or companies, in those cases referred to in paragraph 3 hereof, engaged in distributing or selling natural gas to the public; (c) for sale or delivery of natural gas to any person or firm or corporation operating under franchise or a contract with any municipality or other legal subdivision of this State; or, (d) for sale or delivery of natural gas to the public for domestic or other use.

"2. Owning or operating or managing a pipe line for the transportation or carriage of natural gas, whether for public hire or not, if any part of the right of way for said line has been acquired, or may hereafter be acquired by the exercise of the right of eminent domain; or, if said line or any part thereof is laid upon, over or under any public road or highway of this State, or street or alley of any municipality, or the right of way of any railroad or other public utility; including also any natural gas utility authorized by law to exercise the right of eminent domain.

"3. Producing or purchasing natural gas and transporting or causing the same to be transported by pipe lines to or near the limits of any municipality in which said gas is received and distributed or sold to the public by another public utility or by said municipality, in all cases where such business is in fact the only or practically exclusive agency of supply of natural gas to such utility or municipality, is hereby declared to be virtual monopoly and a business and calling affected with a public interest, and the said business and property employed therein within this State shall be subject to the provisions of this law and to the jurisdiction and regulation of the Commission as a gas utility.

"Every such gas utility is hereby declared to be affected with a public interest and subject to the jurisdiction, control and regulation of the Commission as provided herein. (Acts 3rd C. S. 1920, p. 18.)"

We do not believe the Hickory Oil and Gas Corporation comes within Section (a), Paragraph 1, under the facts as given us. We do not believe that this corporation is producing gas for public use. On the other hand, it is producing gas for sale and sells it to the concern offering the highest price for it.

The question as to whether Hickory Oil & Gas Corporation comes within paragraph 3, Article 6050, is much more difficult to answer, but by transposing and rewording the statute, we believe that this concern does come clearly within the provisions of this paragraph. By transposing the phrases and sentences in the statute we have the following:

"The term 'gas utilities' means companies producing natural gas for sale to concerns which purchase natural gas and transport or cause the

same to be transported by pipe lines to or near the limits of any municipality in which said gas is received and distributed or sold to the public by another utility or by said municipality."

It seems clear, therefore, that when the language is transposed, the Legislature intended that any concern which produced gas and sold the same to any concern which supplied a municipality with gas, should be a gas utility.

You are, therefore, advised that it is the opinion of this department that the Hickory Oil and Gas Corporation is liable for the tax provided in Article 6060, Revised Statutes for 1925.

Very truly yours,
ALLEN CLARK.
Assistant Attorney General.

Op. No. 2680, Bk. 62, P. 168.

HOSPITALS—COUNTY HOSPITALS—COUNTIES—COMMISSIONERS' COURT—LEASE OF COUNTY HOSPITALS.

Article 1577, R. C. S., 1925.
Articles 4478 to 4494, R. C. S., 1925.
Chapter 5, Title 71, R. C. S., 1925.

1. Commissioners' courts have only such authority as is expressly or impliedly conferred upon them by the Constitution or laws.

2. Commissioners' courts do not have authority to lease the county hospital to an organization of doctors.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 11, 1927.

Mr. E. P. Walsh, County Auditor, Wichita Falls, Texas.

DEAR SIR: This department acknowledges receipt of your letter of March 26th, which reads as follows:

"The Wichita General Hospital, a joint city and county hospital, was constructed at a cost of $200,000.00.

"The City Council and the Commissioners' Court desire to lease the hospital to an organization of doctors for a period of five years..

"Are the City Council and Commissioners' Court vested with power to lease our City-County Hospital to doctors? If so, what would be the correct procedure in leasing the building?"

You state that the hospital is a City-County Hospital, but in a subsequent letter say that the county issued bonds for the construction of the hospital under the authority of Article 4478, Revised Civil Statutes, 1925, and that the city also issued bonds. The writer assumes that the agreement with the city was made under the provisions of Article 4492. Therefore, we are of the opinion that, under the above circumstances, the

same law is applicable as if the hospital were owned by the county alone.

It is a well settled principle of law that the commissioners' court does not have any authority except that which is expressly or impliedly conferred upon it by law. (Edwards County vs. Jennings, 33 S. W. 585; Von Rosenberg vs. Lovett, 173 S. W. 508; Hill County vs. Bryant & Huffman, 264 S. W. 520; Wallace vs. Commissioners' Court, 201 S. W. 593; Scaling vs. Williams, 284 S. W. 310; 15 C. J. 457, Sec. 103; 15 C. J. 537, Sec. 221.)

In 15 Corpus Juris, Page 457, Section 103, we find this language:

"It is well settled that a county board possesses and can exercise such powers, and such powers only, as are expressly conferred on it by the Constitution and the Statutes of the State, or such powers as arise by necessary implication from those expressly granted or such as are requisite to the performance of the duties which are imposed on it by law. It must necessarily possess an authority commensurate with its public trusts and duties. Therefore it possesses inherent authority to perform acts to preserve or to benefit the corporate property of the county intrusted to it. However, where there is doubt as to the existence of its authority, it should not be assumed."

In 15 Corpus Juris, Page 537, Section 221, we find this statement:

"In accordance with the general rule heretofore stated, that county boards or county courts have no powers other than those conferred expressly or by necessary implication, such courts or boards have no power to rent or to lease property or franchises owned by the county, in the absence of statutory authority so to do."

In the case of Edwards County vs. Jennings, 33 S. W., Page 585, the Court said:

"Counties are political or civil division of the state, created for the purpose of bringing government home to the people, and supplying the necessary means for executing the wishes of the people, and bringing into exercise the machinery necessary to the enforcement of local government. Counties being component parts of the state, have no powers or duties except those clearly set forth and defined in the constitution and statutes. 1 Dill. Mun. Corp. (par. 5). The statutes of Texas have clearly defined the powers, prescribed the duties, and imposed the liabilities of the commissioners' court, the medium through which the different counties act, and from those statutes must come all the authority vested in the counties. It is provided in the constitution that the 'county commissioners so chosen, 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 this constitution and the laws of this state, or as may be hereafter prescribed.' Const. Art. 5, par. 18. Looking to the powers granted by the legislature by virtue of the above constitutional provision, we find that no authority is given the commissioners' court to enter into such contracts as the one sued on in this case. Rev. St. Art. 1514. It is clear, therefore, that the attempted contract was beyond the power and authority confided in the county commissioners."

In the case of Von Rosenberg vs. Lovett, 173 S. W., Page 508, the Court uses this language:

"Commissioners' courts in this state, as will be seen from the above references to our Constitution, are courts of limited jurisdiction, having no authority, except such as is expressly or impliedly conferred upon them by law. This is true of like bodies, by whatever name called, in all other states of the Union."

The question to decide then, is whether there is expressly or impliedly conferred upon the commissioners' court authority by law to lease a county hospital. Chapter 5, Title 71, Revised Civil Statutes, authorizes the establishment of county hospitals. This chapter gives rather minute details regarding the manner of the operation of said hospital, and provides for assessing and collecting taxes for the maintenance of the same. We fail to find any provision in the statutes expresslv authorizing the commissoners' court to lease a county hospital, and the remaining question is whether there is any implied power in the Statutes or Constitution, authorizing such action by the commissioners' court.

Article 1577 makes provision for the sale of real estate of the county but does this power impliedly authorize the county to lease said real estate, such as a hospital, owned by the county? The Legislature has granted lands to counties of this State, and our statutes expressly authorize a lease of these lands to secure an income for the available school funds. However, even if no express authority had been given to lease the lands, the counties might have the power to do so on the theory that the purpose in owning the land was to secure an income for the schools and necessarily there would be an implied power to lease the land for this purpose. But the purpose in establishing a county hospital is not to secure revenue. Article 4478 provides that the hospitals are established for the care and treatment of persons suffering from any illness, disease, or injury. The same Article gives the commissioners' court authority to acquire real property for this purpose, to erect all necessary buildings, to levy and collect taxes for the maintenance thereof, and to appoint a board of managers of said hospital. Other details as to the management are set out in the Statutes. Is the authority to lease the hospital necessary in order to carry out the expressed authority of maintaining and operating the hospital? Is there anything in the Statutes that gives the court the implied authority to lease the hospital to private individuals, especially since the hospital was established by the public, by public funds, for the benefit of the public, and a specific statute for the management of said hospital by public officials?

This department, in an opinion rendered on July 3, 1919, and printed in the Reports and Opinions of the Attorney Gen-

eral for 1918-1920, Page 131, held that the commissioners' court is without authority to lease a portion of the court house square to an individual on which there was to be erected a building for an oil station and cold drinks. It was held in this opinion that the court house square was public property, intended to be used for public purposes, and that it would be inconsistant with these purposes for an individual to erect a building on the court house square to be used by him for private purposes. This opinion is in line with the general rule set out above that the commissioners' court has only such authority as is conferred upon it expressly or impliedly, and also with the general rule that said body has no authority to lease public property unless authorized to do so by law.

You are advised therefore, that it is the opinion of this department that the Commissioners' Court of Wichita County is without authority to lease the county hospital.

Very truly yours,
H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2689, Bk. 62, P. 216.

BUILDING AND LOAN ASSOCIATIONS—RIGHT TO OWN REAL ESTATE.

A Building and Loan Association organized under the laws of the State of Texas is not authorized to purchase or own real estate for the purpose of affording or furnishing a home office building. They may only acquire such real estate as is necessary in the conduct of their business to protect mortgages upon real estate.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 11, 1927.

Hon. R. L. Daniel, Commissioner of Insurance, Austin, Texas.

DEAR MR. DANIEL: We have before us your communication in which you request us to give you opinion on the question of whether or not a building and loan association in Texas may own real estate which it occupies as its office building. The question is not without difficulty but we are inclined to the opinion and so advise you that a building and loan association chartered under the laws of the State of Texas may not own real estate except such as it may purchase for the protection of a mortgage which it holds upon the property. It is unlawful for a building and loan association to buy real estate even though it intends to use it for a home office building except the property may be bought at a sale and for the purpose of protecting a mortgage.

The rule in this State and uniformly, is that a corporation may invest its funds in real estate to such an extent as may be necessary for the purpose of carrying out the corporate enterprise. Under this rule it is generally held that a corporation may buy real estate for its own use as an office building and in so doing may acquire a larger building than it needs for its own immediate use and may lease or otherwise use the balance of the building for the purpose of producing a revenue. The question before us is whether or not this general rule applies in the case of building and loan associations.

The Statute relating to building and loan associations in this State is to be found in Title 24. It is interesting to note that this Statute does not attempt to define the building and loan association. The language of Article 852 is:

"Any number of persons desiring to organize a building and loan association for the purpose of **building and improving homesteads removing incumbrances therefrom and loan money to the** members thereof. may by complying with the provisions of this title, become a body corporate, etc."

The method whereby the money to be used for these purposes is to be accumulated by the association, is nowhere set out except in so far as it may be gathered from Article 856 having to do with the sale of capital stock. This sale of stock is generally known to be upon an installment paid whereby the members contribute periodically small sums of money to the common fund from which, in accordance with the by-laws of the society, they may withdraw or borrow larger sums as may be required by them for the purpose of buying homes for themselves. It appears, therefore, that the primary purpose of the association is to furnish a method whereby members through their several contributions accumulate a fund which will enable them in due course to acquire a home.

Generally speaking it is also held that a corporation has the implied power to purchase at a judicial sale or other foreclosure any property on which it has a mortgage or which it would be necessary to acquire to protect an indebtedness. This rule is recognized independent of any statutory right that may be given.

We find, however, with reference to building and loan associations in this State that the Legislature thought it necessary to give to them the express right to purchase real estate at foreclosure sales or to protect their mortgage. This provision is to be found in Article 861.

In view of this provision and in view also of the limited purpose for which the associations are organized we feel that it must have been the thought of the Legslature that these corporations were distinct and different from the ordinary corporation authorized by law to be created.

If we examine the authorities on this point we find that

uniformly they lay down the rule that the associations of this sort are not authorized to purchase real estate for the purpose of resale or for the purpose of trading and trafficing

The Courts have gone so far along this line as to hold that an association did not have a right to purchase one lot of land upon which it did not have a mortgage even though it made the purchase of that lot in connection with the purchase of another lot upon which it did have a mortgage and for the general purpose of protecting its lien. See National Home Building and Loan Association vs. Home Savings Bank, 181 Ill. 35; 72 A. S. R. 245. This case is typical of a number of others along the same line.

When we come to the question of the right of a building and loan association to buy its own home office building, we find the authorities divided. Two leading cases on the proposition seem to be: Africani Home Purchasing and Loan Association vs. Carroll, 267 Ill. 380; 108 N. E. 322, and Home Savings Fund Company vs. Driver (Ky., 112 S. W. 864.) The first of these cases holds that an association may purchase real estate for home offices, reasoning from a Statute which is in effect identical with ours: that an association may purchase real estate to protect its mortgages. This Statute expressly gives a right to purchase real estate for this purpose and would seem, by a necessary implication, to prohibit the purchase of real estate under any other circumstances or for any other purpose. The Kentucky case, with a similar statute to construe, takes the contrary view and holds that the general law authorizes the purchase of home office buildings, would apply to corporations of this character, as well as to other corporations and that the permission given by statute to purchase real estate to protect liens, is merely an express statutory addition to the corporate powers and not a limitation upon those powers.

We are inclined, however, to the former view. It would not have been unnecessary for the Legislature to have given these associations the right to purchase land at foreclosure if it had not had in mind that they were different and governed by different rules from the ordinary corporation. The Legislature apparently thought that specific authority to buy real estate for any purpose was necessary and having given specific authority for this restricted purpose, we think it necessarily must follow that the Legislature did not intend that these corporations should be additional power to purchase any real estate.

This view is strengthened when we consider again the primary purpose for the organization of these associations. They are required to accumulate a fund from which a member may borrow for the purpose of building a home. If it is permitted that these associations invest funds which come into their hands in the purchase of real estate for home office purpose, it is entirely possible, indeed it is almost inevitably

true, that there will be a time when they will not have money to meet the demand of some member who desires to borrow for the purpose of building a home. It must have been this contingency that the Legislature had in mind when it specifically authorized the associations to tie up their funds in real estate to such an extent as might be necessary to protect their investments and not otherwise.

Not only that, but we find specific statutory instructions given to these associations as to the use of all funds at their disposal. Article 857 deals with this subject and requires that at all monthly meetings of the Board of Directors funds in the Treasury applicable for loans shall be loaned to the members. If there are no demands from borrowing members, they may be loaned to non-members upon real estate securities and if there are no applications for real estate of non-members they may be loaned or invested in such securities as are authorized to be accepted by savings banks in this State. These avenues of investment consume the entire funds of the association. The money which an association would put into a building of this sort, would otherwise be applicable for loans and under the statute it must be held for that purpose.

Yours very truly,

R. B. COUSINS, JR.,
Assistant Attorney General.

Op. No. 2693. Bk. 62, P. 242.

LIENS—PUBLIC IMPROVEMENTS.

S. B. 123, Chap. 17, Acts of 1925.

1. Where a bank furnishes money to pay laborers and materialmen it does not place itself in the shoes of laborers and materialmen, and has no lien.

2. A lien of a laborer or materialman may be assigned, and in such case, the assignee stands in the shoes of the laborers and material men.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 26, 1927.

State Highway Department, Austin, Texas.

GENTLEMEN: The Attorney General is just in receipt of your letter of the 25th instant, to which was attached letter written by the firm of Cantey, Hanger & McMahon, with reference to claim filed with the Highway Department by the Stephenville State Bank, of Stephenville, Texas, against H. C. Smith, who is a sub-contractor under the McClung Construction Company, who has a contract with the Highway Department for construction work in Erath County.

You desire a construction of Senate Bill 123, Chapter 17,

General Laws of the 39th Legislature, 1925, which creates a lien in favor of any person, firm or corporation who furnishes any material, apparatus, fixtures, machinery or labor to contractors who entered into contracts for public improvement.

While it will be noticed from a reading of the above law, the term "contractor" is used throughout and no reference is made to a sub-contractor, laborer, mechanic, artisan, or any other person other than the contractor, however, the emergency clause, it seems to us, shows that the Legislature intended that not only should persons furnishing labor or material to a contractor be protected, but all persons, whether they furnish labor to a contractor, or sub-contractor, should be protected, and this also seems to be the view of the lawyers representing the McClung Construction Company. It is such a close question that we are not prepared to hold that anyone furnishing material or labor to a sub-contractor would not be protected by the provisions of this Act, and in view of the fact that this statute has never been construed by our courts, we believe that the safest course for the Highway Commission to pursue is, upon the filing of a claim with the Highway Department by any person against a sub-contractor, to hold sufficient money to pay the claim and let the matter be decided by some court of competent jurisdiction, and the claim either be established or defeated in that manner.

With reference to the claim of the Stephenville State Bank, you are advised as follows:

It seems from the file submitted to us in connection with your letter that the Stephenville State Bank advanced money to Mr. H. C. Smith, a sub-contractor of the McClung Construction Company, to pay for labor and materials used in connection with the construction of the highway in Erath County. The bank filed its claim with the Highway Department in accordance with Chapter 17, General Laws of 1925. The attorneys for the Construction Company contend that inasmuch as the bank did not furnish either labor or material, that they do not have a lien and cite in support of their contention several Texas cases which seem to bear out this contention. However, this may be a question of fact and, of course, this department can not, and will not, decide a matter of this kind. It might be that the bank holds an assignment from each laborer and each materialman who furnished material to Mr. Smith and if this is the case, the bank would stand in the shoes of the laborers and materialmen, and would be entitled to enforce the lien if the above statute includes not only contractors, but sub-contractors.

If the facts are as stated by lawyers representing the Construction Company then the bank has no lien, and the Highway Department would be safe in paying the balance owing to the McClung Construction Company, but as pointed out above, this might be a disputed question of fact.

In view of the fact that this statute has not been construed and that our higher courts might hold that the statute covers claims against sub-contractors, as well as contractors, we suggest that the proper procedure to take in this matter is to hold up enough money belonging to any contractor to pay any claims that might be filed for labor or material furnished to any contractor, or sub-contractor, and let the courts decide the matter, and upon the trial of the case the Highway Department could tender into court the amount involved to be recovered by the successful party.

Very truly yours,
ALLEN CLARK,
Assistant Attorney General.

Op. No. 2716, Bk. 62, P. 379.

JUVENILES—ADMISSION TO STATE PENITENTIARIES—TITLE 16, CODE OF CRIMINAL PROCEDURE CONSTRUED.

1. A male person under the age of 17 years and a female person under the age of 18 years may legally be admitted to the State Penitentiary.
2. Under the provisions of the criminal laws of this State, it is the mandatory duty of the trial judge, upon learning in any way whatsoever that the accused, if a male, is under the age of 17 years, and if a female, under the age of 18 years, immediately to transfer the case to the juvenile docket and try the accused as a delinquent child.
3. The right to trial as a delinquent child cannot be asserted at law in the absence of fraud or duress at a time when such child has been convicted and committeed to the State Penitentiary.
4. The admission of male persons under the age of 17 years, and female persons under the age of 18 years to the State Penitentiary is diametrically opposed to the legislative intent and the policy of this State.

Construing:
Title 16, Code of Criminal Procedure
Articles 30 and 31, Penal Code
Article 55, Penal Code, 1916.

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

The Honorable, the Board of Pardon Advisors, Capitol.

GENTLEMEN: You recently called the attention of this office to a case pending before you in which a convict was convicted on September 13, 1924, of a felony. He was sentenced to seven years' confinement in the State Penitentiary, and was received there on September 18, 1924, his age, as officially reported to you, then being sixteen years.

Under these facts, you request to be advised first "as to

whether or not, under the law then existing, a convict could have been properly admitted into the penitentiary". You then ask for our opinion "as to the law now prevailing as to the age when a convict may not be admitted into the penitentiary". The questions are not susceptible of unqualified answer. If a commitment is legal upon its face, a convict is "properly admitted into the penitentiary" irrespective of the legality or illegality of his arrest and conviction. The officials of our State Penitentiary cannot be expected to go behind the facts as officially communicated to them. We advise you that, in so far as the officials of the State Penitentiary are concerned, any person "may be admitted into the penitentiary" irrespective of age. This does not mean, however, that sentence or commitment is justified in law. Article 30 of the Penal Code, provides that:

"No person shall be convicted of any offense committed before he was nine years old except perjury, and for that only when it shall appear by proof that he had sufficient discretion to understand the nature and obligation of an oath; nor of any other offense committed between the age of nine and thirteen unless it shall appear by proof that he had discretion sufficient to understand the nature and illegality of the act constituting the offense."

Article 31 of the Penal Code provides that:

"A person, for an offense committed before he arrived at the age of seventeen years, shall, in no case, be punished with death."

Title 16, Code of Criminal Procedure, provides a method by which one accused of crime, being less than eighteen years old in the case of a female, and seventeen years old in the case of a male, may set up that fact and avoid being sentenced to the State Penitentiary.

At the time when the convict in this case was convicted and committed to the penitentiary, Article 35 of the Penal Code, as then in force, read as follows:

"A person for an offense committed before he arrived at the age of seventeen years, shall in no case be punished with death; but may according to the nature and degree of the offense be punished by imprisonment for life or receive any of the other punishments affixed in this Code to the offense of which he is guilty."

Title 16 of the Code of Criminal Procedure was enacted by the Legislature in 1918 and was, accordingly, in force at the time of the trial in this case. Under the provisions of Title 16, the convict could have made an affidavit setting up his age and upon proof that he was a juvenile, it would have been mandatory upon the judge to transfer the case to the juvenile docket and proceed to try him under the same indictment as a delinquent child. It has repeatedly been held that

one so asserting and proving that his age is less than seventeen, must be tried as a juvenile and cannot be sentenced to the penitentiary.

There are four courses which may have been followed by this convict upon his trial:

First: He may have made the affidavit prescribed by Title 16, supra, and the affidavit may have been overruled upon the law. Such a ruling would manifestly be incorrect, but by his failure to appeal and assign this action of the trial judge as error, the convict has sacrificed his right to be tried as a juvenile.

Second: The affidavit may have been made and the judge may have held that the convict was over seventeen years of age. The decision in such matters lies within the discretion of the trial judge, and only in the strongest possible cases, can his action be overruled and set aside. Here, again, the remedy of the convict was an appeal which he has failed to prosecute.

Third: The convict, with full knowledge of his rights and privileges, may have deliberately failed to make the affidavit to which we have above referred. In other words, he may have consciously elected to be tried as an adult. It has repeatedly been held that Title 16, supra, gives to one under the age designated in that title an option to be tried either under the general penal laws or under the special provisions of Title 16 as a delinquent child. See Slade v. State, 212 S. W. 661; Fifer v. State, 234 S. W. 409, and Valdez v. State, 265 S. W. 161. Briefly stated, these cases hold that by failure to make the prescribed affidavit, a juvenile may waive his right to be tried as a delinquent child, and thereupon may be tried as an adult, sentenced to and imprisoned in the State Penitentiary. The question of age is preliminary, and in the absence of fraud or duress, cannot be raised for the first time even by a motion for a new trial.

Fourth: Fraud upon the convict, duress or ignorance upon his part of his rights, may have resulted in failure to make the prescribed affidavit. In such a case, we believe the question might be raised by motion for a new trial, but apparently in the instant case, this was not done.

It is to our minds almost incredible that fraud or duress would be practiced upon a child by the officers of any court in Texas. If, however, this did occur, it is our earnest hope, although we cannot state it as our definite opinion, that a writ of habeas corpus would lie to right the wrong thus done.

We cannot refrain from a short statement regarding the intention of the Legislature in enacting Title 16 of the Code of Criminal Procedure in so far as this intention may affect the action of your honorable Board. Manifestly, the intention was, as Mr. Justice Morrow stated in the case of McLaren vs. State, 199 S. W. 811, in which case he construed a similar enactment "to prohibit the sending of boys under seventeen years of age to the State Penitentiary and to provide a method whereby they may, by reason of their youth, avoid the consequences of the conviction for a felony," In the cited case, the strength of this policy is apparent by reason of the fact that the court was reversing an undoubtedly well deserved sentence for a peculiarly repellent murder. The strength of the policy is also clear by reason of the fact that it is the mandatory

duty of the trial judge to transfer the case to the juvenile docket upon notice of the age of the accused being less than seventeen years, irrespective of how such knowledge comes to him and even in the absence of the affidavit provided by law. It is the intention of the Legislature and the policy of this State that children are not to be sentenced to associate with hardened criminals but shall be sentenced to reformatories where the association surroundings and discipline are of an entirely different nature than we find in ordinary penal institutions.

There may be no remedy at law though the intention of the law be flouted. In Slade vs. State, *supra*, Mr. Justice Morrow spoke, as follows:

"Counsel insists that the Juvenile Acts disclose the policy on the part of the lawmaking power to exempt delinquent children from confinement in the state penitentiary, and that even though there is a failure to follow the procedure named by the Legislature and bring to the court's attention the claim of one accused of felony to be tried as a juvenile, the policy of the Legislature should nevertheless be given effect by refusing to send to the penitentiary any person accused of a felony who is in the statutory definition of delinquent children. **To do so the court would make, rather than construe, the law, and bring on the public evils much greater than those they seek to remedy.**"

It seems almost superflous to state that in addition to giving effect to the humane idea of clemency, it is a legitimate and admirable function of the machinery of executive clemency to remedy situations which should not exist but unfortunately sometimes do exist by reason of rigid and inflexible rules of law. It is our opinion that no female child under the age of eighteen and no male child under the age of seventeen should be permitted to remain in any jail or penitentiary of this State for one instant longer than is found necessary to accomplish his or her release therefrom. This statement must be qualified, however, to the extent that it is largely inapplicable to cases where the appeal for clemency is made subsequent to a time when the applicant has passed the age of seventeen or eighteen years, as the case may be. The association of one under the ages specified with hardened criminals cannot be prevented after th applicant has passed the designated ages.

Respectfully,

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

Op. No. 2718, Bk. 62, P. 388.

LABOR—EMPLOYMENT OF WOMEN IN STATE INSTITUTIONS.

1. Superintendent of State Institution may be sued for violations of provisions of 9-54 hour law affecting employment of women.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 1, 1927.

Hon. Charles McKemy, Commissioner of Labor, Austin, Texas.

DEAR SIR: Replying to your letter of the 21st inst., requesting an opinion from this Department on the question of whether the superintendent of a State eleemosynary institution must comply with the provisions of Article 1569 P. C., to the effect that "no female shall be employed in any factory * * * or any State institution * * * for more than nine hours in any one calendar day,, nor no more than fifty-four hours in any calendar week"; and whether an action against him would be in effect an action against the State and, therefore, not maintainable, we would advise:

The superintendent of a State eleemosynary institution is not a representative of the State, nor an officer of the State, and no attributes of soverignty are lodged in him. He is an employee of the State; and his employer, the State, has forbidden him by statute to permit the female employees in the institution under his supervision to work more than nine hours a day or more than fifty four hours a week.

An action against such superintendent for violation of this statute would be an action against him personally for violation of a State law, and could not be construed in any respect as a suit against the State.

Very truly yours,
ETHEL F. HILTON,
Assistant Attorney General.

Op. No. 2722, Bk. 62, P. 409.

MOTOR BUSSES—TRANSFER OR SALE OF CERTIFICATES—RAILROAD COMMISSION.

1. The Railroad Commission is not authorized to disapprove a sale or transfer of a certificate unless the Commission finds that such sale or transfer is not made in good faith or that the proposed purchaser or transferee is not able or capable of continuing the operation of the equipment proposed to be sold or transferred in such manner as to render the service demanded by the public necessity and convenience on and along the designated route.

2. In approving a sale or transfer of a certificate, the Railroad Com-

mission is without authority to attach any conditions to the sale with reference to the payment of debts owing by the seller or transferer.

3. If the Railroad Commission makes a finding that a proposed sale or transfer of a certificate is for the purpose of defrauding the creditors of the owner of the certificate, the Commission may disapprove the sale or transfer.

Construing: Sec. 5, Chapter 270, Acts of Regular Session of the 40th Legislature.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 27, 1928.

Honorable Clarence E. Gilmore, Chairman, Railroad Commission, Capitol.

DEAR SIR: This department acknowledges receipt of your letter of January 25th, which reads as follows:

"In the administration of the Motor Transportation Act, the Commission is confronted with this problem:

"Section 5 of the Act authorizes the sale and transfer of a certificate of convenience and necessity, or any other right, privilege or permit, subject to the approval of the Railroad Commission, and the law appears to indicate that the Commission is to grant the transfer when satisfactory proof is made that assignment is in good faith and that the proposed purchaser, assignee, lessee or transferee is able or capable of continuing the operation of the equipment proposed to be sold, assigned, leased or transferred, in such manner as to render the service demanded by the public necessity and convenience on and along the designated route."

"The situation is occasionally presented where a proposed grantor of a certificate has liabilities existing against him in the way of claims for loss and damage to property and personal injury to passengers; also possible claims for gasoline, tires and other supplies furnished him while operating under the certificate, such claims not being sucured by any mortgage on the equipment. In a large number of cases the equipment used in the operation of the motor bus line is mortgaged for a part of the purchase price."

"We shall be glad to have you advise us if the Railroad Commission has authority under the law to take into consideration in an application to transfer a certificate or franchise any pending claims, liquidated or unliquidated, against the grantor? That is to say, can the Commission in granting a sale or transfer of a certificate make any reservation in it with respect to outstanding claims, or would the Commission be authorized to refuse permission to make the transfer because of any such claims?"

"Thanking you in advance for your usual prompt attention to this, I am"

Section 5 of Chapter 270, Acts of the Regular Session of the 40th Legislature. known as the Motor Bus Act, provides that any right, privilege, permit or certificate may be sold, assigned. leased or transferred. However, the proposed sale or transfer must first be presented to the Commission for its approval or disapproval. The Act provides that the Commission may disapprove such proposed sale or transfer if it be found and determined by the Commission:

1. That such sale or transfer is not made in good faith, or
2. That the proposed purchaser or transferee is not able or capable of continuing the operation of the equipment proposed to be sold or transferred in such manner as to render the service demanded by the public necessity and convenience on and along the designated route.

The first part of this paragraph pertaining to the sale or transfer of a certificate seems to indicate that a company has an absolute right to transfer or sell and it becomes the duty of the Commission to approve it unless one or both of the above exceptions are found to exist.

Section 11 of the Motor Bus Act authorizes the Commission to require a bus company to carry insurance, the policy providing that the insurer will pay all judgments which may be recovered against the bus company based upon claims and loss or damage from personal injury or loss of, or injury to, property. The statutes nowhere authorize the Commission to require the bus company to enter into an obligation to pay all debts or claims other than those above mentioned. Therefore, it would be beyond the authority of the Commission in approving a sale to make an order concerning the payment of debts of a bus company. However, the statute does not state what shall constitute good faith in the sale or transfer of a certificate, and, therefore, this is a question for the Commission to determine. If the Commission should hear evidence that the sale or transfer of the certificate is being made for the purpose of defrauding creditors, and so finds by an order entered on its minutes, then, the Commission is authorized to disapprove the transfer or sale. But, in approving a sale or transfer the Commission is without authority to attach any conditions to the sale with reference to the payment of debts.

Very truly yours,
H. GRADY CHANDLER,
Assistant Attorney General.

Op. No. 2724, Bk. 62, P. 418

NATURAL GAS—INTERSTATE COMMERCE—POWER OF THE STATE

1. The transportation of natural gas from one State to another is interstate commerce, and this State cannot prevent the same even though it is to be used in the State to which transported for the purpose of manufacturing it into carbon black.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, January 31, 1928.

Honorable Clarence E. Gilmore, Chairman, Railroad Commission, Capitol.

DEAR SIR: This is to acknowledge receipt of your letter of

January 10, 1928, asking that we reconsider the question as to whether transportation of natural gas from Texas to be used in the manufacture of carbon black in Louisana can be prohibited by this State.

We have been furnished with a brief by Honorable W. H. Francis of Dallas—it has been carefully considered and we here express our appreciation for the same.

It has been decided time and time again by the Supreme Court of the United States that transportation of natural gas from one State to another is interstate commerce, and that natural gas is a legitimate and lawful article of commerce, and that a State law of the State where the gas is produced or where it is sold, which, by its necessary operation, prevents, obstructs or burdens such transmission, is a regulation of interstate commerce and is a prohibited interference. West vs. Kansas Natural Gas Co., 221 U. S. 229, 55 L. ed. 716 35 L. R. A. (N.S.) 1195, 31 Sup. Ct. Rep. 564; Public Utilities Co. v. Landon, 249 U. S. 236, 245, 63 L. ed. 577, 586, P. U. R. 1919C, 834, 39 Sup. Ct. Rep. 268; United Fuel and Gas Co. v. Hallanan, 257 U. S. 277, 66 L. ed. 234, 42 Sup. Ct Rep. 105; Dahnke-Walker Mill Co. v. Bondurant, 257 U. S. 282, 290, 291, 66 L. ed. 239, 243, 244, 42 Sup. Ct. Rep. 106; Lenke v. Farmer's Grain Co. 258 U. S. 50, 66 L. ed. 458, 42 Sup. Ct. Rep. 244; Western U. Teleg. Co. v. Foster, 247 U. S. 105, 62 L. ed. 1006, 1 A. L. R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438; Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213.

It has been held by the same atuhority, however, that a State may regulate the amount of pressure to be put on pipe lines transporting natural gas from one State to another in the interests of the safety and welfare of its citizens. This, of course, is within the police power of the State. See Pennsylvania v. West Varginia, 262 U. S. 553, 67 L. ed. 1117; 43 Sup. Ct. Rep. 658; Myron Green Cafetaria Co. v. Kansas City, Mo., 240 S. W. 132. We find no authority which would authorize one State to keep natural gas-a legitimate article of commerce-within the confines of its own borders irrespective of the use to be made of it in the State to which it is transported.

We do find, of course, case after case which holds that a State may prevent the transportation of wild game and birds to another State. See Geer v. Connecticut, 161 U. S. 519; McDonald v. Southern Export Co., 134 Fed. 282; State v. Harrub, 95 Alabama 176; Organ v. State, 56 Ark. 267; In re Phoedovius 177 Cal. 238, 107 Pac. 412; Ex Parte Fritz,86 Miss. 210, 38 Southern 722. All of these cases are based upon the principle that a person killing or capturing wild game does not have an unqualified or unlimited ownership in the same; that one of the limitations attached to the ownership, and which

is precedent to the ownership, is that such game shall not be shipped out of the State, and that the State has a special property interest in its wild game and birds. Such, however, is not true with natural gas. After natural gas is severed from the soil, it is a commodity which may be dealt in like other products of the earth as coal, and other minerals. Pennsylvania v. W. Virginia, *supra,* State ex. rel. Corwin v. Indiana and O., Oil Gas, and Mineral Co., 120 Indiana 575, 6 L. R. A. 579.

It follows we think from the authorities referred to and the principles derived therefrom that the State of Texas cannot prohibit the transportation of natural gas from this State to Louisana, even though it is to be used in Louisana in the manufacture of carbon black. We regret that such is the law, but the relief necessary must come from the Federal Government, and is something over which this State has no control.

Yours very truly,

ALLEN CLARK
Assistant Attorney General.

Op. No. 2730. Bk. 62, P. 452.

UNIVERSITY OF TEXAS—BRANCH SCHOOL OF DENTISTRY.

1. The Legislature is without authority to establish additional branches of the University of Texas. If a school of Dentistry is organized as part of the Medical Department of the University of Texas, it must be located at. Galveston.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 18th, 1928.

Senator Robert A. Stuart, Burkburnett Building FtWorth Texas.

DEAR SENATOR: In your letter of March 28th, you ask for a legal opinion on the authority of the Legislature to establish and locate a Dental Department of the University of Texas You state that a committee of the Legislature was appointed last year to make an investigation in this connection and that the committee has visited Houston and inspected the property of the Texas Dental College in that city, with the possible view of considering it in connection with a Dental Department of the University of Texas.

We hand herewith a copy of a Departmental opinion, issued today, dealing with the status of the School of mines and Metallurgy at El Paso, Texas, as a branch of the University of Texas. The historical parts of that opinion, as well as the

conclusions are applicable here and will not be reiterated in this opinion.

From time to time there has been agitated the question of establishing a School of Dentistry as a part of the University of Texas. Senate bill Number 217 of the Regular Session of the Twenty-Fourth Legislature proposed to establish a School of Dentistry as a component part of the Medical Department at Galveston. This bill passed the Senate, but died in the house. (Senate Journel, p. 721; House Journal, p. 1089)

Governor Colquitt in a message to the Legislature delivered Febuary 5th, 1913 among other things, said:

"The Medical Branch of the University located at Galveston ought to be improved and a dental department added to it. This should not be done by separate legislation beyond requirement that the Board of Regents should provide for it as soon as finances of the University will permit them."

The Joint Investigating Committee, appointed by the 35th Legislature in its report on March 11th, 1918, recommended that a dental department should be established in connection with the Medical Department as soon as practicable. (House Journal, pages 231-8)

From these excerpts, it appears that past opinion in the executive offices and in the Legislature has been to the effect that a dental school was a component part of a well rounded Medical Department.

The Legislature at this time is without authority to establish additional branches for the University of Texas. The University was provided for in Article 7, section 14, of the Constitution and the only method provided for locating either the University or its branches was by a vote of the people. The historical reasons for this is set forth briefly in the opinion addressed to the Honorable Adrian Pool.

If a Dental School is a component part of the Medical Department, it should be located with the Medical Department of the University, at Galveston. If it is not a part of the Medical Department, it must be located at Austin.

The Legislature, of course, is fully authorized to establish such schools and colleges as it may think proper. Its powers in connection with the University of Texas must be construed in harmony with the provisions of the Constitution. This requires that schools of the University must be located in the places specified by the people in the elections held under direction of the Constitution.

Very truly yours,

D. A. Simmons

First Assistant Attorney General.

Op. No. 2731, Bk. 62, P. 455.

UNIVERSITY OF TEXAS—BRANCHES—SCHOOL OF MINES AND METALLURGY.

1. The School of Mines and Metallurgy, located at El Paso, Texas, is not a branch of the University of Texas within the intendment of the Constitution of Texas.
2. The School of Mines and Metallurgy as constituted is a properly constituted college of the State of Texas which the Legislature is authorized to maintain and support, and funds may be appropriated out of the General Revenue for these purposes and for the erection of buildings.
3. Article 7, Section 14, of the Constitution of Texas of 1876 construed.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, April 18th, 1928.

Hon. Adrian Pool, ElPaso Texas.

DEAR SIR: Some weeks ago you asked this office to make a careful investigation of the present status of the School of Mines and Metallurgy, located at El Paso, Texas, and to give you as a member of the Legislature, a legal opinion on the following questions:

(1) Is the School of Mines and Metallurgy, located at El Paso, Texas, a branch of the University of Texas within the intendment of the Constitution of Texas?
(2) If the School of Mines and Metallurgy is a branch of the University of Texas, is the Legislature prohibited by Article VII, Section Fourteen of the Constitution, from appropriating money out of the General Revenue to be used for the erection of buildings at El Paso for the School of Mines and Metallurgy.

A proper answer to these questions can only be based upon a review of the Constitutional and statutory history of the University of Texas and its branches. Considerations of space prevent the inclusion of details, however pertinent or interesting. Those who wish to view the picture in its complete development are referred to the source book of the History of the University of Texas, compiled by Dean (now president) H. Y. Benedict, published in 1917 as a bulletin of the University. This opinion can only sketch the broad outline.

The first reference to a University is found in a bill recommended to the Congress of Texas in 1839 by the committee on education. It provided a land grant to establish "two colleges of Universities, hereafter to be created, one to be established in the Eastern and the other in the Western part of Texas." The bill as passed appropriated fifty leagues of land for the endowment of two universities, but eliminated all reference to the place of location. (Gammel's Laws, Vol. 2, page 135)

The fight over the location of the University continued intermittently for the next forty years. An animated debate occured in the Legislature in 1857, during which the proposal was advanced to locate the several departments of the University at various places in the State, the Law Department at Austin, the Medical Department at Galveston or Houston, the Literary Department between the Trinity and Brazos Rivers, and so forth. The injection of this issue of location uniformly resulted in the postponement of the establishment of any college or university.

In 1871 the attention of the Legislature was called to the fact that a donation of 180,000 acres of land by Congress to the State would lapse unless an agricultural and mechanical college was established. The act to establish the Agricultural and Mechanical College of Texas was promptly passed. (Gammel's Laws, Vol. 6, page 938)

In the Constitutional Convention of 1875 he question of the estblishment of the University of Texas, and its location again came to the front. Austin, Brenham, Salado, Georgetown and Ft. Worth were suggested as suitable locations. Finally it was agreed the University should be located by a vote of the people. A tendered amendment to "establish branch of said University at some eligable point in Northern Texas" was rejected.

The Constitution of 1876 was adopted. Article 7, Sections 10 to 15 refer to the University.

Section 10 provides that the Legislature shall, as soon as practicable, establish a university of the first class "*to be located by a vote of the people of this State.*"

Section 11 defines the permanent University fund and limits the method of its investment.

Section 13 provides that the Agricultural and Mechanical College of Texas, established by Act of April 17th, 1871, and located in the County of Brazos, shall be a branch of the University of Texas for instruction in agriculture, the mechanical arts and the natural sciences connected there with. The Legislature was directed to appropriate at its next session not to exceed forty thousand dollars to complete the buildings and improvements to put the college in imediate operation.

Section 14 reads as follows:

"The Legislature shall also, when deemed practicable, establish and provide for the maintenance of a College or branch university for the instruction of the colored youths of the State, **to be located by a vote of the people**; 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."

In 1879 the Legislature established the Prarie View Normal for colored teachers in Waller County and appropriated six

thousand dollars from the University available fund for its support. (Gammel's Laws, vol. 8, p. 1481) A total of more than fourteen thousand dollars from the available fund for this purpose has been used.

Persuant to the Constitutional mandate the Legislature in 1881 passed an act creating the University of Texas, and provided for a vote of the people to fix the location. The proposal was submitted in dual form; the first; to locate the entire University at one place; the Second; to seperately locate the Medical Department.

Austin, Waco, Albany, Graham, William's Ranch and Matagorda filed on the ballot for the entire University of Texas.

Lampasas, Cado Grove, Peak Thorp Springs and Tyler applied for the main University without the medical department.

Galveston and Houston applied for the Medical Department.

The election was held and the proposal to seperate the main university and the Medical Department prevailed, Austin being chosen for the former and Galveston for the latter.

In 1882, the Legislature for the first time seemed to realize that the Prarie View Normal was not the colored branch of the University mentioned in the Constitution, and an election was ordered for November 7th, 1882 to locate this branch. The contesting places were Austin, Prarie View, Houston, Palestine, Paris, Brenham, Pittsburg and Georgetown. Austin was again successful.

Governor Roberts in his message to the Eighteenth Legislature, delivered January 10, 1883, among other things, says:

"All the branches of the State University have now been located; the main branch at Austin; the medical department at Galveston, the Agricultural and Mechanical College at Bryan, and at the late general election; the branch university for colored youths at Austin."

A pursual of the appropriation bills passed since the establishment of the University will disclose that almost every legislature has appropriated money from the general revenue for the erection of buildings at the Agricultural and Mechanical College, but this is not the case with reference to the Main University, the Medical Department or the colored branch. One Governor (Campbell) vetoed such an appropriation for A. & M. College on the ground that the limitation of Article 7, section 14, applied as well to that institution as to the University and its other branches. The other executives, presumably, construe the constitutional limitation as not applying to A. & M. College, since they approved such appropriations.

So much for the historical background.

The Act approved April 16th, 1913, created the School of Mines and Metallurgy and located it "in or near the city of El Paso," (Acts 1913, p. 427). The School was placed under

the supervision of the Board of Regents of the University of Texas.

The Acts of March 13, 1919 provides that the School of Mines and Metallurgy, located in the city of El Paso, "is hereby made and constituted a branch of the University of Texas for instruction in the arts of mining and metallurgy." The Board of Regents of the University are directed to take over the school and its properties and to assume and pay off its debts. It may be here noted that in 1917 the Legislature appropriated $100,000.00 out of the general revenue for the erection of buildings for the school. It is a matter of common knowledge that the available University fund is not sufficient at this time to pay for the erection of buildings needed at the main university and the Medical Department to say nothing of the School of Mines and Metallurgy. We understand the School of Mines has developed greatly during the past year and that the present facilities are entirely inadequate for the present school. This situation, indeed, is obviously the basis of your inquiry.

If the School of Mines and Metallurgy is limited by Article 7, Section 14, as a part of the University of Texas, it can look only to the available University fund just as the University proper, the Medical Department and the colored branch must look to that fund. Parenthetically it may be presumed that this situation explains why the colored branch has never been made a reality. On the other hand, if the School of Mines is not limited by this constitutional provision, it may apply to the Legislature for all necessary relief.

In our opinion, the School of Mines and Metallurgy is not a branch of the University of Texas, as the term "branch" is used in the Constitution of Texas. The History of the University as briefly outlined herein, shows very clearly that the power is not given to the Legislature to create branches of the University whever it might see fit. In the case of the Agricultural and Mechanical College, the fact that such a school was already in existance determined the constitutional convention to fix its location in Brazos County. The University of Texas proper, the Medical Department and the colored branch were each located by vote of the people. In each instance, the vote authorized by the Constitution has been taken and there is no longer authority either in the Legislature or in the people under the present terms of the Constitution to make any futher or additional location of the University or its branches, the A. & M. College, the Medical Department or the colored branch.

This conclusion makes it unnecessary to answer your second question.

The Legislature had full authority to establish the School of Mines and Metallurgy at El Paso, and is authorized by Article 3, Section 48 to make adequate provisions for its support and

maintenance including appropriations from the General Revenue for the purpose of erecting buildings. This power the Legislature has in this instance, because it has the general authority to create and support schools and colleges.

Very truly yours,
D. A. SIMMONS.
First Assistant Attorney General.

Op. No. 2735, Bk. 62, P. 480.

PENSIONS—FRONTIER COMPANIES.

The windows of soldiers who, under the Special Laws of the State of Texas during the war between the States, served in organizations for the protection of the frontier against Indian raiders or Mexican marauders, and who were married to such soldiers prior to January 1, 1910, are entitled to pensions under the provisions of Section 51 of Article 3 for the Constitution of Texas, and Article 6205 of the Revised Civil Statutes.

Section 51 of Article 3 of the Constitution,
Article 6205 of the Revised Civil Statutes.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, June 14, 1928.

Hon.S. H. Terrell, Comptroller of Public Accounts, Capitol.

DEAR MR. TERRELL: Your Department has furnished us with the records in several cases in which application has been made by the widows of deceased parties who served in organizations for the protection of the frontier against Indian raiders under Special Laws of this State. We understand that in each of these cases the service has been proved to the satisfaction of your Department, but that it has been suggested that the applications must be denied for the reason that the organizations in which said deceased parties served were never under the control or direction of the Confederate States.

These pensions are sought under the provisions of Section 51 of Article 3 of the Constitution and Article 6205 of the Revised Civil Statutes.

Section 51 of Article 3 of the Constitution provides in part that:

"The Legislature may grant aid to indigent or disabled Confederate soldiers and sailors who came to Texas prior to January 1, 1910, and to their widows in indigent circumstances, and who have been bona fide residents of this State since January 1, 1910, and to indigent and disabled soldiers who under the special laws of the State of Texas during the war between the States, served in organizations for the protection of the frontier against Indian raiders or Mexican marauders, and to indigent and disabled soldiers of the militia of the State of Texas who were in active service during the war between the States, and to the widows of

such soldiers who were in indigent circumstances, and who were married to such soldiers prior to January 1, 1910, provided that the word 'widow' in the preceding lines of this section shall not apply to women born since the year 1861, and all soldiers and sailors, and widows of soldiers and sailors eligible under the above conditions shall be entitled to be placed upon the pension rolls and participate in the distribution of the pension fund of this State under any existing law or laws hereafter passed by the Legislature "

Article 6205 of the Revised Civil Statutes follows the words of the Constitution above set out.

As we construe the provisions of the Constitution and the statutes, the pension fund thereby created, and under the terms of which it must be administered, is created for the payment of a pension to indigent or disabled Confederate soldiers and sailors and their widows, to those who under the States served in organizations for the protection of the frontier against Indian raiders or Mexican marauders, and the widows of such persons and members of the Texas Militia who were in active service during the war between the States and their widows.

As we consider these provisons there is a clear-cut distinction between the three classes. If only members of organizations regularly mustered into the Confederate service were to receive the benefit of the pension, then much of the language of the Constitution and the statute would not only be surplusage, but would be directly opposed to the intention of the enactments.

The reason why applicants of this nature are entitled to a pension is historically very clear. During the Civil War the great mass of able-bodied men of Texas was enlisted in the Army of the Confederacy. They were engaged in warfare against the armies of the North and were many miles from their own State. They were subject to the command of generals whose objectives lay in the North, and who could not be expected to concern themselves, while engaged in a bitter struggle for supremacy with a declared enemy, with the protection of the border of Texas from the raids of Mexicans and Indians. Accordingly, it became a matter of prime importance to organize some force which would be available for the defense of the border.

Chapter XVI, Acts of the Ninth Legislature, found on Page 452 of Gammel's Laws, which became effective December 21, 1861, is typical of all the acts creating such companies. It is significant that among the provisions found is one that the troops "shall not be removed beyond the limits of the State of Texas." It is true that it was contemplated by the acts that the troops should be mustered into the Confederate service..

See Section 12 of Chapter XXXVI, Acts of the Tenth Legislature, Volume 5, Gammel's Laws, Page 679.

The necessity for troops of this nature, and the efficacy of

such troops is shown by quotation from Section 13 of the Act just quoted, which reads in part as follows:

"In the event that the enemy should invade any portion of the State near the frontier the Governor shall have the power to order the commanders of such districts, as may be contiguous to the scene of danger, to take the whole or part of their respective forces and participate in repelling the enemy; but in no event are such forces to be kept away from their own proper field of operations for a longer time than one month unless such forces are used against an Indian enemy."

We are not disposed by strict construction to deprive of pensions a class of men, or the widows of a class of men, which performed valiant and valuable service to this State. It is clear to us that this service was deliberately recognized by those who wrote into the Constitution Section 51 of Article 6205 of the Revised Civil Statutes.

We advise you accordingly that the indigent widows of those who under the Special Laws of the State of Texas during the war between the States served in organizations for the protection of the frontier against Indian raiders or Mexican marauders are eligible for pensions under the provisions of Section 51 of Article 3 of the Constitution, and Article 6205 of the Revised Civil Statutes, and that upon proper application and sufficient proof such pensions should be granted.

Very truly yours,

PAUL D. PAGE, JR.
Assistant Attorney General.

Op. No. 2739, Bk. 62, P. 500.

CONSTITUTIONAL LAW—UNIVERSITY BONDS.

1. Article 2592, Revised Statutes of 1925 which authorizes the Board of Regents of the University to pledge interest and income of Permanent University Fund for a term of years in order to borrow money to construct buildings is not in violation of any provision of the Texas Constitution.
2. The pledge of the interest and income on the Permanent University Fund by Regents of the University does not create a "debt" against the State under the provisions of Section 49, Article 3 of the Constitution.
3. "Debt" as used in Section 49, Article 3 of the Constitution means those obligations which must be liquidated by the imposition of tax burdens upon the people.

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

Dr. H. Y. Benedict, President, University of Texas, Austin, Texas.

DEAR DR. BENEDICT: I acknowledge reciept of your commnuication in which you quote from the minutes of the Board of

Regents of the University from which it appears that they desire my official opinion as to the constitutionality of Article 2592, Revised Statutes of 1925. Ths Article is as follows:

"The Board of Regents of the University of Texas shall expend the interest which has heretofore accrued and that which may hereafter accrue on the permanent University fund, and also all other income of said fund and all income resulting from the use of the University lands, including all proceeds from grazing and mineral leases which proceeds are now in the State Treasury or may be hereafter received from such leases, for permanent improvements to be erected on the campus of the University of Texas or at any of the branches of the University, and the Board of Regents may pledge said interest and income for a term of not exceeding fifteen years to make said funds immediately available. Any contract for the expenditure of said interest and income for any other purpose shall be void. No lease of said land shall be made for a period of more than ten years during the fifteen-year period."

The inquiry involves the construction and application of several provisions of the Constitution. The first is Section 49 of Article 3 which provides that:

"No debt shall be created by or on behalf of the State except to supply casual deficiencies of 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 other provisions involved are Sections 6 and 7 of Article 8. Section 6 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."

and Section 7 provides that:

"The Legislature shall not have power to borrow, or in any manner, divert from its purpose any special fund that may or ought to come into the Treasury, and shall make it penal for any person or persons to borrow, withhold or in any manner divert from its purpose any special fund or any part thereof."

In answer the inquiry submitted, these provisions must be construed in connection with the provisions of Article 7 which relate to the establishment, mantenance and support of the University.

It is a matter of common knowledge that our forefathers, in specifying the reasons for the Declaration of Independence of Texas in 1836, stated as one of them the charge against Mexico that:

"It has failed to establish any public system of education although possessed of boundless resources, and although it is an axiom of political science that unless a people are educated and enlightened, it is idle to

expect the continuance of civil liberty or the capacity of self-government."

This axiom of political science as it is contained in the Declaration of Independence has been incorporated in identical terms into all of the Constitutions of the Republic of Texas, and of the State of Texas, and is now a portion of our present Constitution.

The general difussion of knowledge and the mandate to establish and maintain and make suitable provision for the support and maintenance of an educational system has always been been one of the predominant features of the Constitution and law of Texas. As early as 1839 the Congress of the Republic, with a view and determination to provide for an educational system, not only in the line of free public schools, but that of a higher class, made a donation of fifty leagues of land as an initial fund to erect and maintain a State University. The sale of these lands to actual settlers was not sufficiently rapid to raise the amount necessary to begin the establishment of such an institution, so that between the years of 1839 and 1858, this branch of the educational scheme of Texas "remained in its cradle." In 1858 the Legislature passed an act, in the preamble of which, it was declared to have been the chiefest design of the people of Texas from the earliest time to establish within her limits an institution of learning for the instruction of the youth in the higher branches, the liberal arts and sciences, and to support and endow it so that it might place within the reach of the poor as well as the rich the opportunity of a thourough education, and the means whereby the young men to the State might become attached to our institutions. This act provided that to the fifty leagues of land set apart for the University under the Act of 1839, there should be added one hundred thousand dollars in United States bonds, and one section out of every ten which the State had reserved for railway purposes.

This was upon the eve of the Civil War, and Texas having cast her lot with the Confederacy, the fund set aside for the University purposes was used for the emergencies brought about by that conflict. After this conflict was over, the framers of the Constitution of 1866 placed therein a pro vision that the moneyes and lands that had theretofore been granted to, or might therefore be granted for the endowment and support of the University, should constitute a special fund for the maintenance of same, and until it was located and commenced, the principal, should be invested in like manner and under the same restricteons as the perpetual public school fund (Article 10, Section 8, Constitution, 1866). Notwithstanding the fact that Texas had not recovered from the disasters and devestations of the Civil War, the representatives of the people placed in the Constitution definite and positive

provision to protect from dissipation and diversion the University and permnent school funds of the State.

The Constitution of 1876 reiterated the principle contained in the Declaration of Independence of Mexico, and made definite and positive provision for the establishment, organization and maintenance of a University of the first class. The first resolution offered on the subject in the Constitutional Convention of 1875 was by Mr. Davis of Brazos County, that "the Legislature shall as soon as practicable provide for the establishment of a State University for the promotion of literature and arts and sciences including an agricultural and mechanical department;" and it provided that the Agricultural and Mechanical Collegeof Texas established by an act of the Legislature passed April 17, 1871 located in the County of Brazos "shall be and is hereby constituted a branch of the State University for the instruction in agricultural and mechanical arts and the natural sciences connected therewith." It futher provided that the University lands and proceeds thereof and al moneys belonging to the University fund, and all grants, donations and appropriations theretofore mad under former laws for the maintenance and support of a State University, and all other lands and appropriations that might thereafter be granted by the State should be and remain a permnant fund for the use of the State University, and that "the interest arising from the same shall be anually appropriated for the support and benifit of the said University." The duty was imposed upon the Legislature to take measures for the protection, improvement, or other disposition of said land.

Out of this original resolution there evolved the provisions of our Constitution relating to the establishment, organization, maintenance and support of the University as they are contained in Section 10 to 15, inclusive of Article 7. The obligation is fixed in Section 10 to "as soon as practicable establish, organize, and provide for the maintenance, support and direction of a University of the first class".

In Section 14 it is provided that "no tax shall be levied and no money appropriated out of the general revenue * * * for the establishment and creation of the buildings of the University of Texas."

The method of fixing for the establishment, maintenance and support of the University is as contained in Section 11 of

Article 7, which provides:

"In order to enable the Legislature to perform the duties set forth in the foregoing section, it is hereby declared that all lands and other property heretofore set apart and appropriated for the establishment and maintenance of 'The University of Texas,' together with all the proceeds of sales of the same, heretofore made or hereafter to be made, and all grants, donations and appropriations that may hereafter be made by the State of Texas, or from any other source, shall constitute and

become a permanent University fund. And the same 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 not, then in United States Bonds; **and the interest accruing thereon shal be subject to appropriation by the Legislature to accomplish the purpose declared in the foregoing section**; provided, that the one-tenth of the alternate sections of the lands granted to railroads, reserved by the State, which were set apart and appropriated to the establishment of 'The University of Texas,' by an Act of the Legislature of February 11, 1858, entitled 'An Act to establish "The University of Texas"' shall not be included in or constitute a part of the permanent University fund."

Thus, it is definitely provided that all lands and other property set apart and apropriated for the establishment and maintenance of the University together with all the proceeds of sales of the same, and all grants donations and appropriatios that may theretofore be made should constitute a permnant University fund to be paid into the Treasury of the State as such and invested in certain defined securities. None of this fund may be used for any other purpose. *The interest thereon only is available.* This interest is available under definite privisions in order to enable the Legislature to preform the duties set forth in Section 10. These dutiesare to "as soon as practicable establish, organize and provide for the maintenance, support and direction of a University of the first class." Under the express provisions of Section 11 the interest accruing on the permanent fund "shall be subject to appropriation by the Legislature to accomplish the purpose declared in the foregoing section" (that is, "to establish, organize, and provide for the mantenance, support and direction of a university of the first class"). It is significant that the original resolution in the Constitutional Convention of 1875 provided that this interest should be "*annualy* appropriated for the support and benefit of said University." But in the article as finally adopted and as is now a part of the Constitution, the Legislature is not limited to an annual appropriation of the interest but is left free to appropriate it to accomplish the purpose and meet the obligation imposed.

The Constitution segregates this fund from all other public funds and makes it subject to use for definite purpooses at the will and discretion of the Legislature. It is not and can not ever become any part of the general revenue or the general funds of the State. It is treated in the Constitution as a distinct fund for a definite purpose and therefore the provisons of Section 6, Artcle 8, which provide that no appropriation of money shall be made for a longer term than two years, have no application. This is emphasized by the provisions of Section 7 of Article 8 that the Legislature shall not have the power to divert from its purpose any special fund that may come into the Treasury. This is a special fund set apart by the Constitution to be administered by the Legislature

for a definite purpose, and for the carrying out of such purpose the fund is "subject to appropriation by the Legislature", not annually, not every two years, but for such a length of time and in such a manner as the Legislature may deem wise for the purpose of meeting its obligation prescribed in Section 10 of Article 7, "to establish, organize, maintain and support a University of the first class."

When the Constitution imposed upon the Legislature the duty to establish and maintain a University of the first class, it fixed for it a task which meant more than the construction of the first building, and laid out for it a forward-looking program based upon the axiom of government contained in the Decleration of Independence of 1836, and reiterated in every Constitution since. In construing constitutional provisions of this sort, it must be kept in mind, as stated by an eminent Justice of the Supreme Court of the United States, that:

> "The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions, * * * their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary but by considering their origin and the line of their growth."

The true meaning of the word "establish" must be determined by the context. It may have an entirely different meaning when used in one connection or another. It is not limited in its signification to the original founding or setting up, but when the purpose to be accomplished is not only the original founding, but ample provision for future growth and maintenance, the word must be construed in harmony with such purpose.

In view of the end sought to be accomplished by the provisions of the Constitution and the positive and definite segregation of the funds provided therefor from all other funds of the State, it cannot be said that the provisions of Section 49 of Article 3 that "no debt shall be created by or on behalf of the State" have an application in so far as the legislative appropriation of the interest on the Permanent University Fund is concerned. The debt to which reference is made in ths provision of the Constitution is clearly one which must be liquidated out of an ad valorem tax levied upon the property of the State. The right to levy taxes or impose burdens upon the people except to raise revenue sufficient for the economical administration of the government, is expressly prohibited by Section 48 of Article 3. This is followed by Section 49 prohibiting the creation of a debt except for certain specified purposes, as: to supply deficiencies in the revenue, repel invasion, et seq.

The debts authorized under this section are of five classes: (a) to supply casual deficiencies of revenue; (b) to repel invasion; (c) to suppress insurrection; (d) defend the State in

war, and (e) pay existing debt. These are all obligations which could only be met by the imposition of taxes upon the people. The preceding section of the same article authorizes the levying of taxes for the benefit of providing a sinking fund of two per centum upon the public debt and for the payment of the present floating debt of the State, including matured bonds. Following this special authorization of tax levies to pay existing debts comes the inhibition against the creation of any debt in the future by or on behalf of the State except for the five purposes hereinbefore indicated. This, it seems to me, gives special emphasis to the construction of the Constitution that I have adopted that the "debt" mentioned in Section 40, and which is prohibited, refers only to one which is to be liquidated by the levy of taxes upon the people. This is further emphasized by those provisions of the Constitution which prohibit cities, towns, counties and other municipal corporations from creating any debt unless at the time of its creation provision be made "to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon". Here, again, the word "debt" is used in relation to those obligations which must be met by the levying of taxes.

So that it is clear that the debts sought to be prohibited were such as must be paid by the imposition of tax burdens upon the people. In segregating the University Fund and making specific provision for the appropriation ofthe interest, no other Construction of the Constitution is reasonable except that the makers never intended that the Legislature in appropriating the interest accruing on the Permanent University Fund should be restricted or limited by other provisions of the Constitution which relate to the appropriation of the general revenue of the State and the creation of debts which would have to be paid from that general revenue.

I am familiar with that line of authorities holding that the trustees of schools, and the Regents and Directors of State Educational Institutions are officers of the State, and that universities established and maintained by the State are State institutions, and their Board of Managers or Regents, although they may under the law be made a corporation, are but Agents of the State to carry out the purposes of the Legislature and the Constitution in connection with the establishment and maintenance of such institutions. This line of authority I think, has no bearing upon the question here involved. To be sure, if the Board of Regents of the University should enter into a contract even in their own name, the result or effect of which would be the creation of an obligation which could only be liqquidated by an appropriation of general revenue by the Legislature such an act would clearly come within the inhibition of the Constitution against creating a debt by or on behalf of the State. But that is not the situation here,

where a definite obligation is by the Constitution imposed upon the Legislature and definite means are provided for meeting the obligation, and a definite fund separate and apart from the general revenue of the State is set apart for the purpose.

The interest accruing on the permanent University Fund can not under the Constitution be used directly or indirectly for any purpose except to "establish, organize, and provide for the maintenance, support and direction of a University of the first class". It is specially segregated from every other fund in the Treasury for this purpose under the provisions of Sections 10 and 11 of Article 7. If those were not sufficient to completely set it apart for the particular purpose, Section 7 of Article 8, would prevent the Legislature from borrowing it or diverting it from such purpose. It could not be used to pay any debt of the State which would be subject to payment out of the general revenue. It is subject only to one authority, and to it for only one purpose, namely, the authority of the Legislature to be appropriated by it for the purpose of accomplishing the things set out in Section 10 of Article 7.

It is a universal rule of construction that the Legislature of the State has the power to do anything not prohibited either expressly or by necessary implication by the provisions of the State or Federal Constitution. The establishment, maintenance and support of the University is not only not prohibited but the obligation to do so is definitely imposed by it. Section 48 of Article 3 authorizes the Legislature to levy taxes to "support the public schools in which shall be included the colleges and universities established by the State, and the maintenance and support of the Agricultural and Mechanical College of Texas." The only limitation on this taxing power for these purposes is that contained in Article 7, Section 14, 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 prohibition cannot under any rule of construction be extended beyond its plain meaning which is to forbid the Legislature appropriating money outof the general fund for the erection of permnent buildings of the University. It con not be contended from this prohibition that the Legislature could not make other provisions for the construction and maintenance of these buildings so long as in an effort to do so they did not call into being the exercise of the taxng power. It is the evident intent to leave the Legislature wide discretion as to the use of the interest on the Permnant University Fund, and therefore when it provides that this interest "shall be subject to appropriation by the Legislature" to enable it to meet an obligation imposed upon it by the Constitution in the matter of establishingand maintaining a University of the first class, it should require no argument to show that it was intended that the Legislature in providing the ways, means and manner of the

use of this interest should not be restricted by other provisions of the Constitution regulating the making of appropriations out of the general revenue, nor that the provision prohibiting the creation of any debt to be liquidated out of the general revenue through the taxing power has no application. The intereste on the permnant fund is in fact appropriated by the very terms of the Constitntion itself for the particular purpose, and the act under consideration violates no express provision of the Constitution, nor can it be said that it violates impliedly any constitutional inhibition. Under its provisions appropriations may be made from the general fund for all University purposes except the establishment and erection of buildings. The Constitution makers having segregated the interest on the permnant fund as the only means of providing these buildings must necessarily have contemplated giving to the Legislature and through the Legislature to the Board of Regents ample discretion in the use of this particular fund for these purposes. The interest itself on this fund is not sufficient and probably never will de sufficient to provide for the erection of adequate buildings to meet the growth of an instituton which has ever been the ideal of the peolpe of Texas. So that, the Legislature, by exercising a power and discretion most wisely has by this act provided a means whereby this interest might be capitalized in order to provide the necessary buildings for the University and meet in full measure the obligations imposed upon it by the Constitution.

While the makers of our Constitution probably in their wildest flights of imagination never dreamed that there would ever accumulate for the benifit of the University of Texas such a permanent fund as seems a certainty now by reason of recent oil development, still, we must give them credit for being men of vision and undertaking to build for the future generations when they created the obligation upon the Legislature, under the urge of the axiom of free government which had permeated every fundamental governmental document since the Declaration of Independence of 1836, to establish, maintain and support a University of the first class, for the promotion of literature and the arts and sciences. The provisions of the Constitution which they framed were intended as the means of ordering the future life of the people, having their roots in the experiences, the ideals, and aspirations of the past, but nevertheless intended for the unknown future. We should not treat it as a "text for interprotation" but as an instrument of government," and considering the origin and line of growth of its various provisions, apply it as a living institution to the developments of the present and future.

The institution, the obligation to establish and provide for the support and maintenance of which was imposed upon the Legislature by the provisions of the Constitution, was not opened until 1883, but even then it gave promise of the real-

ization of the hope of the people of Texas. While there were enrolled at that time only two hundred and twenty-one students and the growth was slow, it was steady, although requiring almost twenty years to reach a thousand, it now has many thousands, and is meeting the expectations announced in the preamble of the Act of the Legislature of 1858 in that, as ably stated by a distinguished Texan, its course of study now embraces

"Everything effecting or pertaining to men socially, from embryology, the beginning, to death, the ending of physical life; governmentally, from a seat at the head of the family table to the most exalted seat in political life; materially, from the bowels of the earth to the very stars; mechanically, from the driving of a nail to the construction of the parts, the adjustment of them, and the operation of the most intricate modern machinery."

and likewise the hope expressed in said act that it should be endowed in such a way as to place within the reach of the poor as well as the rich, the opportunity of a thorough education has been realized because it has been demonstrated by the experience of those who have had the advantage of its instruction that it is not a school for the son of the rich, but that the poorest is enabled, through its course of instruction and the opportunities it affords to secure that mental equipment necessary to fight the battles of life and develop into that class of high citizenship which was ever the dream of our forefathers.

A recital of these things is perhaps non-essential in an opinion construing a Constitution, but I have deemed them pertinent as indicating the broadness of view which should be taken into construing and applying it.

The statute involved in your inquiry is one which seeks to carry out the obligation imposed upon the Legislature by the Constitution in the proper establishing and maintaniing as a growing institution a university of the first class. In order to do this, the Legislature under the provisions of Sections 11, Article 8, has the express authority to appropriate the interest accruing on the Permanent University Fund. There is no restriction or limitation upon this appropriation as to time or manner. The only limitation that exists is that it shall be used only for the prescribed purpose.

Keeping in view the manifest purpose of the constitutional provisions and the proper rules of construction that should be applied to such provisions, in view of the purpose sought to be accomplished, you are advised that it is my opinion that the Legislature did not transgress any provision of the Constitution in the enactment of Article 2592, Revised Statutes of 1925, which authorizes the Board of Regents to expend the interest accruing upon the Permanent University Fund for permanent improvements to be erected on the campus of the University,

and authorized it, in order that these necssary improvements might be made and the payment for same provided for out of this interest, to pledge it for a term not exceeding fifteen years.

Of course care should be taken in the preparation of such evidence of indebtedness as may be used for the liquidation of which this interest may be pledged, that they do not appear to evidence a debt of the State, as such, but are protected only by th pledge of this interest for their payment, and in this respect I tender to you the hearty co-operation of this department.

Most respectfully,
CLAUDE POLLARD,
Attorney General.

Op. No. 2746, Bk. 62, P. 545.

PUBLIC CALAMITY—WHAT IS UNDER ARTICLE 3, SECTION 51, OF THE CONSTITUTION.

1. Where the facts show that in an independent school district a cyclone destroyed the school buildings and equipment, and the water works of the city in which the school was located, the provisions of Section 51, Article 3 of the Constitution authorizes the Legislature to make such appropriation as may be deemed advisable for the relief of such municipalities and independent school districts since such destruction by a cyclone is a public calamity within the meaning of the Constitution.

OFFICES OF THE ATTORNEY GENERAL,
AUSTIN, TEXAS, May 4, 1927.

Honorable Roscoe Runge, Member of House of Representatives, Austin, Texas.

DEAR MR. RUNGE: In your letter of May 3rd, you advise that the House Appropriation Committee has under consideration the matter of making an appropriation of approximately $100,000.00 for the relief of the Independent School District of Rock Springs, and for the relief of the water works system of the City of Rock Springs, and you further advise that said water works, and the buildings of said school district were all totally destroyed by the recent cyclone. The contemplated appropriation includes an item for a school building, equipping the building, for maintenance of the school, and for rebuilding the city water works.

You ask to be advised as to whether or not the Legislature has the authority in view of the provisions of Section 51, Article 3, of the Constitution, to make this appropriation. This Article of the Constitution provides 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."

It then contans an exception authorizing the granting of aid to indigent and disabled Confederate soldiers, and concludes with this provise:

"Provided further that the provisions of this section shall not be construed so as to prevent the grant of aid in cases of public calamity."

The Constitution of 1876 was as is quoted above, and the two quotations contained the complete section.

In 1894, the section was amended so as to authorize the granting of aid to the extent of $100,000.00 a year to indigent and disabled Confederate soldiers, the amendment still containing the exception authorizing the granting of aid in cases of "public calamity." In 1898, the section was again amended as to the granting of aid to disabled Confederate soldiers, and the proviso as to the granting of aid in cases of "public calamity" retained. Again, in 1904 and 1910, the section was amended in so far only as it related to the granting of aid to Confederate soldiers. In 1912, the section was again amended, and in this instance the proviso authorizing the granting of aid in cases of public calamity was eliminated and it so remained until 1924 when the section was again amended, and the proviso authorizing the granting of aid in cases of public calamity restored. So that the Constitution, as it now is, prohibits the Legislature from granting or authorizing the making of any grant of public money to any individual, association of individuals, municipal or other corporation whatsoever except "in cases of public calamity."

There can be no doubt that the recent cyclone at Rock Springs clearly comes within the definition of "public calamity" as that term is used in this section of the Constitution. Therefore, you are advised that the Legislature has the authority to make such an appropriation as may be deemed by it advisable and appropriate, for the relief of the municipalities of Rock Springs and of the Independent School District of Rock Springs and I find no item of the contemplated appropriation which may not legitimately made, so far as the purpose indicated is concerned.

You also inqquire as to whether or not this appropriation can be made at the Special Session of the Legislature under the call of the Govenor. This call is "to pass a general appropriation bill for the ensuing bienium in order that the departments and institutions of the State may be properly financed." It is my opinion that this special apropriation for the relief of Rock Springs may not be passed under this call of the

Govenor, but that it will be necessary that it be submitted specifically to the Legislature.

Yours truly,
CLAUDE POLLARD,
Attorney General.